

ICAC Update

Q: Is the SKY about to FALL in?

A: No, but it may well be SHAKEN

As our readers will know, last week the ICAC Bill passed the Legislative Council in an amended form and was subsequently ratified by the House of Assembly. It is expected to be assented to on Thursday this week.

The purpose of this LG Alert is to provide you with a twofold bullet point guide. Firstly, to advise of relevant amendments to the Bill since we published our series of seven Papers earlier this year explaining the Bill and its consequences for local government. Secondly, to provide a reminder of the key aspects of the *Independent Commissioner Against Corruption Act 2012* for local government.

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1. Amendments to the Bill – What has Changed?

- The Bill, as originally drafted, provided for the establishment of the Parliamentary Conduct Committee to keep Parliamentary conduct under review, to promote compliance with standards of conduct, to investigate alleged contraventions by members of Parliament and to report contraventions to the relevant House. These provisions have been deleted in their entirety meaning Members of Parliament are not subject to the same level of scrutiny and accountability as elected members. Perhaps it is intended that there will be a prescribed Mandatory Code of Conduct for Members of Parliament introduced in its place!
- The maximum penalties for publishing (or causing to be published) information about a complaint, report, assessment, investigation or referral under the Act have been increased from a single penalty of \$5,000.00 or 1 year's imprisonment to \$150,000.00 for a body corporate and \$30,000.00 for a natural person.
- The victimisation provisions which are aimed at protecting a person who has or intends to make a complaint or report under the Act have always provided for civil action either as a tort or under the *Equal Opportunity Act 1984*. The amendments now create an additional offence provision with a maximum penalty of \$10,000.00.
- Schedule 1 to the Act clarifies that the Local Government Association, the members of its State Executive and its officers/employees are subject to the Act under the public office provisions.

- The Code of Conduct and Register of Interest provisions contained in the *City of Adelaide Act 1998* are repealed on the basis that the equivalent provisions in the *Local Government Act 1999* will apply.
- Where the Commissioner undertakes a review of a legislative scheme he/she may do so by way of a public inquiry to be regulated as he/she thinks fit.
- As has been widely publicised, the Commissioner will be appointed by a resolution of both Houses of Parliament on a recommendation of the Statutory Officers Committee.
- During any period when there is a vacancy in both the Office of Commissioner and Deputy Commissioner the Governor may appoint a person to act as the Commissioner for a maximum period of 6 months in any 12 month period. This person may be a Public Service employee. The position of Acting Commissioner is completely new.
- The Commissioner's powers to make public statements are extended to enable him/her to redress prejudice in circumstances where an allegation against a person has been made public and the Commissioner is of the opinion that the person is not implicated in corruption, misconduct or maladministration.
- Where the Commissioner seeks a Supreme Court injunction to restrain a person from acting in a manner which may affect an actual or proposed corruption investigation, he/she can be required to give an undertaking in damages (under the Bill as originally drafted, there was an exemption from providing such an undertaking which is a common consideration where a person is seeking injunctive relief).
- Where, under the amended provision of the *Local Government Act 1999*, the Minister refers the investigation of a Council to the Ombudsman, the Minister may require an interim report of the investigation. Where the Minister does so he/she must provide a copy to the subject Council with an opportunity to make submissions (unless to do so would likely undermine the investigation).

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2. Reminder – What stays the Same?

- The ICAC does not have any powers to prosecute any criminal offences. This action remains the responsibility of the Office of the DPP.
- The Office for Public Integrity will be the recipient of all complaints and reports about corruption, misconduct and maladministration in public administration. The role of the OPI is to receive and assess all complaints/reports.

- A complaint is made by a member of the public. A report is made by an inquiry agency, a public authority or a public officer.
- The inquiry agency for local government is the Ombudsman.
- The OPI will not undertake any direct action but will make recommendations to the Commissioner.

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- The actions that may be taken by the Commissioner are:
 - In respect of corruption – an investigation by him/herself or referral to SAPOL;
 - In respect of misconduct or maladministration – referral to the Ombudsman or to the Council concerned;
 - In respect of other matters – referral back to the Ombudsman, the Council or the public officer;
 - In respect of a matter assessed as trivial, vexatious or frivolous – no action.
- On appointment, the Commissioner will be required to attend to matters that include:
 - the appointment of the Deputy Commissioner;
 - the engagement of employees and the secondment of Public Service staff;
 - the appointment of examiners and investigators;
 - the assignment of functions to the OPI;
 - a system for the receipt of complaints from the public and directions/guidelines for reporting by the Ombudsman, a Council or a public officer (including the identification of matters that will be subject to mandatory reporting) and;
 - standard operating procedures to be followed in the investigation of corruption.
- In relation to the investigation of corruption we refer you to our Paper 6 *"Investigations: How, When, Where and Why?"* <http://www.kellydjones.com.au/publications.html>.
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- Except as authorised by the Commissioner (or in Court proceedings) it is a serious offence for any person to:

- publish or cause to be published anything that suggests that a particular person is, has been, may be or may have been subject to any report to or action by the Commissioner; or
- that any person has made or may be about to make a complaint or report; or
- that a person has given or is about to give information or evidence; or
- any other information or evidence which is prohibited by the Commissioner.
- Grounds of complaint against an elected member for misconduct (or maladministration) arise from non-compliance with Chapter 5 Part 4 of the *Local Government Act 1999* being the general conduct duties, the prescribed code of conduct, the register of interest and the conflict of interest provisions.
- An investigation by the Ombudsman, whether under Part 3 of the draft prescribed Mandatory Code of Conduct or otherwise, may result in recommendations that the Council take action against or require compliance by the subject elected member. Where a member fails to comply with a requirement of the Council in accordance with an Ombudsman recommendation, that member will be taken to be in breach of Chapter 5 Part 4 and the Council is to ensure that a complaint is lodged against the member in the District Court (refer to our Paper 4 *"Amendments to the Local Government Act – What are they and what do they mean?"* <http://www.kellydjones.com.au/publications.html>).

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Given all of the above, our Papers 1 to 7 (to be found at <http://www.kellydjones.com.au/publications.html>) remain relevant in providing an overview and understanding of the ICAC Act 2012. We will continue to provide further issue-specific papers and relevant briefings over the coming months. In the meantime, if you have any questions or require any assistance with these developments please contact Michael Kelly on 8113 7103, 0417 653 417 or mkelly@kellydjones.com.au or Natasha Jones on 8113 7102, 0419 864 531 or njones@kellydjones.com.au