

ICAC Bill 2012

Penalties and Remedies

Introduction

This Paper is the final paper prepared by the Local Government Team (now KellyJones 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.

When reviewing or investigating a complaint, the ICAC will not be given any direct powers to prosecute a public officer (such as an Elected Member or a council staff member). Similarly the ICAC will not be able to direct that an inquiry agency (the Ombudsman) or a public authority (a council) take specific steps or perform specific acts, such as disciplining a staff member or changing certain practices.

However, the ICAC's powers will enable him or her to indirectly achieve such outcomes by:

- referring certain matters to the police or a public authority for it to investigate and take further action as it sees fit (Referral Powers); and
- recommending to an inquiry agency and/or a public authority that it take specific steps or perform specific acts (i.e. directions or guidance) (Recommendation Powers).

Whether the ICAC has Referral or Recommendation Powers in respect of a particular complaint will depend on the nature of the complaint.

As identified in previous Papers, the Office for Public Integrity does not have powers to investigate matters itself, but simply to refer matters to the ICAC or to an inquiry agency or to a public authority as appropriate. Further, the ICAC does not have any powers to prosecute a matter him/herself.

Referral Powers

Referrals to SAPOL

Where a complaint raises a potential issue of corruption in public administration and it is clear from the complaint that one or more criminal acts may have been committed, the ICAC may, at his or her discretion, immediately refer the matter to SAPOL for investigation without undertaking an investigation him or herself.

Otherwise, the ICAC must retain and investigate the complaint which raises issues of corruption, and where satisfied at the conclusion of the investigation that there has been corruption, refer the matter to the Director of Public Prosecutions. While there are no limits to the offences which a person can be charged with following a referral from the ICAC, some of the offences the ICAC might identify in the course of an investigation into alleged corruption in public administration are set out in the Table below, together with the penalties which a court may impose, should a person be prosecuted and convicted of the offence.

"...the ICAC may...refer the matter to SAPOL for investigation...or...retain and investigate the complaint..."

If, during the corruption investigation or at its conclusion, the ICAC identifies possible evidence of other criminal behaviour, he or she can refer such evidence to SAPOL for it to investigate. Such a referral is not limited to conduct involving corruption in public administration, but can relate to any possible breach of any law which the ICAC considers may have occurred. Following a referral, SAPOL can investigate the matter(s) referred to it and, if it considers that sufficient evidence exists, lay criminal charges or refer matters to the Director of Public Prosecutions, as appropriate.

Referrals to Public Authorities

If, during a corruption investigation or at its conclusion, the ICAC considers the conduct of a public officer, whilst not amounting to the commission of a criminal offence, does warrant the public authority of which that officer is a member or for whom that officer works taking disciplinary action against them, the ICAC can refer the matter to that authority for further investigation and possible disciplinary action. Such referral can be made either on its own, or in addition to a referral to SAPOL.

Recommendation Powers

Where a complaint raises a potential issue of misconduct or maladministration in public administration, the ICAC must refer it to either an inquiry agency or a public authority, but only after consultation with that agency or authority. When referring a complaint, the ICAC can make a recommendation as to what action he or she considers that body should take and the time within which it should be taken. The ICAC cannot dictate the outcome of any process of the inquiry agency/public authority or any penalty that it is able to impose.

In the case of a complaint referred to the Ombudsman, to ensure that he is empowered to carry out an investigation without interference, the Bill will also amend the *Ombudsman Act 1972* to empower the Ombudsman to direct a public authority to refrain from performing an administrative act which, in his or her opinion, is likely to:

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

Where the ICAC decides to evaluate the practices, policies or procedures of an inquiry agency or a public authority (which he or she is able to do as part of the performance of his or her functions) he or she can make a recommendation that the inquiry agency or public authority:

- make changes to its practices, policies and procedures;
- review its practices, policies or procedures; and/or
- conduct or participate in an educational program.

The Bill does not contain any guidance regarding the matters about which the ICAC can make a recommendation, or the level of detail or specification such recommendation can contain. However, given the broad powers conferred on the ICAC under the Bill, our view is that these powers of recommendation can relate to any matter the ICAC sees fit to raise, and include any level of particularity the ICAC considers appropriate or necessary. In this way, a recommendation from the ICAC may, in some circumstances, more closely resemble a direction.

“...the ICAC...can make a recommendation [to]...make changes to...practices, policies and procedures”

Furthermore, while the ICAC will not be given any direct powers to ensure that an inquiry agency or public authority follows his or her recommendations, the ICAC will be able to place a significant amount of pressure on such bodies to do so. This is because if an inquiry agency or public authority does not, without good reason, follow a recommendation of the ICAC, he or she can:

- in the first instance, submit a report to the Minister responsible for the agency or authority, explaining his or her dissatisfaction with the action taken. To ensure that the Minister is able to act on such a report, the Bill will also amend the *Local Government Act 1999* to enable the Minister to give directions to a council to:
 - rectify a matter; or

- prevent a recurrence of an act, failure or irregularity,

if the Minister considers that the Council has failed to respond appropriately to a recommendation of the ICAC; or

- if this does not result in action being taken to the ICAC’s satisfaction, the ICAC can submit a second report to both Houses of Parliament, explaining his or her dissatisfaction. To ensure that Parliament acts on reports submitted by the ICAC, the Bill will create a Crime and Corruption Policy Committee, the function of which will include examining reports submitted by the ICAC and reporting to both Houses of Parliament on any matter of policy affecting public administration which arises out of such a report.

“...these powers of recommendation can relate to any matter the ICAC sees fit to raise...”

Through these mechanisms, the ICAC will be in a position to place a significant amount of political and public pressure on inquiry agencies and public authorities to act in accordance with his/her recommendations.

Investigations relating to Elected Members

As discussed in Paper 4 of this series, the Bill will also amend Part 1 of Chapter 13 of the *Local Government Act 1999* to:

- strengthen the role of, and remedies available to, the Ombudsman in investigating complaints made under that Part; and
- strengthen the remedies available to both councils and the District Court where those bodies are involved with complaints made under that Part.

The Bill will amend section 263 of the *Local Government Act* to broaden the grounds on which complaints can be made against Elected Members under Part 1 of Chapter 13 of that Act. These grounds will be extended from breaches of an Elected Member’s conflict of interest obligations to any breach by an Elected Member of his or her obligations under Part 4 of Chapter 5 of the *Local Government Act*, being:

- the general duty in section 62;
- the code of conduct obligations arising from section 63;
- the register of interest obligations in sections 65 to 67, 69 and 72; and
- the conflict of interest obligations in sections 74 and 75.

The Bill also reinforces that the Ombudsman (or the OPI) is to be the first ‘port of call’ for all complaints against Elected Members, including complaints relating to Part 4

of Chapter 5 of the *Local Government Act*. It achieves this through:

- introducing a new section 263A into the *Local Government Act* which will expressly provide that:
 - any person may make a complaint to the Ombudsman alleging that an Elected Member has breached the *Local Government Act*; and
 - the Ombudsman may, on his or her own initiative, carry out an investigation under the Ombudsman Act of matters that may constitute grounds for complaint under the *Local Government Act* against an Elected Member; and
- amending section 264 of the *Local Government Act* to substantially restrict the circumstances in which a complaint under Part 1 of Chapter 13 can be lodged in the District Court. Under the amended section 264(2), a complaint will only be able to be lodged in the District Court:
 - if the complainant is a public official, where the Ombudsman has completed an investigation into the matter; or
 - if the complainant is not a public official, where a legally qualified person (appointed by the Minister, after consultation with the LGA) has granted approval.

Finally, the Bill strengthens the remedies available to each of the Ombudsman, councils and the District Court where breaches of Part 4 of Chapter 5 of the *Local Government Act* are made out.

“These grounds will be extended from breaches of an Elected Member’s conflict of interest obligations to any breach...under Part 4 of Chapter 5 of the *Local Government Act*”

With respect to the Ombudsman, the Bill will establish, in a new section 263B of the *Local Government Act*, that on the completion of an investigation, the Ombudsman may (under the Ombudsman Act) recommend to a council that it:

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

The Bill provides that a council may act on a recommendation of the Ombudsman. However, where a council does act on a recommendation of the Ombudsman and requires an Elected member to take certain steps or perform certain acts and the Elected

Member does not do so, that failure will be taken to be a breach of Part 4 of Chapter 5 of the *Local Government Act*, and the Council will be obliged to lodge a complaint against the Elected Member in the District Court. As was discussed in Paper 4, this may have significant implications for councils, since councils will be required to fund Court proceedings against one of their own Elected Members.

Where a council does not act on a recommendation of the Ombudsman, it will need to have good reasons for not doing so if it is to avoid an Ombudsman investigation of it and/or the issuing of directions by the Minister.

Where a council (or another complainant) lodges a complaint against an Elected Member under Part 1 of Chapter 13 of the *Local Government Act*, the Bill will expand the District Court’s powers under section 267 of the *Local Government Act* to include the power to make an order (or orders):

- reprimanding a member (including by means of a public statement);
- requiring a member to issue an apology in a particular form; and
- requiring a member to reimburse the Council a specified amount.

Further Offences under the Ombudsman Act

The Bill will also replace section 26 of the Ombudsman Act, which regulates the disclosure and publication of information by the Ombudsman. The new section 26, will create an offence for a person engaged or formally engaged in the administration of the Ombudsman Act to disclose information which he or she obtained in the course of the administration of the Act unless:

- required for the purposes of the administration of the Ombudsman Act or a Royal Commission;
- required for the purposes of the performance of official functions by an agency to which the Ombudsman Act applies; or
- authorised by the Ombudsman, which must only occur if, in the opinion of the Ombudsman, the disclosure is in the public interest.

It will also be an offence under the new section 26 for information which is disclosed for a particular purpose to be used for any other purpose. The maximum penalty for each of these offences will be \$20,000.00.

Therefore, while the effect of the Bill will be to increase the circumstances in which the Ombudsman may conduct investigations into councils, the Bill will also amend the Ombudsman Act to place additional restrictions on the circumstances in which information obtained in the course of an investigation can be disclosed to the public.

Table of Selected Offences and Penalties under the Criminal Law Consolidation Act 1935

Section	Offence	Maximum Penalty
86E	Accessing or modifying computer data, unless done or made by the owner of the data	10 years imprisonment
86E	Impairing electronic communications, unless done by a person entitled to control use of the electronic communication network	10 years imprisonment
134	Theft	10 years imprisonment
140	Deception involving: <ul style="list-style-type: none"> • creating a false documents; • falsifying a document; • possessing, producing or publishing a false document; or • destroying, concealing or suppressing a document 	10 years imprisonment
172	Blackmailing another person	15 years imprisonment
241	<ul style="list-style-type: none"> • impeding an investigation; • assisting another person to escape apprehension or prosecution; or • assisting another person to dispose of proceeds of an offence 	Related to the offence being impeded/concealed (between 10 years imprisonment and not more than 2 years imprisonment)
249(1)	Giving, offering or agreeing to give a benefit to a public officer, a former public officer or a third person as a reward for: <ul style="list-style-type: none"> • an act done or omission made by the public officer in his or her official capacity; or • the exercise of power or influence 	7 years imprisonment
249(2)	A public officer seeking, accepting or agreeing to accept a benefit from another person as a reward for: <ul style="list-style-type: none"> • an act done or omission made by the public officer in his or her official capacity; or • the exercise of power or influence 	7 years imprisonment
250	Stalking, injuring or attempting to injure a person or property with the intention of influencing the manner in which a public officer performs his or her duties or functions	7 years imprisonment
250(2)	Stalking, injuring or attempting to injure a person or property on account of anything said or done by a public officer in good faith in the discharge of his or her duties or functions	7 years imprisonment
251	A public officer abusing his or her public office to gain a benefit for him or herself, or cause injury or detriment to another persons	7 years imprisonment
252	Demanding or requiring a benefit on the basis of public office	7 years imprisonment
253	<ul style="list-style-type: none"> • improperly giving or agreeing to give a benefit in connection with the appointment of a person to a public office • accepting a benefit on account of act done with regard to the appointment of a person to a public office 	4 years imprisonment

If you have any questions please contact Michael Kelliedy or Natasha Jones on 0417 653 417, 0419 864 531 or mkelliedy@kelliedyjones.com.au, njones@kelliedyjones.com.au