

ICAC Bill 2012

Investigations: How, When, Where and Why?

This Paper is the sixth 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 Paper examines/discusses:

- the role of the Office for Public Integrity in determining how a matter must be dealt with;
- investigations undertaken by ICAC;
- the powers and procedures available to effectively expose allegations of corrupt conduct; and
- the referral of matters concerning misconduct or maladministration to an inquiry agency or public authority.

The ICAC Bill will give the ICAC extensive powers to perform his/her investigative functions. Investigations will target serious or systemic corruption in public administration. That is, corrupt conduct arising from and facilitated by inadequate or inappropriate policies, procedures and work practices. This will mean that serious or systemic misconduct or maladministration will be referred to other relevant bodies. This Paper will also examine the ways an investigation can be triggered, the powers available during an investigation, the use of examinations as an investigative tool, referral of misconduct or maladministration and the outcome of the investigation.

Executive summary

Investigations undertaken pursuant to the ICAC Bill will be facilitated by co-operation between the Office for Public Integrity, the ICAC, and relevant inquiry agencies or public authorities. After carefully assessing all complaints and reports about corruption, the OPI will direct the matter to the appropriate authority.

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Allegations of corrupt conduct will be referred to the ICAC for investigation through the use of statutory

powers including search and seizure, covert surveillance and examinations. Matters of misconduct or maladministration will be referred to a relevant inquiry agency or public authority subject to any input from the ICAC.

Once the ICAC has established all the relevant facts, he or she may refer a matter to others for further investigation or prosecution, disciplinary or preventative actions. The ICAC can also recommend systemic changes to build and sustain an organisation’s corruption resistance. Through these processes, the ICAC Bill will facilitate the exposure of corruption. The outcomes of these investigations will also help organisations transform their operations so the likelihood of corruption in public administration is minimised in the future.

1. Ways an investigation can be triggered

An investigation into corruption in public administration may be triggered in these ways:

- a complaint or report received by the OPI which has been assessed and forwarded to the ICAC; or
- the ICAC exercising an own-motion initiative; or
- the Attorney-General reporting a matter directly to ICAC for his or her consideration.

The Office of Public Integrity (OPI) is responsible for receiving and assessing all complaints from members of the public and all reports from an inquiry agency, public authority or public officer. Complaints must be assessed in accordance with criteria to be developed and directions and guidelines will be produced for the purposes of reporting. After conducting an assessment of a complaint, the OPI will determine whether it gives rise to corruption or misconduct and/or maladministration or name of these. Based on its determination, the OPI will make recommendations as to whether and by whom complaints and reports should be investigated.

The OPI is in the nature of a ‘clearing house’ in that it will not take any action itself. It does not have the capacity or resources to resolve complaints. Complaints of misconduct and/or maladministration in public administration will be referred to an appropriate inquiry agency or public authority. Relevant for local government purposes, the inquiry agency will be the Ombudsman and the public authority is the Council. Where a matter has been referred to the Ombudsman, the ICAC has discretion to provide directions or guidance or, if so minded, to exercise the powers of the Ombudsman.

The following complaints or reports will not proceed beyond the initial assessment of the OPI:

- trivial, vexatious or frivolous matters;
- matters that have previously been dealt with by an inquiry agency or public authority and there is no reason to re-examine; and
- matters which, for good reason, no further action should be taken.

Where the OPI has determined that a matter gives rise to a potential issue of corruption in public administration the matter will either be forwarded to the ICAC for investigation or referred to SAPOL. It is important to note that the ICAC has absolute discretion in deciding whether or not it will investigate a matter, or refer it to SAPOL.

Once a decision is made to investigate an allegation of corruption in public administration, the ICAC must head or oversee the investigation. In situations where the ICAC does not conduct the investigation personally, the ICAC may appoint the Deputy ICAC or an examiner to head the investigation and report back to him/her. Legal practitioners may be appointed to assist an investigation. Assistance will also come in the form of 'investigators' and 'examiners'. These people will be appointed by the ICAC and be issued with an identity card. Police officers or special constables seconded to assist will automatically be investigators and will be able to utilise their SAPOL powers during the course of an investigation.

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Investigations will be governed by standard operating procedures prepared by the ICAC for the investigators acting under his/her direction. SOPs are designed to ensure that persons being investigated are informed about their rights, obligations and liabilities. SOPs will be made available to the public once they are finalised, as prescribed under clause 24 of the Bill.

2. Corruption

2.1. Powers available: Corruption Investigations

The Bill confers extensive investigative powers (some of a coercive nature) to enable the effective investigation of allegations of corrupt conduct. These powers will allow investigators to:

- compel a public authority or public official to provide information;
- compel the production of documents or things;
- obtain warrants to enter and search properties and vehicles;
- seize and retain items;

- use surveillance devices and intercept telephone calls; and
- compel a witness to answer questions during an examination.

In the course of carrying out an investigation, the investigator also has the power to require a public authority or a person to produce:

- a written statement of information;
- a document or thing; and/or
- evidence of a person's personal details.

The powers used will be determined by the information required by the ICAC to establish the facts and the degree of difficulty or risk involved in obtaining that information. For example, if the ICAC is confident that a person or organisation will produce documents when directed to do so, it would not have to obtain a search warrant. In contrast, if the ICAC considers there to be a real risk that documents might be destroyed or altered, or there will otherwise be some element of obstruction, a search warrant would be issued or sought.

These powers will be utilised when the ICAC needs to secure evidence quickly. Before a place or vehicle is entered and searched, a warrant must be issued. The ICAC has the power to issue a warrant authorising an investigator to enter and search places occupied or used by public agencies, public authorities, public officers or public vehicles. The justification for vesting this power in the ICAC (rather than a judge) is that the power is being exercised in regards to matters of public administration and attendance at offices or vehicle of public agencies.

By contrast, if an investigator is seeking to enter and search a private place or vehicle, it is necessary to obtain a warrant by application to a judge of the Supreme Court.

A warrant will only be issued where the ICAC or judge is satisfied that the warrant is reasonably required in the circumstances for the purposes of an investigation into a potential issue of corruption in public administration.

Given their intrusive nature and to ensure the integrity of investigations, the Bill indicates that a warrant must identify:

- the specific place or vehicle that is subject to the warrant; and
- whether entry is authorised at any time of the day or night or during specified hours of the day or night.

A warrant issued by the ICAC or judge of the Supreme Court will authorise an investigator to use reasonable force (if necessary) to break into or open a place or vehicle, or part of, or anything in or on, a place or vehicle. An investigator may also provide directions with respect to the stopping or moving of a vehicle.

During the course of inspecting a place or vehicle, an investigator may:

- take photographs, films or audio, video or other recordings; and
- examine, copy or take extracts from a document connected with the investigation or any other investigations into corruption in public administration; and
- examine or test any thing connected with the investigation or any other investigation into corruption in public administration, or cause or require it to be examined or tested; and
- search a person – if the investigator reasonably suspects that he or she is or has been on or in the place or vehicle has on or about his or her body evidence of a prescribed offence; and
- seize and retain anything that the investigator reasonably suspects has been used in, or may constitute evidence of, a prescribed offence, or issue a retention order in respect of such a thing requiring that it not be removed or interfered with without the approval of the investigator.

These powers of seizure and retention may also be used if the investigator reasonably believes that it is necessary to do so in order to prevent concealment, loss, mutilation, destruction or the use of a thing in committing such an offence.

In addition to the above powers, investigators will also have the power to conduct covert investigations. Amendments to the Listening and Surveillance Devices Act 1972 and the implementation of the Telecommunications (Interception) Bill 2012 (which will repeal the Telecommunications (Interception) Act 1988), accommodate investigators' use of listening and surveillance devices and telephone intercepts as investigative instruments. As is the case with SAPOL, to prevent the misuse of these powers, it is proposed that the use of surveillance devices and telephone intercepts will be audited by an independent review agency.

It is intended that these wide ranging investigative powers will assist investigators to root out systemic corruption.

2.2. Examinations: A tool for exposing corrupt conduct

Examinations, which include the use of coercive powers, are a vital investigative tool in exposing corruption. The formal examination procedure is outlined in Schedule 2 of the Bill.

Examinations can only be conducted by the ICAC, Deputy ICAC, or an examiner appointed by the ICAC and will be regulated as the particular examiner thinks fit. Examiners have the power to issue a summons compelling a person to appear at an examination, to give evidence and to produce documents. A person subject to examination is

unable to seek refuge in the right to silence. The person must answer questions and produce evidence even if to do so might incriminate them. However, their evidence cannot be used against them.

An examination can occur at any time during an investigation and must be held in private. Further, the examiner may also give directions as to the persons who may be present during the examination or part of it. This secrecy is to ensure the integrity and success of the examination and to protect peoples' reputations.

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For these same reasons, the examiner may give a direction that any evidence, document, or information that might enable a witness to be identified, not be published. Further, if the examiner deems it necessary, arrangements can be made to protect a witness to ensure their safety is not prejudiced and they are not subject to harm or intimidation.

Any witness giving evidence at an examination is permitted legal representation but the role and input of the legal representative may be limited by the examiner. Similar to Court proceedings, witnesses at an examination can be examined and cross-examined.

The Bill proposes severe punishments for persons who do not cooperate during an investigation or examination. A person who obstructs an investigation can be charged with a criminal offence and may be prosecuted. Where an obstruction occurs during an examination, the witness may be held in contempt. Conduct that amounts to contempt includes:

- refusing or failing to take an oath or affirmation, answer a question or produce a document;
- knowingly giving false or misleading evidence;
- disrupting an examination; and
- threatening a person present at an examination.

To have a witness held in contempt, an examiner can make an application to the Supreme Court. Where such an application is proposed, the examiner has the power to direct a police officer to detain the person for the purpose of bringing them before the Supreme Court. If an examiner has reasonable grounds for suspecting that a person who can provide evidence or other documents intends to leave the country, they can make an application to the Supreme Court that the passport of the witness be delivered to the examiner.

3. Misconduct/maladministration

As previously discussed, the ICAC has the power to refer a matter that raises potential issues of misconduct or maladministration in public administration to an inquiry agency, being the Ombudsman, or a public authority, being the Council. Prior to making a referral, the ICAC must consult with the agency or authority and consider its particular views.

The ICAC has powers of authority over a matter referred to an inquiry agency. In addition to being able to give directions and guidance, the ICAC can monitor the referral by compelling the inquiry agency to submit a report or recommendations on action taken in respect of the matter. These powers are not available to the ICAC in relation to public authorities.

“The outcome of the investigation will determine what action the ICAC takes.”

If, following a referral, the ICAC is dissatisfied with the action taken by either the inquiry agency or the public authority, the ICAC can convey his or her dissatisfaction in the following manner:

- inform the agency or authority and provide them with an opportunity to comment;
- submit a report to the Minister;
- provide a report to Parliament.

In addition to these powers of referral, the ICAC also has the ability to collaborate with, or limit the action taken by, other agencies and authorities. If a situation arises where it is necessary for the ICAC’s investigation to take precedence over a related investigation by SAPOL, an inquiry agency or public authority, the ICAC can require the relevant party to refrain from taking action. Conversely, where an investigation exposes both corrupt conduct and other criminal offences, two or more investigating bodies can conduct a joint investigation.

Another body that can support the ICAC is the Auditor-General. Where the ICAC has formed the view that it is appropriate, he or she has the power to request the Auditor-General to conduct an examination of accounts.

The ICAC also has the ability to apply to the Supreme Court for an injunction to cause a person or persons to refrain from conduct pending an investigation (clause 33). This may be appropriate where the ICAC only wants to restrain a person or class of persons, as opposed to an entire agency or authority.

4. The outcome of the investigation: law enforcement and/or evaluation

The outcome of the investigation will determine what action the ICAC takes. If an investigation reveals evidence

that gives rise to criminal conduct, the ICAC can refer the matter to a relevant law enforcement agency for further investigation and potential prosecution. Alternatively, an investigation into a public officer can be referred to a public authority responsible for the officer for further investigation and potential disciplinary action.

Although the Bill facilitates collaboration between the ICAC and inquiry agencies and public authorities, it also establishes evaluation of the practices, policies and procedures of an inquiry agency or public authority as one of the functions of the ICAC. Where the ICAC proceeds with an evaluation, the agency or authority subject to the evaluation must be informed of the nature and timing of the evaluation. The inquiry agency or public authority must assist the ICAC’s evaluation if requested. Once the evaluation is completed, the ICAC must prepare a report and provide a copy to the President of the Legislative Council and the Speaker of the House of Assembly.

Once an evaluation has been conducted, the ICAC can take action in the form of making recommendations or preparing a report. The ICAC can recommend that an inquiry agency or public authority:

- change (or review) its practices, policies or procedures to achieve specified outcomes; or
- conduct or participate in relevant educational programs.

Any recommendations or statements about whether prosecution or disciplinary action should be considered must be reported to the President of the Legislative Council and the Speaker of the House of Assembly. A report can also be prepared for the Attorney-General, President of the Legislative Council and Speaker of the House of Assembly on matters that are not subject to a previous or ongoing assessment, investigation or referral. For example, a matter considered to be in the public interest or a recommendation to amend or repeal a law.

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