

PART 4 ASSESSING COMPLAINTS AND REFERRALS

Refer: *Development Act 1993*
Independent Commissioner Against Corruption Act 2012 (ICAC Act)
Local Government Act 1999 (Local Government Act)
Ombudsman Act 1972 (Ombudsman Act)
Public Sector Act 2009
Whistleblowers Protection Act 1993 (Whistleblowers Protection Act)

NOTE: For Ombudsman SA, the overriding criteria for making decisions about complaints are the public interest and improving public administration.

Ombudsman SA staff must bring to the Ombudsman's or Deputy Ombudsman's attention:

- complaints with serious substance
- matters which appear to raise systemic issues.

The Ombudsman may decide it is in the public interest to investigate any such matter.

Ombudsman SA staff also must bring to the Ombudsman's or Deputy Ombudsman's attention:

- matters which invoke the Ombudsman's reporting obligations under the Whistleblowers Protection Act or the ICAC Act.

In assessing complaints, staff should exercise their judgement and err on the side of caution when applying this part. If in doubt, staff should consult the Deputy Ombudsman or the Ombudsman.

Staff should ensure that all of the criteria for assessing a 'complaint' have been satisfied.

NOTE: The Ombudsman or Deputy Ombudsman should be consulted about legal or other queries at any stage of assessing or investigating a complaint.

1. IS MORE INFORMATION NEEDED FROM THE COMPLAINANT OR AGENCY?

1.1. Request more information from the complainant if any of the following is not clear:

- the subject of the complaint i.e. the scope of the complaint, the apparent administrative act(s) and the surrounding circumstances

NOTE: All of the administrative acts involved in a complaint may not be immediately evident. The officer needs to firstly examine the scope of the complaint and its underlying issues.

- when the complainant had notice of the matters alleged in the complaint
- the nature of the complainant's personal interest in the matter and whether they are directly affected
- whether the complainant has raised the matter at a senior level with the agency and if so, how the agency responded.

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1.2. Request more information from the agency if any of the following is not clear:

- how the agency carried out the administrative act
- why the agency acted in the way it did, including the authority (i.e. legislation or policy) it claims for its actions
- how the agency has responded to the complainant's allegation(s).

If Ombudsman SA intends to investigate a complaint, the agency must be given the opportunity to provide an account of its actions in the matter.

2. OMBUDSMAN SA MUST NOT INVESTIGATE

2.1. IF the respondent is not an 'agency' under the Ombudsman Act i.e. not one of the following:

- a person who holds an office established by an Act i.e. a statutory role such as the Public Trustee or the Registrar of Motor Vehicles
- an administrative unit of the public service i.e. a state government department or an office attached to a department (an attached office) as defined in the *Public Sector Act 2009*
- a council within the meaning of the Local Government Act
- a regional or council development assessment panel constituted under section 34 or section 56A of the *Development Act 1993*
- any incorporated or unincorporated body—
 - established or continued in existence for a public purpose by an Act
 - established or continued in existence for a public purpose under an Act (other than an Act providing for the incorporation of companies or associations, co-operatives, societies or other voluntary organisations)
 - established or subject to control or direction by the Governor, a Minister of the Crown or any instrumentality or agency of the Crown or a council (whether or not established by or under an Act or an enactment)
- a person or body declared by the regulations to be an agency to which this Act applies.

Note: An agency does not include a person or body declared by the regulations to be an agency to which the Ombudsman Act does not apply. (ICAC/OPI are not subject to the jurisdiction of the Ombudsman.)

IF the complaint is not about an administrative act, the Ombudsman has no jurisdiction to investigate. For the Ombudsman to investigate, the act (or omission) must be:

- an act (or omission) relating to a matter of administration on the part of an agency or a person engaged in the work of such an agency
- an act (or omission) done in the performance of functions conferred under a contract for services with the Crown or an agency
- an act of a council member that may constitute grounds for complaint under the Local Government Act

but not:

- an act done in the discharge of a judicial authority

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- an act done by a person in the capacity of legal adviser to the Crown
- an act of a class declared by the regulations not to be an administrative act for the purposes of this definition. Currently, there are no such regulations
- the contents of a policy.

Administrative acts or decisions (or failures to act or decide) are made in the exercise of public power. They are generally not policy, legislative or judicial acts but can include the circumstances leading to those acts e.g. reports and recommendations by an agency to a body that is not an agency.

- 2.2. IF the person making the complaint is an employee and the complaint relates to an administrative act done by another in the capacity of their employer, the Ombudsman has no jurisdiction to investigate (section 17(1)).

NOTE: The Ombudsman may conduct an own initiative investigation where the complainant is an employee making a complaint about their employer, if for example, it is in the public interest e.g. if the employee is a whistleblower.

3. THE OMBUDSMAN MUST REFUSE TO INVESTIGATE, EXCEPT WHERE A DISCRETION IS AVAILABLE

- 3.1. In certain circumstances, a discretion is available to the Ombudsman in deciding whether to refuse to investigate a matter (based on sections 13 and 17 of the Ombudsman Act). The bases for exercising this discretion are the public interest and the improvement of public administration.

In deciding whether an investigation may be in the public interest, the following criteria may be considered:

- does the alleged administrative error amount to a serious failure to meet expected standards of public administration?
- is the complaint about matters of serious concern and benefit to the public rather than simply an individual's interest?
- is there evidence of ongoing systemic failure in public administration?
- are the circumstances of the complaint likely to arise again?
- is the complaint about matters of process as well as outcomes?
- is the complaint about failures of ethical and transparent management?
- does the complaint relate to matters of public safety and security, the economic well-being of South Australia, the protection of public well-being and morals or the rights and freedoms of citizens?
- has the complainant suffered significant personal loss?
- would investigation of the complaint be likely to lead to meaningful outcomes for the complainant and/or to the improvement of public administration?
- has another review body considered the matter?
- what is the likelihood of collecting sufficient evidence to support a finding of administrative error?
- would investigation of the complaint involve effort and resources that are proportionate to the seriousness of the matter.

- 3.2. The Ombudsman must not investigate if the complainant has a right of appeal to a court or another legal remedy (section 13(3)). That is:

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- if the complainant has, in relation to the administrative act, a right of appeal, reference or review to a court, tribunal, person or body or the complainant had a remedy by way of legal proceedings,
- unless the Ombudsman's opinion is that it is unreasonable, in the circumstances, to expect that the complainant should resort, or should have resorted, to that appeal, reference, review or remedy.

NOTE: It is presumed that the Ombudsman will not exercise this discretion unless it is warranted by the circumstances. Relevant circumstances may include:

- the seriousness of the matter
- the existence and strength of evidence of the alleged administrative error(s)
- the personal circumstances of the complainant
- whether the complaint has been investigated by others
- whether the matter has already been considered in legal proceedings.

- 3.3. A complaint must not be entertained if it is made more than 12 months after the complainant had notice of the matters alleged, unless the Ombudsman is of the opinion that, in all of the circumstances of the matter, it is proper to consider the complaint (section 16).

Relevant circumstances include those listed above.

NOTE: A complainant is presumed to have had notice of the matters alleged when he or she might reasonably be expected to have had notice.

- 3.4. The Ombudsman may refuse to entertain a complaint if, in the Ombudsman's opinion:
- the complaint is trivial or frivolous, vexatious or not made in good faith
 - the complainant has insufficient personal interest in the matter
 - investigation or continued investigation of the complaint is unnecessary or unjustifiable e.g. due to:
 - the matter lacking serious substance
 - a lack of evidence of administrative error
 - the fact that the complainant had or has recourse to an adequate investigation of the matter by others.

4. WHAT CONSTITUTES ADMINISTRATIVE ERROR?

Under section 25(1) of the Ombudsman Act, to constitute 'administrative error', the Ombudsman must be of the opinion that the administrative act:

- appears to have been made contrary to law
- was unreasonable, unjust, oppressive or improperly discriminatory
- was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory
- was done in the exercise of a power or discretion and was so done for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations
- was done in the exercise of a power or discretion and the reasons for the act were not but should have been given
- was based wholly or in part on a mistake of law or fact

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- was wrong.

Refer PART 8.

5. NORMALLY, OMBUDSMAN SA WILL NOT INVESTIGATE IF...

- the complainant has not first raised the matter at a senior level within the agency: Ombudsman SA may refer the complainant to or back to the agency.
- the agency is served by a separate complaints-handling body: Ombudsman SA may refer the complainant to the relevant body.

Complaints about matters concerning health and community services or workers compensation may be REFERRED, for example to:
 - the Health and Community Services Complaints Commissioner
 - the WorkCover Ombudsman.
- the complainant is not 'directly affected' by the administrative act. It may be appropriate for the Ombudsman to conduct an own initiative investigation; OR:
 - if the person directly affected by the administrative act is unable to make the complaint personally, the complaint may be made by a suitable representative. If the complainant has the capacity to do so, he or she must be asked to sign an Authority to Act form to give effect to their wishes.
 - with the consent of the person affected, a complaint may be made by a Member of Parliament.

6. COMPLAINTS AND REFERRALS UNDER THE LOCAL GOVERNMENT ACT

ICAC amendments

- 6.1. Following amendments by the ICAC Act commencing on 1 September 2013, the Local Government Act provides that (section 272):
- the Minister may refer matters for an Ombudsman investigation where the Minister has reason to believe that:
 - a council has contravened or failed to comply with, or failed to discharge a responsibility under the Local Government Act or another Act
 - an 'irregularity' has occurred in the conduct of the affairs of a council under the Local Government Act or another Act
 - the Minister has to give the council a reasonable opportunity to explain its actions before referral to the Ombudsman (unless this would undermine any investigation)
 - The Ombudsman is able to investigate a council member's breach/failure to comply with Chapter 5, Part 4 of the Local Government Act. This includes a breach of:
 - general duties (section 62)
 - code of conduct - misconduct (section 63)
 - register of interest requirements (sections 64-72)
 - conflict of interest (sections 73-75)
 - Complaints can be:
 - from the Minister (section 263A(1))
 - from 'any person' (section 263A(2))
 - on the Ombudsman's 'own initiative' (section 263A(3)).

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The Council member code of conduct

6.2. The Council member code of conduct (**the code**) commenced operation on 1 September 2013 (although gazetted on 29 August 2013). It does not operate retrospectively, and applies only to acts and omissions of a council member after that date. This is not to say that an act of the council member before that date which may have contributed in some way to the post 1 September acts, may not be considered in the investigation.

6.3. The code refers to:

Part 1 - Principles - overarching statements

Part 2 - Behavioural code

Part 3 - Misconduct

Appendix - Criminal matters

6.4. Part 2 - Behavioural code

- deals with general behaviour; responsibilities; relationships; requirement to report breach of Part 3, and other matters
- there are 16 behavioural requirements listed in Part 2 (clauses 2.1 - 2.16)
- each council must adopt its own process for breach of this Part (must be reviewed within 12 months of general election)
- complaints must be made to the principal member/CEO/nominated delegate
- investigations must follow the council's adopted process
- a breach of Part 2 must be reported at a public meeting
- outcomes - include censure motion; requiring an apology; attendance at training; suspension from position; repayment of monies.

6.5. Part 3 - Misconduct

- refers to breaches by council members of their duties set out in Chapter 5 Part 4 of the Act (i.e. general duties; conflict of interest; register of interests)
- also covers breaches relating to gifts/benefits; bias; misuse of council resources; repeated breach of Part 2; and other matters which do not feature in the Act
- there are 18 conduct requirements listed in Part 3 (clauses 3.1 - 3.18)
- complaints under Part 3 can be made to the council, Electoral Commissioner, Ombudsman or OPI, and may be referred to the Ombudsman for investigation
- where the Ombudsman finds a breach, the Ombudsman report must be provided at a public meeting
- the council must pass a resolution to give effect to the Ombudsman's recommendations.

6.6. Appendix - criminal matters

- do not form part of the code
- the Ombudsman must refer these matters to the Office for Public Integrity.

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- 6.7. The Local Government Act suggests that the Ombudsman will be the primary body to investigate Part 3 misconduct allegations. However, serious or systemic misconduct must be reported to OPI.
- 6.8. Usually, the Ombudsman will only investigate Part 3 misconduct investigations.
- 6.9. Part 2 allegations must be referred back to the council to be dealt with under the council's particular complaint process, unless there is good reason not to (e.g. if Part 2 allegations are interlinked with Part 3 allegations.)
- 6.10. In investigations, the Ombudsman must be clear about whether the conduct complained of is captured by Part 2 or Part 3 of the code, and which clauses in each part.
- 6.11. The Ombudsman will not investigate campaign donations in the first instance. These complaints must be referred to the Electoral Commissioner (section 92 of the *Local Government (Elections) Act 1999*).

Resolve - Part 2 and Part 3 complaints and investigations

- 6.12. In RESOLVE, all complaints about council members' breach/failure to comply with one or more sections in Part 2 and Part 3 of the Code will be titled 'Breach of council member code of conduct'. The branches of the ISSUE tree in Resolve will be:

Council member code of conduct

Breach of Part 2

Breach of Part 3

3.1 Act honestly at all times in the performance of duties...

3.2 Perform and discharge of official functions ..

7. COMPLAINT REFERRALS BY OPI/ICAC UNDER ICAC ACT - SECTION 24(3)

If a matter received by OPI/ICAC is assessed as raising issues other than 'misconduct or maladministration in public administration' that should be dealt with by the Ombudsman (or other body), section 24(3) of the ICAC Act provides that matter must be referred to the Ombudsman (or other body) or the complainant must be advised to refer the matter to the Ombudsman (or other body).

If a matter is referred under section 24(3), the approach must be assessed in the usual way to determine if it is a 'complaint' which should be investigated. See above and refer PART 3.

For matters referred to the Ombudsman under section 24(2)(a), refer PART 6.

8. PARLIAMENTARY REFERRALS

- 8.1. Under section 14 of the Ombudsman Act, the Ombudsman must investigate and report any matter referred to the Ombudsman by either House of Parliament or a Parliamentary committee.
- 8.2. Following the investigation, the Ombudsman must submit a report to the President of the Legislative Council, the Speaker of the House of Assembly or both, depending on the source of the referral. Note that section 25 of the Ombudsman Act does not apply to a section 14 investigation and report – see section 25(1a).

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- 8.3. The relevant house or committee may refer an administrative act to the Ombudsman and resolve that it warrants investigation despite the availability of an appeal, reference or review to a court, tribunal, person or body or legal remedy, or the passing of more than 12 months since the person affected had notice of the administrative act.

9. OMBUDSMAN ADMINISTRATIVE AUDITS

- 9.1. In the public interest, the Ombudsman may conduct an audit or review of the administrative practices and procedures of an agency under section 14A of the Ombudsman Act or sections 93A and 187A of the Local Government Act.
- 9.2. Factors to be considered to determine if an audit will be undertaken include:
- public interest
 - jurisdictional issues
 - evidence of possible administrative error (e.g. from previous complaints)
 - the issue appears to arise in relation to the practices of more than one agency or council.

10. OMBUDSMAN REPORTING OBLIGATIONS - Refer PART 2

- 10.1. The following is particularly relevant to Assessment Officers and Investigating Officers when assessing complaints, but all staff of Ombudsman SA must be aware of these obligations.
- 10.2. If the information provided in the complaint elates to fraud or corruption, or if it meets the criteria of being a 'disclosure of public interest information' under the Whistleblowers Protection Act, the officer receiving the information must explain to the Enquirer the Ombudsman's obligations under the Whistleblowers Protection Act. These obligations relate to passing the information on to the Anti-Corruption Branch of SA Police, and protecting the complainant's identity.
- 10.3. Ombudsman SA should also inform a complainant who discloses corruption, serious or systemic misconduct or maladministration in public administration of Ombudsman SA's obligation under the ICAC Act to report to OPI (section 15 ICAC Directions and Guidelines refers). Refer PART 2.
- 10.4. The Ombudsman's reporting obligations to the ACB and OPI are also set out in the Ombudsman SA Information Sheet provided to complainants.