Towards a cohesive public integrity framework in South Australia

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On 15 February 2017, the Public Interest Disclosure Bill 2016 (SA) (the Bill) passed through the Legislative Council in South Australia and has since been returned to the House of Assembly for assent. It is expected that the House of Assembly will agree to the (minor) amendments made by the Legislative Council when it sits on 28 March 2017 and the Act will commence soon thereafter.

Accordingly, due to the effect that the Bill is set to have on the South Australian public integrity landscape, KelledyJones Lawyers considers it timely to outline and discuss the anticipated impact for the local government sector on commencement.

The statutory regime under the Whistleblowers Protection Act 1993 (SA) (WBP Act) does not recognise the Independent Commissioner Against Corruption (the ICAC) as an appropriate authority to which a disclosure can be made,[1] nor does it operate in conjunction with the Independent Commissioner Against Corruption Act 2012 (SA) (ICAC Act). In fact, some of the definitions found in the WBP Act are different (or contradictory) to those under the ICAC Act.[2]

Accordingly, to address these issues and to implement the recommendations of the ICAC, (as outlined in the 2014 report pertaining to the review of the WBP Act),[3] the Bill repeals the WBP Act, as well as amending the Local Government Act 1999 (SA) (the LG Act) and the Public Sector Act 2009 (SA).

"Public interest information"

The Bill provides for "public interest information" disclosures under two categories, the first being a disclosure pertaining to "environmental and health information" and the second a disclosure pertaining to "public administration information".[4] Importantly, *only public officers* (as defined under the ICAC Act 2012 (SA)) may make a disclosure under the "public administration information" category[5] and council employees and Elected Members are defined as are "public officers" under Sch 1 of the ICAC Act.

"Appropriate" disclosures

Clause 5(1) of the Bill has the effect of granting immunity to those persons who make "appropriate" disclosures of "public interest information" to a "relevant authority" for the purposes of the Bill. While a similar provision can be found at s 5 of the WBP Act, the Bill extends the protection and expressly provides for immunity *despite* any duty of secrecy or confidentiality that may be applicable to either the person or the disclosure.

This means that irrespective of any obligation of confidentiality or secrecy (for example, as may apply to an Elected Member to not disclose confidential information to which there is an order of council in effect under s 90 of the LG Act), the person *will not* be subject to any liability in making an "appropriate disclosure".

A person makes an "appropriate disclosure" of "environmental and health information" to a "relevant authority" when:

- the person ***believes*** on reasonable grounds that the information is true; or
- if they are not in a position to form a belief on reasonable grounds about the truth of the information, they ***believe*** on reasonable grounds that the information *may* be true, and it is of sufficient significance to justify its disclosure, so that its truth may be investigated.[6]

This is similar to the provision currently contained under the WBP Act.[7]

However, a disclosure under "public administration information" category will be an "appropriate disclosure" when it is made to a "relevant authority" and the public officer ***reasonably suspects*** that the information raises a potential issue of corruption, misconduct or maladministration in public administration (as those terms are defined under the ICAC Act).[8]

It is important to note then that a disclosure with regards to environmental and health information requires a person to have a reasonable belief (or believe on reasonable grounds that the information may be true) whereas a disclosure under the public administration information category only requires a reasonable "suspicion", which is, of course, a lower threshold to meet.

Clause 14 of the Bill provides that the Commissioner (defined to be the person holding or acting in the office of the ICAC)[9] may publish Guidelines, and the Guidelines will designate the person who will be taken to be responsible, or who is responsible, for the management or supervision of the public officer.[10]

This is likely to be the council's Chief Executive Officer, as well as the Director, for disclosures relating to any council employee, and may include the Mayor with regards to information relation to Elected Members. However, until such time as the Guidelines have been prepared, it is not known who the "relevant authority" will be for council disclosure purposes.

Conversely, the WBP Act currently provides that "a responsible officer" of the council will be the "appropriate authority" "where the information relates to a matter falling within the sphere of responsibility of a local Government body".[11]

It should also be noted that under the WBP Act there is an obligation on informants to assist in the investigation of information that they are responsible for disclosing.[12] However, a corresponding obligation has ***not*** been included in the Bill, and further, a person is ***not*** obligated to make their identity known when making an "appropriate disclosure".[13]

Removal of such an obligation will arguably assist in encouraging persons to come forward and make disclosures, rather than be deterred by the prospect of potentially being required to make their identity known, or otherwise, assist in the investigation.

Councils and "responsible officers"

Importantly, cl 12 requires council CEOs, as the council's "principal officer" under the Bill, to ensure that the council has one or more designated "responsible officers" for the purposes of the Bill, to be designated within ***3 months*** of the commencement date.[14]

The "responsible officer" is required to receive "appropriate disclosures of public interest information" relating to the council, make appropriate recommendations to the CEO in relation to dealing with the disclosure and provide advice to employees and Elected Members.[15]

While no regulations are available at this time, the Bill provides that regulations may prescribe the qualifications that a "responsible officer" is required to have.[16]

Despite the term "responsible officer" attracting no definition under the WBP Act, arguably, s 5(4)(i) provides that councils are required to designate a "responsible officer" under the current regime for the purpose of receiving appropriate disclosures under that Act. Similarly, s 302B of the LG Act (which is to be repealed should the Bill become law) states that a "responsible officer" may be required to have qualifications as required by regulation.

In this regard, reg 33 of the Local Government (General) Regulations 2013 (SA) states that the "prescribed qualifications" are those determined by the Minister for the purposes of the regulation, however the Minister has not made a determination as to these qualifications.

Accordingly, should the proposed regulations specify the qualifications required to undertake the role of "responsible officer", or alternatively, should the Minister make a determination, some councils may be disadvantaged if there is no person in the councils employ with the required qualifications, or in the event it cannot afford to employ additional staff for that purpose. This is an issue that may need further consideration upon the release of any draft regulations.

Action upon receipt of disclosure

Upon receipt of a "public information disclosure", a "relevant authority" must act in accordance with cl 7 and adhere to any Guidelines prepared by the ICAC under clause 14.

Under this new framework the "relevant authority" will be required to provide the Office for Public Integrity (OPI) with information relating to any appropriate disclosure it receives in accordance with the Guidelines.[17] This will ensure that the OPI will be kept informed as to all public integrity matters that have been raised with relevant authorities.

It should also be noted that the only instances in which no further action is required to be taken in relation to an "appropriate disclosure" is when either the information does not justify the taking of further action; ***or*** the information relates to a matter that has already been investigated, or otherwise acted upon, by a relevant authority, and the information does not give rise to a need to re-examine the matter.[18]

Any other "appropriate disclosure" of "public interest information" made to a "relevant authority" must be investigated further in accordance with cl 7 of the Bill, and should a "relevant authority" not take appropriate action, a person can make their disclosure known to either a journalist or a Member of Parliament (other than a Minister of the Crown).[19]

While there are certain requirements that must be met prior to a disclosure being made under cl 6 (as it is intended as a "last resort"), this clause enables otherwise unheeded informants to publicise and widely circulate the information to which they are privy.

Relevantly, a disclosure under cl 6 will also be protected from liability.[20]

The amendment to include such disclosures to journalists was introduced at the committee stage of the Legislative Council by the Liberal Party (in Opposition), for the purpose of ensuring that relevant authorities,

including councils, are not complacent in their duties, and to ensure that disclosures are addressed expediently.

It will be of interest to note whether this amendment remains in the final version of the legislation, now that the Bill has been returned to the House of Assembly.

Offence provisions

The Bill prescribes a number of criminal offences, which by way of summary include:

- clause 8 — the identity of an informant is to be kept confidential, which otherwise overrides any other legislative or common law requirement of disclosure. The maximum penalty is proposed to be a $10,000 fine or 1 year imprisonment.
  Under the WBP Act, while an informant's identity was to be kept confidential it was not expressly an offence to disclose the identity of the informant;[21]
- clause 9 — provides for an offence of "victimisation", which mirrors that contained in the ICAC Act. Accordingly, a person who causes detriment to another on the ground, or substantially on the ground, that the other person (or a third person) has made (or intends to make) an "appropriate disclosure of public interest information" commits an act of victimisation.
  It is a criminal offence to *personally* victimise a person who has made, (or intends to make), an appropriate disclosure under the Bill, which will carry a maximum penalty of a $10,000 fine. This provision can only be enforced by the Commissioner of Police or the Director of Public Prosecutions. Relevantly, the Crown will be held vicariously liable for any act of victimisation committed by any agent or employee of a public sector agency, as that term is defined in the Public Sector Act 2009 (SA) (this does not include local government entities).[22]
  Alternatively, an act of victimisation will also be actionable as a tort, or as if it were an act of victimisation, under the Equal Opportunity Act 1984 (SA);[23]
- clause 10 — false or misleading disclosures are to be punishable by a maximum penalty of $10,000 or imprisonment for 2 years, and persons who make such disclosures are not protected by the Bill insofar as liability is concerned.[24]
  While a similar offence provision appears under the WBP Act, the maximum penalty is only $8000, however the imprisonment provision remains the same at 2 years; and
- clause 11 — it will be a criminal offence to prevent or hinder a person from making an "appropriate disclosure" which will carry a maximum penalty of $10,000 or imprisonment for 2 years. This is a new offence provision and does not have a corresponding section under the WBP Act.

Conclusion

While much of the WBP Act is reproduced in the Bill, the Bill has been drafted in such a manner that it compliments the existing public integrity legislative schemes in South Australia, and supports the reforms made by the Government in its move towards a more accountable and transparent public administration.

We now await the final stages of consideration of the Bill by the House of Assembly, before it becomes law; and thus provides the South Australian public sector with a more cohesive, practical and consistent integrity framework.

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Footnotes

1. Whistleblowers Protection Act 1993 (SA), s 5(4).
2. See definitions for public officer and maladministration as found in s 4 Whistleblowers Protection Act 1993 (SA).
3. Independent Commissioner Against Corruption, "A review of the Whistleblowers Protection Act 1993" (2014) available at https://icac.sa.gov.au/sites/default/files/ICAC_Whistleblowers_Protection_Act_Review.pdf.
4. Public Interest Disclosure Bill 2016, cl 5(1).
5. Above n 4, cl 5(1)(b).
6. Above n 4, cl 5(3)(b).
7. Above n 1, s 5(2).
8. Above n 4, cl 5(4).
9. Above n 4, cl 4.
10. Above n 4, cl 5(5).
11. Above n1, s 5(4)(i).
12. Above n 1, s 6.
13. This in inferred on the basis that no positive requirement to disclose identity is prescribed in the Bill, and cl 7(b) is only activated "if the informant's identity is known".
14. Above n4, Sch 1, Pt 3, cl 6.

15. Above n 4, cl 13.
16. Above n 4, cl 12(2).
17. Above n 4, cl 7(1)(c) and cl 7(3)(b).
18. Above n 4, cl 7(2).
19. Above n 4, cl 6(a).
20. Above n 4, cl 6 — a disclosure under cl 6 will be an "appropriate disclosure" for the purposes of cl 5.
21. Above n 1, s 7.
22. Above n 4, cl 9(3).
23. Equal Opportunity Act 1984 (SA), s 86.
24. Above n 4, cl 10(2).