

## PART 7 INVESTIGATIONS - LOCAL GOVERNMENT ACT

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Refer: *Ombudsman Act 1972* (Ombudsman Act)  
*Independent Commissioner Against Corruption Act 2012* (ICAC Act)  
*Local Government Act 1999* (Local Government Act)  
*Health and Community Services Complaints Act 2004* (HCSC Act)

### 1. INVESTIGATION OF COUNCILS

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) (See section 272 Local Government Act).

The Ombudsman investigates the matter using the powers under the Ombudsman Act.

### 2. INVESTIGATION OF COUNCIL MEMBER CONDUCT

#### Chapter 5 Part 4

2.1. The Ombudsman is able to investigate a council member's breach/failure to comply with Chapter 5, Part 4 of the Local Government Act (council member conduct). This includes a breach of:

- general duties (section 62)
- the code of conduct (the code) (section 63)
- register of interest requirements (sections 64-72)
- conflict of interest provisions (sections 73-75)
- council member conduct that can be the subject of complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act (section 263A(4) Local Government Act)
- note also that under the Ombudsman Act, the Ombudsman has jurisdiction to consider council member conduct where the council member is 'engaged in the work of ... [the] agency (council) (section 3)
- complaints can be:
  - from the Minister (section 263A(1))
  - from 'any person' (section 263A(2))
  - on the Ombudsman's 'own initiative' (section 263A(3)).

2.2. The code commenced operation on 1 Sept 2013 (although it was gazetted on 29 August 2013). It does not operate retrospectively, and applies only to acts and omissions of council members after that date. This is not to say that an act of the

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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.

2.3. The code refers to:

**Part 1 - Principles - overarching statements**

**Part 2 - Behavioural code**

**Part 3 - Misconduct**

**Appendix - Criminal matters**

2.4. **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.

2.5. **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.

2.6. **Appendix - criminal matters**

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

2.7. **Investigation of misconduct**

- investigations occur using the powers of the Ombudsman under the Ombudsman Act

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- the Local Government Act suggests that the Ombudsman will be the primary body to investigate Part 3 misconduct allegations.
- usually, the Ombudsman will only investigate Part 3 misconduct investigations.
- Part 2 allegations must be referred back to the council to be dealt with under their particular complaint process, unless there is good reason not to (e.g. if Part 2 allegations are interlinked with Part 3 allegations)
- the Ombudsman must be clear about whether the conduct complained of is captured by Part 2 or Part 3 of the Code, and which item/s in each part.
- the Ombudsman will not investigate campaign donations in the first instance. These complaints must be referred to the Electoral Commissioner (section 92 Local Government (Elections) Act 1999)

#### 2.8. Reports and recommendations

- the council member and the council being complained about are the respondents
- findings in provisional and final reports (or assessments if referred by OPI/ICAC) should:
  - refer to the relevant provision in the Local Government Act
  - refer to the number of the relevant clause of the code that has or has not been breached
  - refer to the appropriate subsection of section 25(1) Ombudsman Act if applicable, or section 5 definition of misconduct under the ICAC Act if referred to OPI/ICAC
  - note that a finding of a breach of an item in the code *even where there is no express statutory provision in the Act*, will be a finding that the council member acted contrary to law because of the legislative force of the code and the need for mandatory compliance with the code under section 63 of the Local Government Act
  - there will be a need to consider also whether **the council** fell into error under section 25(1) Ombudsman Act (or the ICAC Act) - this may be because of the council member's conduct or for other reasons.

#### 2.9. After investigation, the Ombudsman may recommend that the council (section 263B):

- reprimand the member
- require the member to attend training, issue an apology, take other steps
- require member to reimburse council
- ensure a complaint against the member is lodged with the District Court.

#### 2.10. The Ombudsman will still, however:

- make recommendations under section 25(2) of the Ombudsman Act
- refer the final report to the Minister as required under section 25(4) of the Ombudsman Act
- different procedures will apply if the matter is a referral from OPI/ICAC. Refer PART 6.

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### Recommendations Implementation

- 2.11. If the council member fails to comply with a council requirement made as a result of an Ombudsman recommendation, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Act and the council is to ensure that a complaint is lodged against the member in the District Court. (section 236B(2) Local Government Act)

### Reporting misconduct to the Principal Officer and the Minister

- 2.12. If the Ombudsman finds misconduct on the part of the council member as well as administrative error under section 25(1), this must be reported to the principal officer under section 18(5) of the Ombudsman Act; and to the Minister.

### District Court

- 2.13. Complaints about council member conduct can be lodged by a public official in the District Court under the Local Government Act - but this cannot occur until the Ombudsman has investigated the complaint. (section 264)
- 2.14. District Court proceedings and their outcomes are set out in sections 265-267 of the Local Government Act.

## 3. AUDIT OF COUNCIL ADMINISTRATIVE PRACTICES AND PROCEDURES

### Section 93A Local Government Act

- 3.1 If the Ombudsman considers it to be in the public interest to do so, the Ombudsman may conduct an audit or review of the administrative practices and procedures of a council or council committee (section 93A of the Local Government Act).
- 3.2 The Ombudsman may conduct the audit as if it were an investigation of an administrative act under the Ombudsman Act (section 93A(2) Local Government Act).
- 3.3 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 council.
- 3.4 The Ombudsman may prepare a report on any aspect of such an audit/review, which may make recommendations to the council.
- 3.5 A council's implementation of any recommendation made by the Ombudsman is monitored by the Recommendation Implementation Team in Ombudsman SA.
- 3.6 The Ombudsman should prepare a provisional report allowing the council to comment prior to preparing the final report, in the same way as investigation of an administrative act under section 18.

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- 3.7 If the Ombudsman prepares a report of such an audit/review, the Ombudsman **must** provide a copy of the report to the Minister and the council reviewed.
- 3.8 The Ombudsman may publish the report, a part of the report, or a summary of the report, in any way the Ombudsman sees fit.

## 4. INVESTIGATIONS OF COUNCIL CONFIDENTIAL MEETINGS AND DOCUMENTS

### Section 94 Local Government Act

- 4.1. The Ombudsman may, on receipt of a complaint, carry out an investigation under section 94 of the Local Government Act if it appears that a council may have unreasonably:
  - excluded members of the public from its meetings (under section 90 Local Government Act) or
  - prevented members of the public from having access to documents (under section 91 Local Government Act).
- 4.2. The Ombudsman uses the powers of investigation under the Ombudsman Act.
- 4.3. At the conclusion of the investigation, the Ombudsman **must** prepare a written report and must provide a copy of the report to the council and to the Minister (sections 94(3) and 94(4) Local Government Act).
- 4.4. The Ombudsman should prepare a provisional report allowing the council to comment prior to preparing the final report.
- 4.5. The Ombudsman may publish the report, a part of the report, or a summary of the report, in any way he sees fit.
- 4.6. A council's implementation of any recommendation made by the Ombudsman is monitored by the Recommendation Implementation Team.
- 4.7. The Minister, after considering the Ombudsman's report, may give directions to the council:
  - with respect to the future exercise of its powers under sections 90 or 91, or
  - to release information that should, in the opinion of the Minister, be available to the public.

## 5. AUDIT OF COUNCIL RATES AND CHARGES

### Section 187A Local Government Act

- 5.1 If the Ombudsman considers it to be in the public interest to do so, the Ombudsman may conduct an audit or review of the administrative practices and procedures of a council or councils relating to rating under section 187A Local Government Act. (Chapter 10, Part 4 Local Government Act).
- 5.2 The Ombudsman may conduct the administrative audit as if it were an investigation of an administrative act under the Ombudsman Act (section 187A(2) Local Government Act).

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- 5.3 Factors to be considered to determine if an audit will be undertaken include:
- 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 council
- 5.4 The Ombudsman may prepare a report on any aspect of the review.
- 5.5 A report may make recommendations to a council or councils.
- 5.6 A council's implementation of any recommendations made by the Ombudsman is monitored by the Recommendation Implementation Team.
- 5.7 If the Ombudsman prepares a report of such a review, the Ombudsman must provide a copy of the report to the Minister and the council reviewed.
- 5.8 If the Ombudsman prepares a report he should prepare a provisional report allowing the council to comment prior to the final report.
- 5.9 The Ombudsman may publish the report, a part of the report, or a summary of the report, in any way the Ombudsman sees fit.

## 6. INVESTIGATION OF RATES AND CHARGES

### Section 187B Local Government Act

- 6.1 The Ombudsman may, on receipt of a complaint or on the Ombudsman's own initiative, carry out an investigation under section 187B Local Government Act of a complaint if it appears that a council's declaration of any rate or service charge (under Chapter 10, Part 1) may have had an unfair or unreasonable impact on a particular ratepayer.
- 6.2 The Ombudsman may conduct the investigation as if it were an investigation of an administrative act under the Ombudsman Act (section 187B(2)).
- 6.3 If the Ombudsman makes an adverse finding against the council, the Ombudsman must prepare a written report and must provide a copy of the report to the council.
- 6.4 The report may make recommendations to the council.
- 6.5 A council's implementation of any recommendations made by the Ombudsman is monitored by the Recommendation Implementation Team.
- 6.6 The Ombudsman may publish the report, a part of the report, or a summary of the report, in such a manner as the Ombudsman sees fit.
- 6.7 If the Ombudsman prepares a report the Ombudsman should prepare a provisional report allowing the council to comment prior to the final report.
- 6.8 If the report makes any recommendations as to action that the council should take the council must provide a written response to the Ombudsman and to the complainant (if relevant) within two months after receiving the report.
- 6.9 The council may, if the Ombudsman recommends it, grant a rebate or remission of any rate, charge, fine or interest (made under Chapter 10, Part 1) on the grounds of special circumstances pertaining to a particular ratepayer.

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