

PART 6 REFERRALS & INVESTIGATIONS - ICAC ACT

Refer: *Independent Commissioner Against Corruption Act 2012 (ICAC Act)*
Independent Commissioner Against Corruption Directions and Guidelines (Directions and Guidelines)
Ombudsman Act 1972 (Ombudsman Act)
Whistleblower Protection Act 1993 (Whistleblower Protection Act)

The Commissioner's key function under the ICAC Act is to investigate corruption. The ICAC Act does not directly empower the Commissioner to investigate matters of maladministration or misconduct in public administration.

SECTION 24(2)(a)

Where a matter before OPI/ICAC involves potential maladministration or misconduct in public administration within the meaning of the ICAC Act, the matter:

- may be referred to the Ombudsman to investigate
- may be referred to the Ombudsman and the Commissioner may then exercise the powers of the Ombudsman and investigate the matter (section 24(2)(a)).

SECTION 24(3)

If the matter is assessed as raising other issues that should be dealt with by the Ombudsman (or other body), the 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) (section 24(3)).

CONSULTATION AND REFERRAL BY THE COMMISSIONER FOR THE OMBUDSMAN TO INVESTIGATE (sections 37, 24(2)(a))

The Commissioner has the power to refer to the Ombudsman a matter that raises a potential issue of misconduct or maladministration in public administration, for investigation by the Ombudsman. The Commissioner may also give directions and guidance.

Before the Commissioner refers a matter, the Commissioner must consult with the Ombudsman under section 37(1) of the ICAC Act. This is currently carried out by the Commissioner issuing a 'notice of intention to refer' to the Ombudsman.

The Ombudsman will respond in writing to the Commissioner.

- The Commissioner may or may not then formally refer the matter to the Ombudsman for investigation (section 24(2)(a) of the ICAC Act).
- If a referral is made, the Ombudsman investigation process that follows will be under the ICAC Act. However, the powers to conduct the investigation derive from the Ombudsman Act.
- Note that the usual jurisdictional limitations and investigative processes (such as findings under the Ombudsman Act) do not apply.

This policy is a guide only. Staff must always refer to relevant legislation.

1. CONSULTATION AND REFERRAL WHERE THE COMMISSIONER INTENDS TO INVESTIGATE (sections 37, 24(2)(a))

- 1.1 The Commissioner may also refer to the Ombudsman a matter raising a potential issue of maladministration or misconduct in public administration under the ICAC Act, with the intention of exercising the Ombudsman's powers.
- 1.2 Before the Commissioner refers the matter, the Commissioner must consult with the Ombudsman under section 37(1) of the ICAC Act. This is currently carried out by the Commissioner issuing to the Ombudsman a 'notice of intention to exercise the powers of the Ombudsman'.
- 1.3 The Ombudsman will respond in writing to the Commissioner.
- 1.4 The Commissioner may or may not then investigate the matter, exercising the powers of the Ombudsman under the Ombudsman Act. Note that the usual jurisdictional limitations and investigative processes (such as findings under section 25(1)) under the Ombudsman Act do not apply; and the investigation is carried out under the ICAC Act.
- 1.5 If the Ombudsman receives a notice of referral in relation to a matter that is under current investigation by the Ombudsman, the Ombudsman must refrain from taking action in respect of the matter until such time as the Commissioner has been given a reasonable opportunity to consider the Ombudsman's written response to the notice.
- 1.6 If the Commissioner decides to exercise the powers of the Ombudsman and investigate a matter, the Ombudsman must refrain from taking any action in respect of the matter. The Commissioner must inform the Ombudsman of the outcome (section 37(5) ICAC Act).

2. OMBUDSMAN CONSIDERATION OF COMMISSIONER'S CONSULTATION UNDER SECTION 37

- 2.1 The general view of the Ombudsman is that the ICAC Act intends that allegations of maladministration and misconduct in public administration should be investigated by the Ombudsman.
- 2.2 The Ombudsman's view is that the Commissioner should exercise the Ombudsman's powers of investigation where:
 - the subject matter of the complaint relates to allegations of corruption that are being or being considered to be investigated by the Commissioner
 - the allegations relate to conduct on the part of Ombudsman SA
 - there is a conflict of interest or perceived conflict of interest, or other good reason why investigation by the Ombudsman is not appropriate.
- 2.3 In determining how to respond to the Commissioner's consultation, the Ombudsman may consider the following factors (which are the assessment factors under the ICAC Act):
 - if the matter trivial or vexatious
 - if the matter previously been dealt with and there is no reason to re-examine it

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- if there other good reason (e.g. public interest; passage of time; evidentiary concerns) why no action should be taken.

3. OMBUDSMAN RESPONSE TO A SECTION 24(2)(a) REFERRAL BY THE COMMISSIONER

- 3.1 In the absence of other directions or guidelines, in response to a referral, the Ombudsman must:
- identify the issues of misconduct/maladministration to be assessed
 - take appropriate action or determine not to take action
 - report to the Commissioner within 56 days of the referral or such extended time as may be directed by the Commissioner:
 - the issues addressed
 - the action taken and the reasons for that action, or, if no action is taken, the reason why no action was taken.
- 3.2 Where directed by the Commissioner, a similar report must be made to the complainant or reporting agency. Such a report should:
- be made within 56 days of the referral or within extended time as directed by the Commissioner
 - the issues addressed
 - the action taken and the reasons for that action, or, if no action is taken, the reason why no action was taken.
- 3.3 Following referral of a matter, the Ombudsman can request that the Commissioner under section 54(2) ICAC Act:
- provide information connected with the matter that is the subject of a complaint or report
 - authorise the provision of information connected with the matter.

4. AUTHORISATION FROM THE COMMISSIONER TO PUBLISH INFORMATION

- 4.1 The Commissioner has issued authorisations pursuant to sections 56 and 54(2) of the ICAC Act to the Ombudsman, Deputy Ombudsman, Senior Legal Officer, Legal Officer and Investigating Officers. These authorisations are stored in Resolve and provide as follows:

Section 56 authorisation: the above officers are authorised by the Commissioner to publish or cause to be published information relating to a matter that has been referred to the Ombudsman by the Commissioner in accordance with section 24(2)(a) of the ICAC Act and which information is otherwise prohibited from publication by virtue of section 56 of the ICAC Act, where such publication is necessary in order to deal with the referred matter in accordance with the directions or guidance issued for the referral.

Section 54(2) authorisation: the above officers are authorised to provide information connected with a matter that has been referred to the Ombudsman by the Commissioner in accordance with section 24(2)(a) of the ICAC Act to a

person or entity mentioned in sections 54(2)(a), (b), (d), (e), (g), (h) of the ICAC Act.¹

5. CONFIDENTIALITY

- 5.1 Information provided by the Commissioner in a referral to the Ombudsman is confidential unless otherwise advised in writing (section 54(2) ICAC Act).
- 5.2 The Ombudsman will advise the complainant or public officer:
 - of the provisions of sections 54(4) and 54(6) of the ICAC Act
 - that the complainant or public officer must not publish the information provided to the complainant or public officer in contravention of section 54 and 56 of the ICAC Act.

6. INVESTIGATION IN RESPONSE TO A REFERRAL FROM THE COMMISSIONER

- 6.1 Generally, in light of the authorisations above, the Ombudsman will advise the complainant and the agency that the matter is being investigated pursuant to a referral under section 24(2) of the ICAC Act. The Ombudsman will inform the parties of the need for confidentiality under the ICAC Act.
- 6.2 At the completion of the investigation, the Ombudsman will present the Commissioner with a provisional assessment, and await the Commissioner's response and direction. The provisional assessment must address the requirements in section 13 of the Directions and Guidelines above.
- 6.3 The provisional assessment will address whether the Ombudsman considers that there has been misconduct or maladministration in public administration for the purposes of the ICAC Act.
- 6.4 After receiving comment from the parties to the provisional assessment, the Ombudsman will finalise the assessment as determined by the Commissioner. It is up to the Commissioner if and when the final assessment will be sent to the parties.

7. PUBLISHING OUTCOMES OF AN INVESTIGATION IN RESPONSE TO A REFERRAL FROM THE COMMISSIONER

- 7.1 As the investigation is conducted under the ICAC Act framework, the confidentiality and publication provisions of section 26 of the Ombudsman Act are not applicable.
- 7.2 Publication of the final assessment is at the discretion of the Commissioner.

¹ See Admin File Resolve 2013/00042. Letter from Commissioner to Ombudsman dated 4 April 2014.