

PART 2 OMBUDSMAN REPORTING OBLIGATIONS WHISTLEBLOWER and ICAC LEGISLATION

Refer: *Independent Commissioner Against Corruption Act 2012 (ICAC Act)*
Ombudsman Act 1972 (Ombudsman Act)
Whistleblowers Protection Act 1993 (Whistleblowers Protection Act)

1. IMPORTANCE OF THE WHISTLEBLOWERS PROTECTION ACT AND THE ICAC ACT

The Ombudsman and staff must be alert to these two Acts, as they contain reporting obligations which may arise at any time.

2. THE OBJECTS OF THE WHISTLEBLOWERS PROTECTION ACT

The Act's main objects are to:

- facilitate disclosure of 'public interest information'
- provide protection for a person who makes an 'appropriate disclosure of public interest information' (**a whistleblower**) - such as protection from civil and criminal liability and protection from victimisation.

3. WHEN IS A PERSON PROTECTED BY THE WHISTLEBLOWERS PROTECTION ACT?

3.1. In order for a person to be protected under the Act, three criteria must be satisfied:

First, the person making the disclosure:

- believes on reasonable grounds that the information is true; or
- is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated (section 5(2)(a)).

This is a judgment call, based on all the available evidence.

Second, the disclosure must be made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure (section 5(2)(b)).

See also sections 5(3) and 5(4). The Ombudsman is named as an 'appropriate authority' to receive disclosures where 'the information relates to a public officer (other than a member of the police force or a member of the judiciary)' (section 5(4)(g)).

'Public officer' is defined in section 4 of the Whistleblowers Protection Act as:

- (a) a person appointed to public office by the Governor; or
- (b) a member of Parliament; or
- (c) a person employed in the Public Service of the State; or
- (d) a member of the police force; or
- (e) any other officer or employee of the Crown; or
- (f) a member, officer or employee of—

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- (i) an agency or instrumentality of the Crown; or
- (ii) a body that is subject to control or direction by a Minister, agency or instrumentality of the Crown; or
- (iii) a body whose members, or a majority of whose members, are appointed by the Governor or a Minister, agency or instrumentality of the Crown; or
- (g) a member of a local government body or an officer or employee of a local government body.

Third, the disclosure must be one of 'public interest information'.

'Public interest information' is defined in section 4(1) as:

- ... information that tends to show—
- (a) that an adult person (whether or not a public officer), body corporate or government agency is or has been involved (either before or after the commencement of this Act)—
 - (i) in an illegal activity; or
 - (ii) in an irregular and unauthorised use of public money; or
 - (iii) in substantial mismanagement of public resources; or
 - (iv) in conduct that causes a substantial risk to public health or safety, or to the environment; or
 - (b) that a public officer is guilty of **maladministration** in or in relation to the performance (either before or after the commencement of this Act) of official functions.

'Maladministration' is defined in section 4(1) to 'include impropriety or negligence'.

In some instances, the types of administrative error listed in section 25(1) of the Ombudsman Act may be considered to be 'maladministration' within the meaning of the definition in the Whistleblowers Protection Act .

- 3.2. Note that the Act does not require a person to expressly identify themselves as a 'whistleblower', or to expressly claim protection under the Act.

4. OMBUDSMAN REPORTING OBLIGATIONS

Whistleblowers Protection Act - section 5(5)

- 4.1. If Ombudsman SA receives information that relates to 'fraud' or 'corruption', the information must be forwarded to the Anti-Corruption Branch of the SA Police (ACB).

Section 5(5) of the Whistleblowers Protection Act provides:

- (a) in the case of information relating to fraud or corruption is made, the person to whom the disclosure is made must pass the information on as soon as practicable to—
 - (b) in the case of information implicating a member of the police force in fraud or corruption—the Police Complaints Authority;
 - (c) in any other case—the Anti-Corruption Branch of the police force
- 4.2. This covers any information which is provided to Ombudsman SA. The information does not have to be an 'appropriate disclosure of public interest information' under the Whistleblowers Protection Act; and it does not have to be the subject of a complaint.

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- 4.3. 'Fraud' and 'corruption' are not defined in the Whistleblowers Protection Act, and should be given their ordinary meaning.
- 4.4. If an Ombudsman SA staff member considers that a complainant may be alleging fraud or corruption, they must update Resolve accordingly and notify the Ombudsman or Deputy Ombudsman.

5. PROTECTING THE WHISTLEBLOWER'S IDENTITY

Whistleblowers Protection Act - section 7(1)

- 5.1. Ombudsman SA must not disclose a whistleblower's identity without their consent, except if necessary to enable the matters to which the information relates are properly investigated (section 7(1)).
- 5.2. The obligation to maintain confidentiality imposed by section 7(1) applies despite any other statutory provision or common law rule to the contrary (section 7(2)).
- 5.3. The identity of the whistleblower is to be safeguarded to the maximum extent possible. The need to disclose a whistleblower's identity in an investigation will depend on the facts of the case and the allegations made, and whether the whistleblower's identity is pivotal to ensuring that the disclosure is thoroughly investigated.
- 5.4. The confidentiality obligation applies even when reporting fraud and corruption matters to the ACB.
- 5.5. If it is necessary to disclose the identity of a whistleblower in an investigation, this must be clearly communicated to the whistleblower prior to disclosing their identity to any party

6. ICAC ACT - ICAC

- 6.1. The objects of the ICAC Act are to:
 - establish the ICAC with functions to:
 - identify and investigate corruption in public administration
 - prevent/minimise corruption, misconduct and maladministration in public administration through referrals, education, evaluation of policies and procedures (section 3)
 - establish the Office for Public Integrity (OPI) to manage complaints about public administration, to:
 - identify corruption, misconduct, maladministration in public administration
 - ensure complaints are dealt with by the appropriate body
 - achieve a balance between exposing corruption, misconduct and maladministration and avoiding undue prejudice to a person's reputation.
- 6.2. The primary object of the ICAC Commissioner is to:
 - investigate serious or systemic corruption in public administration
 - refer serious or systemic misconduct or maladministration in public administration to the relevant body, giving directions or guidance to the

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body or exercising the powers of the body as Commissioner considers appropriate. (section 3(2))

7. ICAC ACT - OPI

- 7.1. OPI is responsible to the ICAC Commissioner, and its functions are to:
- receive and assess complaints from the public, about public administration
 - receive and assess reports about corruption, misconduct, maladministration from inquiry agencies, public authorities, public officers
 - make recommendations about whether and by whom complaints and reports should be investigated (section 17).
- 7.2. OPI does not 'investigate'; rather it makes recommendations to the Commissioner.

8. DEFINITIONS IN THE ICAC ACT (sections 4 and 5)

- 8.1. The following terms are defined in section 4:
- **inquiry agency** - includes the Ombudsman, Police Ombudsman, Commissioner for Public Sector Employment, or if declared by the regulations
 - **public authority** - see Schedule 1 to the ICAC Act, includes councils and the Local Government Association (LGA)
 - **public officer** - see Schedule 1 to the ICAC Act - includes public sector employees, staff of Ombudsman SA, councils and LGA employees
 - **public administration** - is an inclusive definition - also, 'an administrative act under the Ombudsman Act will be taken to be carried out in the course of public administration'
- 8.2. The terms '**corruption**', '**misconduct**', '**maladministration**' - in '**public administration**' are defined in section 5 of the ICAC Act.

9. COMPARE 'MISCONDUCT' UNDER THE ICAC ACT & OMBUDSMAN ACT

- 9.1. Under the Ombudsman Act, the Ombudsman is able to investigate the conduct of a person 'engaged in the work of an agency', a council member, or conduct carried out in the performance of functions under a contract for services with an agency or the SA government (section 3).
- 9.2. The Ombudsman Act does not define 'misconduct'. Rather, the Ombudsman must have regard to the 'administrative errors' listed in section 25(1)(a)-(g) of the Act - that is, whether the conduct was contrary to law, unreasonable, wrong, etc...
- 9.3. However, the Ombudsman must report 'any evidence of breach of duty or misconduct on the part of a member, officer or employee of an agency to which this Act applies to the principal officer of the agency' (section 18(5)).

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- 9.4. What amounts to 'misconduct' under the ICAC Act will invariably satisfy one of the paragraphs in section 25(1)(a)-(g).
- 9.5. The converse may not be true; and a finding of error under section 25(1)(a)-(g) of the Ombudsman Act about an officer's conduct may not necessarily constitute 'misconduct' under the ICAC Act.
- 9.6. It is important to be mindful of the different jurisdictions and definitions.

10. COMPARE 'MALADMINISTRATION' UNDER THE ICAC ACT & OMBUDSMAN ACT

- 10.1. The Ombudsman sometimes uses the word 'maladministration' as a way of describing 'administrative error' - which, under the Ombudsman Act, means one of the paragraphs in section 25(1)(a)-(g) of the Act.
- 10.2. The Ombudsman Act itself does not use the word 'maladministration' (or 'administrative error'), and the Ombudsman can only ever be guided in an investigation under the Act by the criteria set out in 25(1)(a)-(g) - contrary to law, unreasonable, wrong, etc... .
- 10.3. What amounts to 'maladministration' under the ICAC Act will invariably be 'administrative error' under one of the paragraphs in section 25(1)(a)-(g) (e.g. an unreasonable procurement process involving large sums of money).
- 10.4. The converse may not be true; and a finding of 'administrative error' under section 25(1)(a)-(g) will not always be 'maladministration' under the ICAC Act.
- 10.5. It is important to be mindful of the different jurisdictions and definitions.
- 10.6. Note that the definition of 'maladministration' under the ICAC Act is similar to the definition in the Whistleblowers Protection Act.

11. OMBUDSMAN REPORTING OBLIGATIONS

ICAC Act - section 8 - ICAC Directions and Guidelines (made pursuant to section 20 of the ICAC Act)

- 11.1. Reporting obligations to OPI only apply if the matter is conduct which occurred on or after 1 September 2013 or has come to the attention of the Ombudsman or public officer on or after 1 September 2013.
- 11.2. They do not extend to a matter involving corruption in public administration where the Ombudsman or the public officer reasonably suspects that the conduct only involves an offence against the *Road Traffic Act 1961*.

Ombudsman mandatory report

- 11.3. The Ombudsman must report a matter to OPI which is reasonably suspected to involve:
 - corruption in public administration
 - serious or systemic misconduct in public administration

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- serious or systemic maladministration in public administration
- misconduct/maladministration In Ombudsman SA.

A report must be made as soon as practicable after the Ombudsman becomes aware that the matter is of a kind that must be reported.

Ombudsman discretionary report

11.4. The Ombudsman may report any other matter to OPI where considered appropriate e.g. if it comes to the Ombudsman's attention that OPI is assessing or the Commissioner is investigating, the same or a related matter.

Helpful definitions

11.5. What is **serious or systemic misconduct or maladministration** is a matter of judgement. Relevant factors to consider in an assessment of whether the matter is serious or systemic may include:

- the nature and circumstances of the allegations (including the number of allegations, the degree of organisation and planning - e.g. steps taken to cover up conduct) the harm (or potential harm) to an individual or government resulting from the matter, including physical, financial or other harm
- whether the matter is widespread, involves more than one agency and/or occurs on a frequent basis.

11.6. A matter may be considered **serious** if it:

- involves a senior public officer
- involves alleged misconduct or maladministration that has resulted in a substantial loss or damage to assets
- involves allegations that would, if proved, bring an agency or the Crown into disrepute
- is otherwise of particular prominence or importance.

11.7. A matter may be considered **systemic** if it:

- causes widespread disruption to services or programs
- affects a number of persons
- is spread throughout an agency or authority or is otherwise accepted or condoned
- involves a large sum of public money.¹

11.8. Section 6 of the ICAC Directions and Guidelines sets a 'test' of what '**reasonably suspects**' means:

Suspicion is a state of mind. A suspicion is different to a belief. In *George v Rockett* (1990) 170 CLR 104 the High Court said (at 115) that:

¹ See http://www.icac.sa.gov.au/sites/default/files/ICAC_Frequently_Asked_Questions.pdf as at 14 February 2014.

[t]he facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief.

However, there must be a factual basis for the suspicion.

Whether or not a suspicion is **reasonable** will depend upon the surrounding circumstances. *In Hughes v Dempsey* (1915) 17 WALR 186 the Full Court of the Western Australian Supreme Court said that:

[r]easonable suspicion means that there must be something more than mere imagination or conjecture. It must be the suspicion of a reasonable man warranted by facts from which inferences can be drawn; but it is something which falls short of legal proof.

It is always necessary to identify the subject matter of the suspicion and whether or not the subject matter would, if established, amount to corruption, misconduct or maladministration in public administration.

It is not necessary for the inquiry agency, public authority or public officer to **believe** that the conduct amounts to corruption, misconduct or maladministration in public administration. What is required is a reasonable suspicion, based upon a proper consideration of the available facts...

12. CONTENT OF OMBUDSMAN REPORT TO OPI & METHOD OF REPORTING

12.1. Under the ICAC Directions and Guidelines, unless directed otherwise by OPI or the Commissioner, the Ombudsman must report the information electronically to OPI, and include:

- the report's title
- summary of matters the subject of the report
- sensitivity
- complainant details. The Ombudsman should not include the complainant's details if section 7 of the Whistleblowers Protection Act applies and the complainant has not consented. However, if OPI/ICAC forms the view that the identification of the whistleblower is necessary to enable a proper investigation of the complaint, they will request this information and the Ombudsman will need to consider such request
- respondent details
- how matter was received
- who received the information
- the date the information was received
- when the alleged conduct occurred
- issues arising from the matter
- actions (if any) taken or to be taken.

12.2. Note that if the complainant or discloser of information is a whistleblower for the purposes of the Whistleblowers Protection Act, the Ombudsman may still have an obligation to ensure that their identity is protected in the reporting process (unless the whistleblower gives consent otherwise).

12.3. The Ombudsman may request OPI to receive a report other than electronically.

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12.4. The report addressing the dot points above will occur electronically through Resolve, via a 'drop box' method. However, the following should also be inserted into the Drop Box:

- scanned copies of relevant documents
- the Resolve running sheet, if relevant.

12.5. Where relevant documents are too great in number to scan and forward via the Drop Box, the Ombudsman will inform OPI that there is additional material, and the Ombudsman can liaise if and when required.

13. COMMISSIONER'S RESPONSE TO OMBUDSMAN REPORT

13.1. Where the matter reported to OPI by the Ombudsman raises an issue of corruption in public administration, it may be investigated by the Commissioner or referred to the SA Police or the Police Ombudsman (section 24(1) ICAC Act).

13.2. However, if the matter reported to OPI by the Ombudsman raises a potential issue of misconduct or maladministration in public administration, under section 24(2) of the ICAC Act, the matter may be:

- referred to the Ombudsman for investigation under the ICAC Act and the Commissioner may give directions and guidance in respect of the matter
- referred to the Ombudsman and the Commissioner may exercise the powers of the Ombudsman in respect of the matter
- refer the matter to the public authority concerned for investigation, and the Commissioner may give directions and guidance in respect of the matter.

13.3. Reasonable steps must be taken (unless the Commissioner directs otherwise) to acknowledge the report by the Ombudsman and information of the action taken. (section 24(8)).

13.4. The options referred to in 13.1 and 13.2 above also apply to complaints received directly by OPI.

14. CONFIDENTIALITY UNDER THE ICAC ACT

14.1. Wide ranging confidentiality obligations apply under the ICAC Act, at all stages of the Ombudsman reporting and ICAC referral and investigation process. Information reported by the Ombudsman to OPI is confidential, unless otherwise advised in writing (section 54(2) of the ICAC Act).

14.2. Depending on the circumstances, these may be in addition to the confidentiality requirements imposed by the Ombudsman Act and the Whistleblowers Protection Act.

14.3. Except as authorised by the Commissioner, a person must not publish or cause to be published:

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- information tending to suggest a person is, has been, may be or may have been the subject of a complaint, report, assessment, investigation or referral under the ICAC Act
- information that might enable a person who has made a complaint or report to be identified or located
- the fact that a person has made or may be about to make a complaint or report
- information that might enable a person who has given or may be about to give information or other evidence to be identified or located
- the fact that a person has given or may be about to give evidence.

Penalties apply (see section 54, 56 of the ICAC Act).

14.4. However, the Commissioner has issued a general authorisation to the Ombudsman that when the Ombudsman reports a matter to both OPI and the ACB in accordance with obligations under the ICAC Act and Whistleblowers Protection Act, the Ombudsman is authorised to advise the ACB that the matter has been reported to OPI.²

² Letter dated 24 September 2013 from ICAC to the Ombudsman, Resolve file AF 2012/000027.