



## ICAC, the Ombudsman and the Auditor-General

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Sydney: 02 9262 6989

Northern Rivers: 1800 626 239

Rest of NSW: 1800 626 239

### Overview

There are a number of ways to ensure that public authorities, including local councils and council employees, are accountable for their actions. This Fact Sheet describes how some of these mechanisms work, and how complaints can be made.

Concerns about corrupt conduct should be made to, and are investigated by, the Independent Commission Against Corruption (ICAC). Public officials who make a complaint to ICAC (known as whistle blowers) are protected from reprisals and other retaliatory actions.<sup>2</sup>

Complaints about the conduct of public authorities can be made to the NSW Ombudsman. A complaint to the Ombudsman should only be made if you have exhausted all other avenues of complaint, review or appeal (including any right of appeal to the Land and Environment Court).

Complaints about the ongoing failure of a government department to carry out its responsibilities in an economically efficient and effective manner can be referred

<sup>1</sup> [http://www.edonsw.org.au/legal\\_advice](http://www.edonsw.org.au/legal_advice)

<sup>2</sup> Under the *Public Interest Disclosures Act 1994* (NSW).

to the NSW Auditor-General. The Auditor-General can audit a government to see how the department is operating, and can report to Parliament.

Public authorities are also required to make certain documents available to the public.<sup>3</sup> For more information on access to information, [see Fact Sheet on Access to information.](#)

The public often has concerns about political donations which are made to public authorities, such as Ministers and local government. There are laws that require developers to disclose political donations and gifts when lodging a development application.<sup>4</sup>

For more information on the obligation of developers to disclose political donations, [see our Fact Sheet on Development Applications and Consents.](#)

## Independent Commission Against Corruption

Complaints about corrupt conduct in NSW should be directed to ICAC.

### Main functions of ICAC

ICAC is an independent statutory body.<sup>5</sup> ICAC's principal aims are to:<sup>6</sup>

- investigate, expose and prevent corruption involving public authorities (including local councils) and public officials; and
- educate public authorities, public officials and members of the public about corruption.

ICAC is a public authority, but is independent of the government of the day. It is not subject to the direction of politicians or government officials. It is accountable to the people of NSW through the NSW Parliament.

ICAC can conduct an investigation in response to a complaint, or on its own initiative.<sup>7</sup>

A common misconception is that ICAC prosecutes corruption offences. In fact, ICAC only investigates and reports. It is then up to the Director of Public Prosecutions to decide whether or not to lay charges for a particular criminal offence.

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<sup>3</sup> Under the *Government Information (Public Access) Act 2009* (NSW).

<sup>4</sup> The *Local Government and Planning Legislation Amendment (Political Donations) Act 2008* (NSW) inserted new provisions into the *Environmental Planning and Assessment Act 1979* (NSW), s. 147.

<sup>5</sup> ICAC is established by the *Independent Commission Against Corruption Act 1988* (NSW).

<sup>6</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 2A(a).

<sup>7</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 20(1).

## What is corrupt conduct?

The kind of corrupt conduct that ICAC can investigate includes:<sup>8</sup>

- any conduct *of any person* (whether or not a public official) that does or could adversely affect the honest or impartial exercise of official functions by any public official or public authority;
- any conduct *of a public official* that involves the dishonest or partial exercise of his or her official functions, or a breach of public trust; or
- any conduct *of a public official* (or former public official) that involves the misuse of information acquired in the course of their official duties.

In particular, corrupt conduct also includes the conduct of any person (whether or not a public official) which adversely affects the exercise of official functions by any public official or public authority, such as:

- official misconduct (fraud in office, breach of trust or extortion);
- bribery;
- blackmail;
- obtaining or offering secret commissions;
- fraud;
- theft;
- perverting the course of justice;
- embezzlement;
- election bribery, election funding offences and election fraud;
- tax evasion;
- illegal drug dealing;
- illegal gambling;
- bankruptcy and company law violations; and
- forgery.

For the conduct to fall within the definition of corrupt conduct which ICAC can investigate, the conduct also needs to constitute or involve a criminal or

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<sup>8</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 8(1).

disciplinary offence, or give rise to reasonable grounds to terminate someone's employment.<sup>9</sup>

### **Who can ICAC investigate?**

ICAC can only examine conduct involving NSW public officials, either directly or indirectly. For example, ICAC could investigate conduct by a person who is not a public official if that person is attempting to unreasonably influence a public official.

ICAC is able to investigate complaints of corruption by local council officers, employees and councilors, as a local council falls within the definition of a public authority.<sup>10</sup>

ICAC can also investigate complaints of corruption by Ministers or members of Parliament.<sup>11</sup> Ministers and Members of the NSW Parliament can be found to have engaged in corrupt conduct if their actions constitute a substantial breach of the [code of conduct](#) which applies to them.<sup>12</sup>

## **Reporting corruption**

### **Who can report corrupt conduct?**

Any person can make a complaint to ICAC about corrupt conduct.<sup>13</sup>

Reports from members of the public inform ICAC about the types of corruption occurring within the NSW public sector and help identify the risk areas. This enables ICAC to recognise patterns and trends in corruption and to ensure its work provides the greatest benefit to the people of NSW.

### **Duty to report corruption**

The principal officer of a public authority has a legal duty to report to ICAC any matter that they reasonably suspect may concern corrupt conduct.<sup>14</sup> Where a local council is concerned, it is the general manager who has this responsibility to notify.<sup>15</sup>

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<sup>9</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 9.

<sup>10</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 4 Definitions of "public authority" and "local government authority".

<sup>11</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 4 Definition "public official".

<sup>12</sup> *Independent Commission Against Corruption Act 1988* (NSW), ss. 9(1)(d); 9(3).

<sup>13</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 10(1).

<sup>14</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 11.

<sup>15</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 11(5); *Independent Commission Against Corruption Regulation 2005* (NSW), cl. 19(a).

## Protected disclosures by public officials

Public officials are encouraged to come forward and report suspected corrupt conduct to ICAC.

Public officials who make a disclosure (complaint) to ICAC will be protected from any reprisals or actions, but only if:

- their disclosure is made in accordance with the ICAC Act; and
- the disclosure shows or tends to show that a public authority or public official has, is or intends to engage in corrupt conduct.<sup>16</sup>

The ICAC website contains more information on [protected disclosures](#).

## How to make a complaint about corrupt conduct

A complaint can be made to ICAC online, or by downloading the [online complaint form](#) and mailing or faxing it to ICAC. If you are unsure [how and what to report](#) to the ICAC, you can also seek advice from an ICAC Officer over the phone. [Fact sheets and publications](#) about reporting corruption are available.

## ICAC chooses whether to investigate a complaint

After receiving a complaint, ICAC decides whether or not to investigate the complaint.<sup>17</sup> ICAC can consider whether the subject-matter is trivial, the conduct took place too long ago, or if the complaint was frivolous or vexatious.<sup>18</sup>

Although ICAC can investigate any allegation or complaint of corrupt conduct, ICAC must focus its attention, as far as possible, on serious corrupt conduct and systemic corrupt conduct.<sup>19</sup>

## ICAC must inform complainant of outcome

If ICAC decides to discontinue or not to commence an investigation of a complaint or report made to it, ICAC must inform the complainant or report in writing of its decision and the reasons for it.<sup>20</sup>

## Protected disclosures

Public officials who act as whistleblowers when they identify maladministration, corruption, or serious and substantial financial waste are legally protected. A public official includes an employee of a local council.<sup>21</sup>

<sup>16</sup> *Protected Disclosures Act 1994* (NSW), s. 10.

<sup>17</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 10(2).

<sup>18</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 20(3).

<sup>19</sup> *Independent Commission Against Corruption Act 1988* (NSW), ss. 12-13.

<sup>20</sup> *Independent Commission Against Corruption Act 1988* (NSW), s. 20(5).

The intention of the law is to encourage and facilitate the disclosure of maladministration by setting out the procedure for public officials to make such disclosures, and by protecting them from any reprisals.<sup>22</sup>

### **Procedure for disclosure by a public official**

An official will only receive legal protection if they make their disclosure in accordance with the strict procedure set out by the law. This means the person must make the disclosure to:<sup>23</sup>

- an investigating authority; or
- to the principal officer or another officer of a public authority or investigating authority to which the public official belongs; or
- an officer of the public authority or investigating authority to which the disclosure relates; or
- a Member of Parliament; or
- a journalist.

In addition, the complaint must be made voluntarily and in accordance with any procedure established by the authority concerned for the reporting of corrupt conduct, maladministration or serious and substantial waste of public money (e.g. an agency's internal reporting guidelines).<sup>24</sup>

Complaints to the following organisations are expressly protected if made in accordance with the legal process:

- disclosures of corrupt conduct to ICAC;<sup>25</sup>
- disclosures to the Ombudsman concerning maladministration;<sup>26</sup>
- disclosures to the NSW Auditor-General concerning a serious and substantial waste of public money by an authority or an officer of an authority;<sup>27</sup> and
- disclosures to the Director-General of the Division of Local Government (a branch of the NSW Department of Premier and

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<sup>21</sup> *Public Interest Disclosures Act 1994* (NSW), s. 4 Definition "public official".

<sup>22</sup> *Public Interest Disclosures Act 1994* (NSW), s. 3.

<sup>23</sup> *Public Interest Disclosures Act 1994* (NSW), s. 8(1).

<sup>24</sup> *Public Interest Disclosures Act 1994* (NSW), ss. 8(1)(c), 9(1).

<sup>25</sup> *Public Interest Disclosures Act 1994* (NSW), s. 10. "Corrupt conduct" is defined in the *Independent Commission Against Corruption Act 1988* (NSW), ss. 8, 9.

<sup>26</sup> *Public Interest Disclosures Act 1994* (NSW), s. 11.

<sup>27</sup> *Public Interest Disclosures Act 1994* (NSW), s. 12; *Public Finance and Audit Act 1983* (NSW), ss. 52C – 52D..

Cabinet) concerning serious and substantial waste in local government.<sup>28</sup>

In some circumstances, disclosures to a Member of Parliament or journalist are also protected.<sup>29</sup> For example, the person making the disclosure must already have made the complaint to an investigating authority or public authority, which must either have failed to investigate the matter or not completed their investigation within 6 months, and the complaint must be substantially true.<sup>30</sup>

### **What legal protection is available to complainants?**

If a public official follows the legal procedure for making a disclosure, then they will be protected in the following ways:

- protection against reprisals: it is an offence for a person to take any detrimental action in reprisal against the person who made the disclosure, including through intimidation, harassment, discrimination or dismissal from their employment;<sup>31</sup>
- protection against legal actions: for example, the person will not be liable for defamation or a damages claim;<sup>32</sup> and
- protection of their name and identity: unless the person who made the disclosure agrees to be identified.<sup>33</sup>

## **NSW Ombudsman**

The [NSW Ombudsman](#) is an independent and impartial watchdog whose role is to investigate any improper conduct by public authorities. The Ombudsman's powers are quite limited in that the Ombudsman only has power to investigate and report on inappropriate conduct.

The Ombudsman is a person appointed by the Premier.<sup>34</sup> The appointment is for up to 7 years.

### **Who can the Ombudsman investigate?**

The Ombudsman can investigate complaints about:

- local councils, its employees and councilors;<sup>35</sup>

<sup>28</sup> *Public Interest Disclosures Act 1994* (NSW), s. 12B.

<sup>29</sup> *Public Interest Disclosures Act 1994* (NSW), ss. 8(1)(d), 19.

<sup>30</sup> *Public Interest Disclosures Act 1994* (NSW), s. 19.

<sup>31</sup> *Public Interest Disclosures Act 1994* (NSW), s. 20.

<sup>32</sup> *Public Interest Disclosures Act 1994* (NSW), s. 21.

<sup>33</sup> *Public Interest Disclosures Act 1994* (NSW), s. 22.

<sup>34</sup> *Ombudsman Act 1974* (NSW), s. 6.

<sup>35</sup> *Ombudsman Act 1974* (NSW), s. 5 Definition "public authority" (g1).

- the police;
- access to information; and
- protected disclosures.

### ***Conduct of some public authorities is excluded***

Certain conduct cannot be investigated by the Ombudsman.<sup>36</sup> For example, the Ombudsman cannot investigate the conduct of:<sup>37</sup>

- the Governor;
- a Minister;
- Parliament;
- the Houses of Parliament;
- a Parliamentary committee;
- a member of either House of Parliament in their role as MP; or
- an officer of Parliament, where acting as such.

### **What sort of conduct is the Ombudsman concerned with?**

In conducting an investigation, the Ombudsman will investigate whether any conduct has been:<sup>38</sup>

- illegal;
- unreasonable, unjust, oppressive or improperly discriminatory;
- based on improper motives, irrelevant grounds or irrelevant considerations;
- based on a mistake of law or fact; or
- otherwise wrong.

### **Complaints to the Ombudsman**

Any person (including a public authority) can complain to the Ombudsman about the conduct of a public authority.<sup>39</sup> If a person does not wish to make a

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<sup>36</sup> *Ombudsman Act 1974* (NSW), s. 12(1).

<sup>37</sup> *Ombudsman Act 1974* (NSW), Sch. 1.

<sup>38</sup> *Ombudsman Act 1974* (NSW), s. 26(1).

<sup>39</sup> *Ombudsman Act 1974* (NSW), s. 12.



complaint themselves, they can ask a Member of Parliament to do it on their behalf.<sup>40</sup>

Complaints should be made in writing, although the Ombudsman can accept a complaint that is not in writing if the Ombudsman considers it appropriate to do so.<sup>41</sup> The NSW Ombudsman's website on [complaint procedures](#) includes tips for making a complaint and an online complaint form.

### **Ombudsman decides whether to investigate conduct**

The Ombudsman decides whether to investigate the conduct of a public authority, and can do so in response to a complaint or on its own initiative.<sup>42</sup> In particular, the Ombudsman will be concerned to see that the complainant has tried to resolve their complaint with the public authority first, and that they have exhausted any complaint and appeal rights before approaching the Ombudsman.

The Ombudsman may decide not to investigate a matter or to discontinue an investigation if the Ombudsman thinks that the:

- complaint is frivolous, vexatious or not in good faith;
- complaint is trivial;
- event took place too long ago; or
- complainant has an alternative and satisfactory means of settling the complaint available to them.

In particular, the Ombudsman cannot investigate the conduct of a local council if the complainant has a right of appeal or review available under another law (e.g. the right to challenge a decision in the Land and Environment Court), unless there are special circumstances which explain why the right was not exercised.<sup>43</sup>

### **What can the Ombudsman do?**

After making an investigation into a person or organisation's conduct, the Ombudsman will make a report, including reasons for any findings.<sup>44</sup>

The Ombudsman may make recommendations in the report, including a recommendation that:<sup>45</sup>

- the public authority reconsider its conduct;

<sup>40</sup> *Ombudsman Act 1974* (NSW), s. 12(2).

<sup>41</sup> *Ombudsman Act 1974* (NSW), ss. 12(4), (4A).

<sup>42</sup> *Ombudsman Act 1974* (NSW), ss. 13AA, 13(1).

<sup>43</sup> *Ombudsman Act 1974* (NSW), s. 13(5).

<sup>44</sup> *Ombudsman Act 1974* (NSW), s. 26(1).

<sup>45</sup> *Ombudsman Act 1974* (NSW), s. 26(2).

- action be taken to rectify or change the conduct;
- reasons be given for the conduct;
- any law or practice relating to the conduct be changed; or
- compensation be paid to any person.

The report must be given to the Minister responsible for the area concerned, the head of the public authority whose conduct is reviewed in the report (such as the Director-General of a government department or the General Manager of a local council), and to the complainant (if the investigation was triggered by a complaint).<sup>46</sup>

In cases where serious misconduct has occurred, the Ombudsman may recommend to the responsible Minister or public authority that a person be dismissed, removed or punished.<sup>47</sup> The Ombudsman can also refer matters to the Director of Public Prosecutions or to ICAC for their consideration.<sup>48</sup>

## NSW Auditor-General

Referring matters to the NSW Auditor-General is one way the NSW Parliament can hold the government accountable for fulfilling its responsibilities. The Auditor-General is independent of government..<sup>49</sup>

The Auditor-General is the chief executive officer of the [NSW Audit Office](#), whose purpose is to assist the Auditor-General in fulfilling the Auditor's role.<sup>50</sup>

The NSW Auditor-General can conduct audits into how the NSW government operates. These audits may identify substantial flaws in government practices, which in turn may lead to reform. Audits cover a very wide range of topics, including for example, the sustainability of native forest operations (logging) by Forests NSW, the clearing of native vegetation and the use of private waterfront tenancies on public land. [Audits in progress](#) can be viewed on the NSW Audit Office website.

### Audit powers

The Audit Office can conduct:

<sup>46</sup> *Ombudsman Act 1974* (NSW), ss. 26(3), (4).

<sup>47</sup> *Ombudsman Act 1974* (NSW), s. 38.

<sup>48</sup> *Ombudsman Act 1974* (NSW), s. 31AB.

<sup>49</sup> *Public Finance and Audit Act 1983* (NSW), ss. 27B, 28; Schedule 1, cl. 5 provides that the Auditor-General can only be removed from office by the Governor following a vote to do so by both Houses of Parliament.

<sup>50</sup> *Public Finance and Audit Act 1983* (NSW), ss. 33A(3), 33B.

- financial audits – which identify whether government agencies are complying with accounting standards, relevant laws, regulations and government directions;
- compliance audits - these audits investigate whether a government department is complying with its specific legislative responsibilities;
- performance audits – these look at whether a government department is operating efficiently and economically;<sup>51</sup> and
- protected disclosure investigations - the Audit Office can examine allegations by public officials of serious and substantial waste of public money.<sup>52</sup>

### **Making a complaint**

Concerns about the general performance of government departments can be reported orally or in writing to the NSW Audit Office.

### **Reports to Parliament**

In most cases, an audit by the Auditor-General will result in the Auditor-General presenting a report to the Minister responsible for the government department concerned, as well as to the Parliament.<sup>53</sup>

#### **Case Study: NSW Auditor-General's report leads to reform of native vegetation management in NSW (2002)**

In 2001-2002, EDO NSW prepared a submission on behalf of environmental groups outlining the shortcomings of the Department of Land and Water Conservation (as it was then) in meeting its legal responsibilities to protect native vegetation in NSW, including the Department's failure to prosecute breaches native vegetation laws.

The submission was instrumental in leading to an audit of the Department by the Auditor-General. The report from the Auditor-General's office was handed down in September 2002, and strongly condemned the Department for its lack of action in this area.

<sup>51</sup> *Public Finance and Audit Act 1983*, ss. 38A – 38C.

<sup>52</sup> Which are made under the *Protected Disclosures Act 1994* (NSW) (except those relating to local government), See: *Public Finance and Audit Act 1983* (NSW), ss. 52C – 52D.

<sup>53</sup> *Public Finance and Audit Act 1983* (NSW), ss. 38E, 52, 52B, 52E.

## Glossary

### **Key to terms used in this Fact Sheet**

**OEH** means the NSW Office of Environment and Heritage

**Environment Minister** means the NSW Minister for the Environment

**ICAC** means the Independent Commission Against Corruption.

### **Useful websites**

- [ICAC](#) is an independent statutory body which receives and investigates complaints about corruption in government.<sup>54</sup>
- [The NSW Ombudsman](#) is an independent and impartial watchdog whose role is to ensure that NSW government agencies fulfill their functions properly.
- [The NSW Auditor-General](#) can conduct an audit to review any systemic failure of a public authority to carry out its regulatory responsibilities.

### **Useful legal texts**

- *Douglas and Jones Administrative Law*, Douglas, R. (6<sup>th</sup> ed, 2009)

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<sup>54</sup> It is established under the *Independent Commission Against Corruption Act 1988* (NSW).