

## Chapter 35 Accountability Legislation

### 35.1 Independent Commission Against Corruption Act 1988

The *Independent Commission Against Corruption Act 1988* established the Independent Commission Against Corruption (ICAC) and conferred it with wide-ranging powers to investigate corrupt conduct (and a wide range of related matters) involving any public official in any public authority in New South Wales. The definition of “public official” specifically includes the Governor, Ministers, Executive Councillors, Parliamentary Secretaries and the members and Presiding Officers of both Houses of Parliament. The ICAC also has a charter to promote conditions under which corruption is not tolerated and has an advisory and educative role with the aim to prevent corruption in public institutions.<sup>1</sup> Reports of the Commission are tabled in Parliament.

Part 7 of the Act provides for a joint committee on the Independent Commission Against Corruption to be established at the commencement of each Parliament. The committee is not empowered to direct the Commission in any way nor can it have the ICAC reconsider its decisions or findings. For further information on the committee see section 26.2.2 of Part One.

Part 7A of the Act deals with Parliamentary ethical standards. It requires each House to establish a designated committee<sup>2</sup> whose functions include:

- (a) preparing draft codes of conduct for members of the House and draft amendments to codes of conduct already adopted, and
- (b) carrying out educative work relating to ethical standards applying to members, and
- (c) giving advice in relation to such ethical standards in response to requests for advice by the respective Houses, but not in relation to actual or alleged conduct of any particular person (ss. 72C & 72E).

In 1998, the Houses each adopted an identical Code of Conduct. The code, with amendments, has been adopted in all subsequent Parliaments. The Members’ Code of Conduct is a highly significant document as it is the relevant Code of Conduct for the purposes of section 9(1)(d) of the *Independent Commission Against Corruption Act 1988*. The legal relationship between the Members’ Code of Conduct and the ICAC Act means that a breach of the Code of Conduct may amount to corrupt conduct under the *Independent Commission Against Corruption Act 1988*, even if the conduct is not otherwise illegal. For further information on the Code of Conduct see Chapter 7 of Part One.

### 35.2 Ombudsman Act 1974

Under ss. 12 & 13 of the *Ombudsman Act 1974* the Ombudsman is empowered to receive complaints about the conduct of a public authority and make a decision as to

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<sup>1</sup> see Parts 1, 3 and 4 of the *Independent Commission Against Corruption Act 1988* for definitions of “corrupt conduct”, “public authority” and “public official” as well as a full description of the functions and powers of the Commission.

<sup>2</sup> This function is performed by the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics and the Legislative Council Privileges Committee.

whether or not to investigate such complaints. Under s. 26 of the Act the Ombudsman is able to report on conduct which is:

- (a) contrary to law;
- (b) unreasonable, unjust, oppressive or improperly discriminatory;
- (c) in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory;
- (d) based wholly or partly on improper motives, irrelevant grounds or irrelevant consideration;
- (e) based wholly or partly on a mistake of law or fact;
- (f) conduct for which reasons should be given but are not given; or
- (g) otherwise wrong.

“Conduct” is defined as any actual or alleged action or inaction relating to a matter of administration. As a matter of practice, the conduct forming the subject matter of complaints ranges from poor service through to serious misconduct leading to criminal charges. The Ombudsman conducts extensive investigations using the preliminary inquiries power under s. 13AA and is able to resolve the majority of complaints without resort to its royal commission and other compulsive powers (ss. 19 & 20).

The Ombudsman also has a role monitoring and reviewing certain police powers and inspecting gaol and juvenile justice institutions. The Ombudsman has an auditing role in telecommunications interception and controlled operations, and determines appeals in relation to inclusion or removal from the witness protection program. More recently the Ombudsman has acquired functions in relation to child protection which include:

- (1) keeping under scrutiny the systems for preventing child abuse;
- (2) overseeing and monitoring the conduct of investigations into allegations or convictions made against employees of designated agencies;
- (3) determining whether an investigation which has been monitored has been conducted properly, and whether appropriate action has been taken; and
- (4) directly investigating child abuse allegations or convictions against employees of designated agencies or the handling of or response to such a matter.

Members of Parliament fall outside the Ombudsman’s jurisdiction.<sup>3</sup> However, the following functions are directly relevant to members:

- (1) the Ombudsman’s office may be able to provide a remedy for aggrieved constituents experiencing problems dealing with the bureaucracy;
- (2) the Ombudsman does have jurisdiction over members’ staff; and
- (3) the Ombudsman deals with complaints against the conduct of government agencies and staff within Ministers’ portfolio responsibilities.

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<sup>3</sup> See Schedule 1 of the *Ombudsman Act 1974*.

A joint statutory committee is appointed by both Houses under Part 4A of the *Ombudsman Act 1974* to monitor and review the exercise of the Ombudsman's functions. As with the committee overseeing the ICAC, there are some limitations as to the ambit of the committee's inquires. See section 26.2.3 for further information.

### **35.3 Freedom of Information Act 1989**

The objects of the *Freedom of Information Act 1989* are to extend the rights of the public to obtain access to information held by the Government and to ensure that records regarding individuals are accurate.

The *Freedom of Information Act 1989* does not apply to the Parliament, Presiding Officers nor members. Section 7 specifically excludes the Parliament from the definition of "public authority" and section 8 specifically excludes members of the Legislative Assembly and Legislative Council, committee chairs, the Presiding Officers, Ministers, Parliamentary Secretaries and members of the Executive Council from the definition of "holders of public office".

### **35.4 Anti-Discrimination Legislation**

Under section 22B of the *Anti-Discrimination Act 1977*, it is unlawful for a member of Parliament to sexually harass a "workplace participant" or another member of Parliament in the workplace. It is also unlawful for a "workplace participant" to sexually harass a member of Parliament in the workplace.

More generally, the *Anti-Discrimination Act 1977* prohibits a wide range of discriminatory behaviour on the basis of race, sex, age, marital status, homosexuality, disability, transgender status, or a person's association with someone from one of these groups. The Act also prohibits sexual harassment, racial vilification and vilification of homosexuals, transgender people and people who have HIV or AIDS. Vilification is defined as a public act that could incite hatred, serious contempt or severe ridicule.

The Act is divided into parts which deal with each major type of discrimination separately. For example, Parts 2 and 3 deal with racial and sex discrimination respectively while Part 2A deals with sexual harassment. This enables the Act to clearly provide for a number of exceptions which are permissible or relevant in relation to one type of discrimination such as sport and sex discrimination (s. 38) or credit applications and age discrimination (s. 49ZYU).

The Act provides for a number of general exemptions to its provisions. These include any act done to comply with a law or an order of a court (s. 54), charities (s. 55), religious bodies (s. 56), voluntary bodies excepting cooperatives, financial institutions and registered clubs (s. 57) and the provision of housing for aged persons (s. 59). Sections 126 and 126A of the *Anti-Discrimination Act 1977* provide for the Minister to grant special exemptions to the Act to enable the provision of facilities, services and opportunities to meet the special needs of a group of people affected by unlawful discrimination.

Part 9 of the Act provides for the president of the Anti-Discrimination Board to receive, investigate and conciliate complaints of discrimination and vilification. Where the president considers that an offence of vilification has occurred the president may refer the matter to the Attorney-General (s. 89B). The president may compel parties to a complaint to appear for the purpose of endeavouring to resolve a complaint by conciliation (s. 92). Where, in the president's view, conciliation will not be successful, where conciliation has failed or the nature of the complaint warrants it, the president may refer the complaint to the Administrative Decisions Tribunal (s. 94).

The Tribunal may inquire into, conciliate and determine complaints. After holding an inquiry the Tribunal may dismiss a complaint, order the respondent to pay the complainant damages, order the respondent not to continue or repeat any unlawful conduct, or order the respondent to perform any reasonable act to redress loss or damage suffered by the complainant. In relation to a vilification complaint, the Tribunal may order the respondent to publish an apology, order the respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination, or make an order declaring void any contract or agreement made in contravention of the *Anti-Discrimination Act 1977* (s. 113(1)).

For the purpose of eliminating discrimination and promoting equality and equal treatment the Act also provides an educative and public policy development function for the Anti-Discrimination Board. The Board may: carry out investigations, conduct research and inquiries relating to discrimination; acquire and disseminate knowledge on all matters relating to the elimination of discrimination and the achievement of equal rights; arrange and coordinate consultations, discussions, seminars and conferences; review the laws of the State; consult with government, business, industrial and community groups; hold public inquiries; and develop human rights programs and policies (s. 119). The Board may also review matters referred by the Minister (s. 120).

Part 9A of the Act contains provisions relating to equal opportunity in public employment intended to eliminate and ensure the absence of discrimination on the grounds of race, sex, marital status and physical impairment, and to promote equal employment opportunity for women, members of racial minorities and physically handicapped persons (s. 122C). It establishes the office of Director of Equal Opportunity in Public Employment to advise and assist government authorities in relation to equal employment opportunity management plans, to evaluate the effectiveness of these management plans, and to report and make recommendations to the Minister (s. 122I). Each government authority is required to prepare and implement an equal employment opportunity management plan (s. 122J) and to report at least annually to the Director of Equal Opportunity in Public Employment on its activities and results under the plan (s. 122L).

### **35.5 Public Finance and Audit Act 1983**

The *Public Finance and Audit Act 1983* furnishes the Auditor-General with wide-ranging powers to scrutinise the financial records and administration of public authorities in New South Wales. Section 6 of the Act prescribes the form of the Public Accounts and the Total State Sector Accounts. Sections 34 and 35 provide that the Auditor-General shall audit these accounts and any other accounts the

Auditor-General is authorised or required to audit whenever and in such manner as the Auditor-General thinks fit and whenever required by the Treasurer to do so. The Auditor-General also has discretion to conduct special audits of particular activities of any authority to determine whether the authority is carrying out those activities effectively, economically, efficiently and in compliance with all relevant laws (s. 38B). After any inspection, examination or audit the Auditor-General is required to forward a report of the results to the Treasurer.

The Auditor-General's annual report of the Public Accounts and Total State Sector Accounts and reports of special audits of particular activities are required to be presented to each House of Parliament (ss. 52A & 52B).

In pursuance of these functions the Auditor-General is entitled to full and free access to the accounts, records, documents and papers relating to the subject of an audit. In addition, the Auditor-General has compulsive powers and may compel the attendance of a person and the production of books, accounts, records or documents in the possession or under the control of that person as appear to be necessary for the purposes of an audit (s. 36).

The Legislative Assembly Public Accounts Committee is established under the Act (ss. 54 & 57) and is responsible for overseeing the Auditor-General and the Audit Office. For further information on the committee see section 26.2.5 of Part One.

The range of statutory bodies and departments covered by the *Public Finance and Audit Act 1983* and required to be audited by the Auditor-General is listed in schedules 2 and 3 to the Act. The Parliament of New South Wales is not listed in these schedules and so the Auditor-General does not have a legislated duty to audit its accounts and systems but does so under the invitation of the Presiding Officers. As such, audits of the Parliament do not necessarily have the same scope as audits of government agencies. However, in the past officers of the Audit Office have been seconded to the ICAC to assist it to examine matters relating to the Parliament and its members.

Neither the Auditor-General nor the Public Accounts Committee may question the merits of policy decisions of the executive in carrying out their statutory functions although the Public Accounts Committee may investigate such matters if they are referred by the Legislative Assembly or by a Minister (ss. 38D & 57(2)).

### **35.6 Protected Disclosures Act 1994**

The *Protected Disclosures Act 1994* was enacted to protect “whistleblowers” who expose waste or wrongdoing in the public sector. More formally, the object of the Act, as defined in s. 3(1), is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:

- (a) enhancing and augmenting established procedures for making disclosures concerning such matters;
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures; and

(c) providing for those disclosures to be properly investigated and dealt with.

Section 8(1) of the Act provides that for a disclosure to be protected it must be made by a public official:

- (a) to an investigating authority (i.e. the Auditor-General, the Independent Commission Against Corruption, the Ombudsman, or the Police Integrity Commission);
- (b) to the principal officer of a public authority or investigating authority;
- (c) to another officer of the public authority or investigating authority to which the public official belongs; or
- (d) to a member of Parliament or to a journalist.

The Act also provides that disclosures to an investigating authority must be in accordance with the relevant legislation establishing that authority. For example, a disclosure to the Police Integrity Commission must be made in accordance with the *Police Integrity Commission Act 1996* (ss. 10-12A).

Section 19 of the Act requires that a disclosure made to a member of Parliament or to a journalist must meet certain conditions to be protected. The public official making the disclosure must have already made the disclosure to an appropriate officer or authority which had:

- (a) decided not to investigate; or
- (b) decided to investigate but not completed the investigation within 6 months; or
- (c) investigated but not recommended the taking of any action; or
- (d) failed to notify the person making the disclosure, within 6 months, of whether or not the matter is to be investigated.

In addition, the public official must have reasonable grounds for believing that the disclosure is substantially true and the disclosure must be substantially true.

Members of Parliament are able to make protected disclosures in addition to being able to receive them and protected disclosures may be made about members of Parliament.

Anyone wishing to make a disclosure of corrupt conduct against a member of Parliament may do so to the Independent Commission Against Corruption. Disclosures about serious and substantial waste can be made to the Audit Office but, as the Ombudsman does not have jurisdiction over members of Parliament, disclosures against members of Parliament concerning maladministration must be taken to the principal officer who, in the case of the Parliament, is the Speaker of the Legislative Assembly or the President of the Legislative Council.

### **35.7 Jury Act 1977**

Under section 5 of the *Jury Act 1977* every person who is enrolled as an elector in New South Wales is qualified and liable to serve as a juror. However, exceptions include people disqualified from jury service because they are currently bound by an

order of a court of New South Wales or because they are ex-prisoners or ex-juvenile offenders.

Jury rolls for each jury district (which are based on groups of electoral divisions) are compiled periodically by random selection from the electoral roll. People included on this roll are notified and requested to complete a questionnaire to establish whether they are qualified or ineligible to perform jury service (ss. 12 & 13). It is at this point that ineligibility for, or an exemption from, jury service must be claimed. There are penalties for failing to complete the questionnaire (s. 61), for providing false or misleading information (ss. 13(3) & 62), for failing to inform the sheriff of disqualification or ineligibility (s. 62A), and failing to attend for jury service (s. 64). Any person who impersonates a juror (i.e. falsely claims to be someone summoned to attend as a juror) is guilty of an offence (s. 67).

Members of Parliament and Parliamentary staff are ineligible for jury service along with the Governor; judicial officers; coroners; a member or officer of the Executive Council; legal practitioners; police and criminal investigators, public employees engaged in the provision of legal services in criminal cases, the administration of justice or penal administration; the Ombudsman and Deputy Ombudsman; former judicial officers, coroners, police officers, Crown Prosecutors, Public Defenders, Directors or Deputy Directors of Public Prosecutions or Solicitors for Public Prosecutions; and people who are unable to read or understand English or who are unable, because of sickness, infirmity or disability, to discharge the duties of a juror.<sup>4</sup>

The following categories of people may claim exemption from jury service: clergy; vowed members of any religious order; dentists; pharmacists; medical practitioners; mining managers and under-managers of mines; emergency services personnel; persons who are at least 70 years old; pregnant women; a person who has the care, custody and control of children under the age of 18 years (other than children who have ceased attending school), and who, if exempted, would be the only person exempt under this item in respect of those children; a person who resides with, and has full-time care of, a person who is sick, infirm or disabled; a person who resides more than 56 kilometres from the place at which the person is required to serve; person who has: (a) within the 3 years that end on the date of the person's claim for exemption, attended court in accordance with a summons and served as a juror or; (b) within the 12 months that end on the date of the person's claim for exemption, attended court in accordance with a summons and who was prepared to, but did not, serve as a juror; and a person who is entitled to be exempted under s. 39 of the Act on account of previous lengthy jury service.<sup>5</sup>

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<sup>4</sup> See s. 6 and Schedule 2, *Jury Act 1977*. Other persons are ineligible because of the *Jury Exemption Act 1965* of the Commonwealth.

<sup>5</sup> See s. 7 and Schedule 3, *Jury Act 1977*.