

ICAC Legislative Review – the recommendations

Last week the Independent Commissioner Against Corruption (“ICAC”) released his report following a review of the legislative schemes governing the making of complaints and reports about public administration, and the oversight and management of the conduct of police.

A copy of the report can be found here:

http://icac.sa.gov.au/sites/default/files/Legislative_reviews_report.pdf

The driver for the review was to improve the efficiency and effectiveness of the integrity system. As part of the review process, the ICAC was specifically requested to “... focus on whether or not the complaint/report processes to [the Police Ombudsman, the Ombudsman and the Office for Public Integrity] can be consolidated in one office.”

“...there are a number of recommendations that will have a direct impact on council...”

Ultimately, the ICAC concluded that a “one-stop-shop” could not effectively be created; however, a number of other efficiencies could be achieved. As a result, the report includes 29 recommendations aimed at improving the integrity system in South Australia.

While a number of the recommendations focus on amendments to the police complaints legislation and the abolition of the Police Ombudsman, there are a number of recommendations that will have a direct impact on councils, specifically with regards to the manner in which complaints and reports about misconduct and maladministration in public administration are managed by the ICAC and OPI.

Of particular importance are the following recommendations:

Recommendation #23: *The ICAC Act should be amended to empower the OPI to assess and refer matters to a public authority (with directions) or to the Ombudsman.*

The OPI is limited in its function to receive and assess complaints and reports about public administration, assessing the matters in accordance with section 23 of the Independent Commissioner Against Corruption Act 2012 (the ICAC Act), and making a recommendation to the ICAC as to whether (and by whom) complaints and reports should be investigated.

The ICAC now recommends that OPI be empowered to assess and refer complaints and reports about public administration for investigation as appropriate. It is also recommended the OPI be empowered to issue directions to the public authority in relation to a referral, including a requirement that the public authority provide a report.

If this recommendation is adopted, councils will receive referrals direct from the OPI, together with direction as required (rather than from the ICAC), and will be required to report back to the OPI.

“...a “one-stop-shop” could not effectively be created; however, a number of other efficiencies could be achieved.”

Recommendation #24: *Section 24(2) of the ICAC Act should be amended to permit the referral of a matter assessed as raising a potential issue of misconduct or maladministration in public administration to the most appropriate public authority as determined by the OPI or the ICAC.*

Section 24(2) of the ICAC Act provides that if a matter is assessed as raising a potential issue of misconduct or maladministration in public administration, the matter may be referred to the “public authority concerned” for investigation. The ICAC has determined that “the public authority concerned” may not always be the most appropriate public authority that a matter ought be referred to. For example, the ICAC reports there has been occasions where the authority best placed to investigate a matter would have been SafeWork SA, rather than the public authority in which the relevant conduct occurred.

The ICAC now recommends that the ICAC and OPI be empowered to refer a matter to the most appropriate “public authority” in the circumstances.

For Councils, this means that if a matter is assessed as raising a potential issue of misconduct or maladministration in public administration, and has been assessed as appropriate for referral to a public authority for investigation, the matter will not necessarily be referred back to the Council.

“The ICAC recommends the ICAC Act be amended to enable the ICAC to investigate misconduct and/or maladministration in public administration using the powers of a Royal Commission.”

Recommendation #25: *The ICAC Act should be amended to remove the power to direct or provide oversight of matters referred to the Ombudsman.*

Recommendation #26: *The ICAC Act should be amended to provide that a matter referred to the Ombudsman under the ICAC Act is deemed to be a complaint under the Ombudsman Act 1972.*

Recommendations #25 and #26 are interrelated.

Currently, the ICAC can refer a matter assessed as raising a potential issue of misconduct or maladministration in public administration to the Ombudsman, and may issue direction or guidance. However, South Australia is the only jurisdiction in which the Ombudsman is subject to direct oversight by another administrative body in the way it deals with matters referred for investigation.

The ICAC has concluded that continued oversight of the Ombudsman is unnecessary and recommends the ICAC Act be amended to provide that a matter referred to the Ombudsman is deemed to be a complaint under the Ombudsman Act. The Ombudsman would thereby be given jurisdiction to deal with the matter exclusively under that Act.

In a practical sense, these two recommendations will have little impact on councils. However it is important to understand if they are adopted, when the ICAC refers a matter to the Ombudsman that has been assessed as raising a potential issue of misconduct or maladministration in public administration, the jurisdiction of that matter will be transferred from the ICAC to the Ombudsman, and the ICAC will play no further role in the investigation or oversight of the matter.

“The ICAC has concluded that continued oversight of the Ombudsman is unnecessary...”

Recommendation #27: *The ICAC Act should be amended to provide that the ICAC may investigate potential misconduct and/or maladministration and may do so utilising the powers under the Royal Commissions Act 1917.*

While the ICAC Act does not prohibit the ICAC from investigating matters raising a potential issue of misconduct or maladministration in public administration, the Act is silent as to when the ICAC can decide to do so, as opposed to referring the matter to an inquiry agency or public authority for investigation.

Where the ICAC does investigate these matters, the ICAC cannot use the investigative powers under the ICAC Act, as those powers are reserved for corruption investigations.

In order to investigate misconduct or maladministration in public administration, the ICAC must exercise the powers of an inquiry agency (i.e. currently the Ombudsman, Police Ombudsman or the Commissioner for Public Sector Employment) and may only do so after first seeking the views of

that agency. The ICAC will then be bound by any statutory provisions governing the exercise of those powers.

The ICAC now recommends the ICAC Act be amended to enable the ICAC to investigate misconduct and/or maladministration in public administration using the powers of a Royal Commission, similar to the provision in section 19 of the *Ombudsman Act 1972*.

In practical terms, means the ICAC will have greater investigative capability and powers to investigate a matter involving misconduct or maladministration in public administration.

“The ICAC now recommends that OPI be empowered to assess and refer complaints and reports about public administration for investigation as appropriate.”

Recommendation #28: *Section 36 of the ICAC Act should be amended to have effect whether the investigation relates to corruption in public administration or misconduct and/or maladministration in public administration.*

To enable evidence obtained during the course of an investigation where the ICAC has utilised the powers of a Royal Commission to be provided to a public authority for potential disciplinary action, section 36 of the ICAC Act will need to be amended to enable that provision to operate whether the investigation relates to corruption, misconduct or maladministration in public administration.

Depending on the scope and nature of the proposed amendments, this may have an impact on an accused’s fundamental right against self incrimination. Any proposed amendments to the ICAC Act of this nature are likely to be followed very closely, and the subject of robust debate.

If you have any questions please contact Tracy Riddle on 8113 7106, 0431 867 523 or triddle@kelledyjones.com.au