

Section 11

Reporting guidelines for ministers

1. About these guidelines

As a minister, you have an obligation under s 11 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) to report suspected corrupt conduct either to the NSW Independent Commission Against Corruption (ICAC) or to the head of any agency responsible to you.

These guidelines provide an:

- overview of that obligation
- explanation of how to report to the ICAC
- understanding of the process the ICAC follows once it receives your report.

2. About the ICAC

The ICAC was established under the ICAC Act. The main purpose of the ICAC is to expose and minimise corruption in (and affecting) the NSW public sector; namely all:

- government departments
- statutory authorities
- local councils.

It does this by conducting investigations, examinations and inquiries, providing corruption prevention advice, and informing and educating both the public sector and the community about the detrimental effects of corruption.

Most of the ICAC’s work arises from reports made by principal officers and information received from the public. The ICAC does not attempt to investigate every matter it receives. In exercising its functions, the ICAC, as far as practicable, is required to direct its attention to serious and/or systemic corrupt conduct, and to take into account the responsibility and role that other public authorities and public officials have in the prevention of corrupt conduct.

Public sector managers and their agencies are primarily the ones responsible for preventing, detecting and responding to corruption. The ICAC also works with public authorities to provide advice and training to undertake most of the day-to-day corruption prevention and investigation work.

Only a small number of matters with the potential to expose serious corrupt conduct and systemic corrupt conduct will meet the criteria for a full ICAC investigation. However, the majority of completed matters over the past five years that have progressed to public inquiry and/or report occurred through s 11 reporting.

3. Your duty as a minister

As a minister, s 11(2) of the ICAC Act imposes an obligation on you in the following terms:

A person to whom this section applies is under a duty to report to the Commission any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct.

Section 11(3A) provides that:

A Minister of the Crown who is under a duty under this section to report a matter may (despite subsection (2)) report the matter either to the Commission or to the head of any agency responsible to the Minister.

Don't delay reporting

Understand your reporting obligation

Tell us everything that's relevant

You can always contact us for advice

Section 11 reporting is a statutory duty. As long as reports are made in good faith, you are protected from any criminal or civil liability. This is the case even if the suspicion on which the report is based turns out to be untrue or unsubstantiated.¹

If you become aware of a matter that you suspect on reasonable grounds concerns or may concern corrupt conduct, and you elect to report the matter to the head of an agency responsible to you, the ICAC would expect to receive a report about the matter from the head of that agency.²

4. Corrupt conduct and making a report

Corrupt conduct is defined in the ICAC Act. It involves deliberate or intentional wrongdoing involving (or affecting) a NSW public official, public authority³ in NSW or NSW public official functions.⁴ It usually does not include conduct that is accidental or unintentional.

Public officials include people working in government departments, statutory authorities and local councils in NSW, as well as judges and magistrates and elected officials such as parliamentarians and local councillors. Public officials also include contractors, certifiers and some volunteers.

For conduct to be considered corrupt under the ICAC Act definition, it has to be serious enough to involve a criminal or disciplinary offence, be grounds for dismissal or, in the case of members of Parliament, involve a substantial breach of their code of conduct. At the point you report to the ICAC, you do not need to know with any certainty that this seriousness test can be satisfied, as this will often be known only after a full investigation.

You still need to report a matter to the ICAC, or to the head of an agency responsible to you, even if any subject public official has since resigned, is otherwise no longer a NSW public official and/or no longer performs public official functions.

¹ See s 109(5) of the ICAC Act and s 27 of the *Defamation Act 2005*.

² The ICAC has guidelines to assist agency heads when reporting matters to the ICAC.

³ The NSW Police Force (including administrative employees) and the NSW Crime Commission are public authorities that do not come within the jurisdiction of the ICAC. While the principal officers of these public authorities still have a duty to reported suspected corrupt conduct to the ICAC relating to other public authorities and/or public officials, the ICAC may only investigate corrupt conduct involving staff of the NSW Police Force and NSW Crime Commission provided the matter involves other NSW public officials.

⁴ Section 3 of the ICAC Act provides definitions of public authority and public official.

What is corrupt conduct under the ICAC Act? Here are some examples.

- A company wants to do business with the government and pays a public official to choose that company for the job.
- A public official accepts money or a gift to promote a development application.
- A local councillor votes in favour of a planning matter in which the councillor has an undisclosed financial interest.
- A public official awards a tender to a business in relation to which the public official has a personal and/or financial interest.
- A public official bypasses recruitment procedures to employ friends or family members.
- A public official accesses confidential information as a favour to a friend or family member.
- A former public official sells confidential information gained while working in an official capacity.
- A public official uses a corporate credit card to pay for personal items.
- A public official extorts money from a client with disability in their care.
- A public official uses a work computer and email address to run a private business.
- A person falsifies their qualifications and work experience to obtain employment as a public official.
- Contractor businesses engage in collusive tendering during a procurement process undertaken by a NSW public authority, resulting in at least one of the contractors gaining an unfair advantage and becoming the successful tenderer.
- Phishing scams or attempts to fraudulently obtain payment from a NSW public authority including via false invoices or emails from entities imitating public officials or suppliers requesting changes to EFT or bank account details.

“Suspects on reasonable grounds” in s 11 of the ICAC Act means there is a real possibility that corrupt conduct is, or may be, involved:

- This is not a high threshold.
- You do not need a “smoking gun”.

- There needs to be more than speculation but less than a firm belief or direct knowledge.
- Proof or admissible evidence is not required to form a suspicion on reasonable grounds.
- You may hold a reasonable suspicion even though no specific individual who engaged in the alleged conduct has (yet) been identified.

Whether or not a suspicion is reasonable will depend upon the surrounding circumstances. If there are facts and circumstances related to the allegation that would make a reasonable person suspect corrupt conduct had occurred or was occurring, such as if an allegation is unlikely to pass “the pub test” because a reasonable person in the community would consider the alleged conduct to be dubious or improper, then you are required to report the allegation either to the ICAC or to the head of an agency responsible to you.

You may contact the ICAC to discuss particular matters that you may be unsure about or to seek clarification on any issue of reporting corrupt conduct.

As a general rule of thumb, if you are unsure whether a complaint or suspected activity involves corrupt conduct you are encouraged to err on the side of caution and report it to the ICAC or to the head of an agency responsible to you. This also applies if a matter is complex and/or you are genuinely uncertain whether the matter might involve corrupt conduct. You may still report a matter to the ICAC or to the head of an agency responsible to you if you are uncertain or have not yet formed a reasonable suspicion that the matter concerns or may concern corrupt conduct, but if you do so you should indicate that to be the case.

Matters that you suspect might only involve minor or one-off incidents of corrupt conduct should also be reported either to the ICAC or to the head of an agency responsible to you. The duty to report arises whenever you suspect alleged conduct might involve corruption.

5. When you must make a report either to the ICAC or to the head of an agency responsible to you

You must report to the ICAC, or to the head of an agency responsible to you, as soon as you have formed a reasonable suspicion that corrupt conduct may have occurred or may be occurring.

You may form a reasonable suspicion at any point during your, or your office’s, review of a matter, including:

- upon your receipt of a complaint or other information
- following an initial assessment of that complaint or information
- during an investigation undertaken by an agency responsible to you
- close to the finalisation of an investigation undertaken by an agency responsible to you.

The ICAC Act does not contain any provision permitting delay in reporting. The ICAC prefers matters to be reported prior to disciplinary or other action being taken, including prior to:

- a decision being made by an employer to proceed with a matter following making an initial assessment under the *Government Sector Employment Act 2013* and its associated rules and regulations
- the subjects of the allegations becoming aware of those allegations against them.

This is especially the case in matters that appear to involve:

- very serious and/or systemic corrupt conduct including possible criminal conduct
- corrupt conduct that may be ongoing or about to occur
- matters where there is a risk that key evidence could be destroyed
- conduct that an agency responsible to you has little experience and/or capability to investigate.

Delays in reporting can result in the loss of investigative opportunities, impairing the ICAC’s ability to investigate matters where corrupt conduct is likely to have occurred. For example, allegations that have become common knowledge, may lead to the loss or destruction of evidence or provide an opportunity for witness collusion.

If this occurs, there is a risk that there will be insufficient evidence to make findings against persons who have engaged in corrupt conduct and, consequently, such persons will remain in an agency responsible to you and/or other public sector agencies and may continue to engage in corrupt conduct. Delays in reporting that cannot be justified may also become the subject of adverse comments in an ICAC report.

If the conduct you are reporting to the ICAC involves potentially criminal conduct or conduct that you are required to also report to other agencies, you can concurrently report the matter to the ICAC, the NSW Police Force and other relevant agencies; if you do so, please inform the ICAC.

6. Making an s 11 report to the ICAC

The ICAC prefers ministers to make s 11 reports in writing via email to icac@icac.nsw.gov.au, or via the ICAC's website at the following [link](#). Ministers may also submit s 11 reports to the ICAC by post or via delivery to the ICAC's premises (see *Contacting the ICAC* below).

For serious matters or those that may require urgent investigative action, it is advisable to telephone the ICAC and report the matter initially in this manner, which should then be followed by a written report.

All s 11 reports should be addressed to the Chief Commissioner of the ICAC, and marked to the attention of the Manager Assessments.

Should an s 11 report be made public?

There is no prohibition in the ICAC Act against making a referral under s 11 publicly known. However, it is the view of the ICAC that a referral should be made without advising the person(s) to whom the report relates and without publicity. Failure to handle reports to the ICAC confidentially may not only prejudice any subsequent investigation but may also cause unnecessary damage or embarrassment to individuals.

What should be included in an s 11 report?

Providing the ICAC with as much relevant detail as possible in the s 11 report will enable a quicker assessment, making it less likely that the ICAC will need to contact you for more information prior to being able to make a decision in relation to the matter reported.

Your report should describe what has happened and what action (if any, and if known) an agency responsible to you might intend to take in relation to the allegation(s), in as much detail as possible. The nature and the seriousness of the allegation should be clear from your report. Descriptions such as "theft", "fraud", "improper conduct", "assault" or "failure to declare conflict of interest" are, of themselves, insufficient.

The checklist at right is a guide to what the report should include.

7. How reports are assessed by the ICAC

The ICAC carefully reviews every s 11 report it receives, and will involve (as relevant):

- reviewing the ICAC's information holdings
- searching other databases (for example, undertaking property or company searches)
- conducting open source searches (for example, identifying related media reports or minutes from local council meetings).

Section 11 report checklist

- Detailed description of the allegations
- Full name, date of birth (if known) and position of any public official/s alleged to be involved
- Name/s and role/s of the person/s who made the allegation/s
- Name and role of any other person/s or entity relevant to the matter
- Dates and/or timeframes in which the alleged conduct occurred
- Indication as to whether the conduct appears to be a one-off event or part of a wider pattern or scheme
- Approximate amount of money or value of resources (if any) involved
- Any other indicators of seriousness
- Date the allegation was made and/or the date you became aware of the matter
- Any steps an agency responsible to you has taken or proposes to take in relation to the suspected conduct⁵
- Any steps you have taken in relation to the suspected conduct, including notification to any agency (for example, an agency responsible to you, the NSW Police Force or the NSW Ombudsman), and any advice provided by that agency in response
- Any other information considered relevant to the matter
- Copies of any relevant documents
- Your contact details or the name and contact details of the relevant contact officer in your office

Once your report has been assessed, the ICAC's Assessment Panel⁶ will consider the matter. Most often, the panel decides that matters reported under s 11 should be left with the subject

⁵ It is preferable to wait until you have received the ICAC's decision before any overt action is taken.

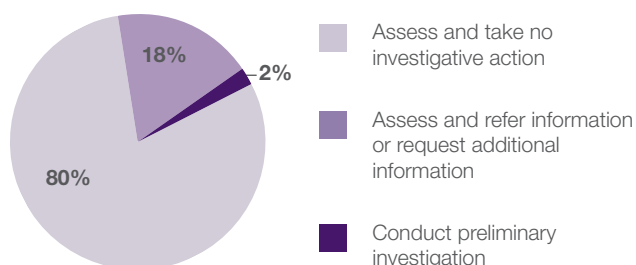
⁶ The Assessment Panel comprises the Chief Commissioner, Commissioners, and the executive directors of each of the legal, investigation and corruption prevention divisions.

agency or another relevant agency to manage. Depending on the seriousness of the reported information, the range of actions the Assessment Panel may decide to take includes:

- formal enquiries to be conducted by the ICAC with a relevant agency or other entity to assist in the assessment of the matter
- referral to another agency or other entity that the ICAC considers to be well placed to deal with the information
- if you have indicated the intention of an agency responsible to you to investigate the matter, either internally or via the use of an external investigator, the ICAC may request:
 - a copy of the final investigation report and/or advice in relation to any resultant disciplinary or other action taken
 - advice in relation to how any corruption risks or deficiencies in systems and processes identified during the investigation may be addressed
- referral to an appropriate agency with a requirement that it investigate the matter and provide a report back to the ICAC⁷
- offering advice or assistance to the subject agency concerning corruption prevention issues
- conducting a preliminary investigation⁸.

The ICAC is required to direct its attention to serious and/or systemic corrupt conduct and takes into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct. Only a small number of matters with the potential to expose serious corrupt conduct and systemic corrupt conduct will meet the criteria for a full investigation (see figure below).

Commission decisions in response to complaints and reports received over the previous 5 years (%)



⁷ The power to make such a referral is contained in s 53 of the ICAC Act. Should such a referral be proposed, the principal officer of the agency will be consulted with regard to the terms of the referral and provided with information about how to meet the requirements of the referral.

⁸ Under s 20A of the ICAC Act.

However, the majority of completed matters over the past five years that have progressed to public inquiry and/or report occurred through s 11 reporting.

With regards to matters the ICAC receives, following the assessment process the ICAC has historically:

- taken no investigative or other action in relation to approximately 80% of these matters, as the reporting agency, subject agency or another agency are well placed to deal with the matter or it is unlikely to involve serious and/or systemic corrupt conduct
- requested further information from and/or referred information to the reporting agency, subject agency or another relevant agency in relation to approximately 18% of these matters
- investigated approximately 2% of these matters.

8. Response from the ICAC to your report

The ICAC acknowledges all s 11 reports received. After your report has been assessed, a letter will be sent to you outlining the ICAC's decision and/or any further action to be taken in relation to your report.

The ICAC aims to provide you with advice of its decision within 28 days of receiving your report. If the ICAC considers that the matter has some urgency, the ICAC will provide you with advice of its decision as soon as possible.

9. The benefits of s 11 reporting

The ICAC uses the information it receives in s 11 reports to improve its understanding of the nature and scope of corruption and corruption risks in the NSW public sector.

Whether or not a report is significant in its own right, its aggregation with other matters may assist to identify systemic corruption issues. This assists the ICAC to better target its work and better inform the public sector and the people of NSW about corruption-related issues. In particular, greater knowledge of trends in corruption supports the ICAC's work with the public sector to bring about long-term changes to attitudes and practices.

10. What happens if you do not comply with your duty to report suspected corrupt conduct

Failure to comply with your duty under s 11 of the ICAC Act is considered to be very serious. Issues relating to this duty have been raised in ICAC public inquiries and reports.

The ICAC has vast information holdings and receives complaints and reports from various sources. As such, the ICAC may already know about a matter, and that you are

aware of it, but that you have not yet reported the matter to the ICAC or to the head of an agency responsible to you. It is beneficial to the proper assessment of a matter if the ICAC is able to consider all relevant information. It is also a more efficient use of the ICAC's resources if the ICAC is not required to use its coercive powers to compel information from other entities about a matter.

Contacting the ICAC

For assistance on the issues raised in these guidelines, please contact the manager of the Assessments Section on 02 8281 5786.

The logo for the Independent Commission Against Corruption (ICAC) in New South Wales. It features the letters 'I·C·A·C' in a large, bold, serif font, with small dots between the letters. Below the logo is a horizontal line.

INDEPENDENT COMMISSION
AGAINST CORRUPTION

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