

Section 11

Reporting guidelines for principal officers

1. About these guidelines

As a principal officer, you have an obligation under s 11 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) to report suspected corrupt conduct to the NSW Independent Commission Against Corruption (ICAC).

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.

These guidelines might also assist advisors to principal officers, such as in-house legal counsel or governance and risk staff, to provide advice and guidance to principal officers.¹

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.

¹ Separate guidelines exist for ministerial reporting obligations.

D on’t delay reporting

U nderstand your reporting obligation

T ell us everything that’s relevant

Y ou can always contact us for advice

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 principal officer

A “principal officer” is a person who heads a public authority, its most senior officer or the person who usually presides at its meetings. This is most commonly the secretary or chief executive officer of a government sector agency, or the general manager of a local council.²

As a principal officer, s 11(2) of the ICAC Act imposes a duty on you in the following terms:

² Clause 20 of the Independent Commission Against Corruption Regulation 2017 prescribes who is the principal officer of particular public authorities. If you are uncertain about who is the principal officer of your agency, seek advice from your in-house legal counsel and/or contact the ICAC.

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

The duty to report resides with the principal officer and cannot be delegated. Where another person is acting as principal officer during periods of leave or other absence, the duty applies to that person. The duty extends to any matter that you become aware of and not just those concerning your own agency.

While the duty to report cannot be delegated, the principal officer may direct staff and/or have processes and procedures in place in their agency to assist the principal officer to meet their duty.

Even if you believe that the ICAC already knows about the matter, the matter is in the public domain and/or another principal officer has already reported the matter to the ICAC, this does not extinguish your duty to report the matter to the ICAC if you have formed a suspicion on reasonable grounds that the matter concerns or may concern corrupt conduct.

Once you have formed a suspicion on reasonable grounds that a matter concerns or may concern corrupt conduct, you are obliged to report the matter to the ICAC. This is because s 11 of the ICAC Act imposes a “duty” to notify the ICAC. You do not have any discretion not to report the matter to the ICAC. This is so even if you do not consider the suspected corrupt conduct to be serious or systemic.

As a statutory duty, s 11 reporting overrides any other obligation to maintain secrecy or other restrictions on disclosure, such as legislation governing your agency’s functions or privacy legislation. As long as reports are made in good faith to the ICAC, as the principal officer, 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.³

Ministers of the Crown also have a duty to notify the ICAC of possible corrupt conduct. Section 11(3A) of the ICAC Act stipulates that a minister of the Crown, despite the duty to report imposed by s 11(2) of the ICAC Act, may report the matter either to the ICAC or to the head of an agency responsible to the minister.

The head of an agency responsible to the minister would usually be the principal officer of that agency. Accordingly, if the minister is aware of a matter that they suspect on reasonable grounds concerns or may concern corrupt conduct, and the minister elects to report the matter to the

head of an agency responsible to the minister, the ICAC would expect to receive a report about the matter from the head of the agency.

4. Corrupt conduct and making a report

Corrupt conduct is defined in the ICAC Act.⁴ It involves deliberate or intentional wrongdoing involving (or affecting) a NSW public official, public authority⁵ in NSW or NSW public official functions.⁶ 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.

You still need to report a matter to the ICAC 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.

“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.

⁴ See sections 7, 8 and 9 of the ICAC Act

⁵ 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 report 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.

³ See s 109(5) of the ICAC Act and s 27(2)(d) and Schedule 1, cl 19 of the *Defamation Act 2005*.

⁶ Section 3 of the ICAC Act provides definitions of public authority and public official.

Whether or not a suspicion is reasonable will depend upon the surrounding circumstances. If there are facts or 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 to the ICAC.

You are encouraged to 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. 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 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 to the ICAC. The duty to report arises whenever you suspect alleged conduct might involve corruption. For example, the fact that a staff member’s cash register is short by a small sum of money or only on one occasion can still give rise to a reasonable suspicion that they might have misappropriated the money. The ICAC might also be aware of other information relevant to the matter that suggests the alleged conduct might have a more serious and/or systemic nature.

5. When you must make a report to the ICAC

You must report to the ICAC, 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 process of reviewing a matter, including:

- upon your receipt of a complaint, public interest disclosure, or other information
- following an initial assessment and/or having undertaken preliminary confidential enquiries of that complaint, public interest disclosure, or information
- during an investigation
- close to the finalisation of an investigation.

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.

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 your agency 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 your agency 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.

Information you could obtain in preliminary confidential enquiries

- Further information from the source of the allegation(s)
- Emails of any public officials involved
- Documentation in your agency's document management system (for example, records relating to a procurement or recruitment decision)
- CCTV footage
- Swipe-card records
- Timesheet and other personnel records
- Details of similar previous allegations and what action, if any, was taken

Internal reporting systems

Effective internal reporting systems allow agencies to proactively detect and receive information about possible corrupt conduct.

It is important that all staff members are aware of these systems, have confidence in these systems and believe that appropriate action will result from reports being made.

Agencies should also ensure that these systems have in place suitably skilled and experienced staff, so that matters involving corrupt conduct reported by staff are forwarded to the principal officer to consider relevant issues and report the matter to the ICAC as soon as possible.

The framework under the *Public Interest Disclosures Act 1994* ("the PID Act") may be helpful in this regard. However, relying on the PID framework alone would not be sufficient. It is important to recognise that a principal officer may form a reasonable suspicion that the matter may involve corrupt conduct even if it is based on information contained in a complaint that does not meet the criteria in the PID Act.

The ICAC can assist you with advice on how to develop internal reporting systems and to deal with problems sometimes encountered with such systems.

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.

A decision regarding whether a matter must be reported to the ICAC should be based on the material available to you. The ICAC understands that you may need to undertake some preliminary confidential enquiries (without alerting any persons or areas within your agency affected by or involved in the alleged conduct) in order to establish what conduct might have occurred and to decide whether you hold a reasonable suspicion that the matter may concern corrupt conduct (see left).

This might particularly be the case in circumstances where you have become aware of the allegations via an external source, such as by a member of the public or a public official at another agency, as opposed to a complaint received via your agency's internal reporting systems.

Forming a reasonable suspicion that a matter concerns or may concern corrupt conduct does not, of itself, give weight to the allegations you report to the ICAC. It does not mean that you have categorically formed a view that the alleged conduct has occurred and constitutes corrupt conduct.

6. Making an s 11 report to the ICAC

The ICAC's website at www.icac.nsw.gov.au includes an:

- s 11 template reporting form to assist you
- online form that you can complete and submit electronically.

Although the ICAC prefers principal officers 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](#), they may also submit s 11 reports to the ICAC by post or 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.

ICAC staff can usually provide prompt guidance about the course of action to be taken. See *Contacting the ICAC* below if you would like to speak to a member of staff.

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. There are no procedural fairness requirements to notify individuals prior to making an s 11 report to the ICAC. 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. A failure to keep a matter confidential may also constitute a breach of the PID Act.

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) your agency 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.

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, the date you became aware of the matter (if different from the date the allegation was made), and how your agency became aware of the allegation
- Any steps your agency has taken or proposes to take in relation to the suspected conduct⁷
- Details of any other agency you have notified, or intend to notify, about the suspected conduct, (for example, 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
- Name and contact details of the relevant contact officer at your agency
- Whether your agency is treating the matter as a public interest disclosure under the *Public Interest Disclosures Act 1994* and, if so, a copy of the disclosant's written consent if they have consented to being identified as the person who made the public interest disclosure (if available).

⁷ It is preferable to wait until you have received the ICAC's decision before any overt action is taken.

7. What to do after you have made a report

The ICAC will assess the information you have provided, and may contact you for further information.

In order to avoid jeopardising any action the ICAC may take, you should discuss with the ICAC any proposed steps you wish to take *before* you take them. This may include, for example, risk minimisation strategies that you consider appropriate in the circumstances, such as suspending the subjects of the allegations and/or any interim or alternative service delivery measures.

Reporting to the ICAC does not affect your obligations to report or refer matters to other bodies (such as the NSW Police Force, the Audit Office of NSW or the NSW Ombudsman) or to carry out disciplinary procedures after consultation with the ICAC. For example, if you have reported a criminal matter to the ICAC, you can also report it to the NSW Police Force.

If you obtain or become aware of additional information after submitting your report, it will assist the ICAC if you provide that to us in a timely manner.

8. 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).

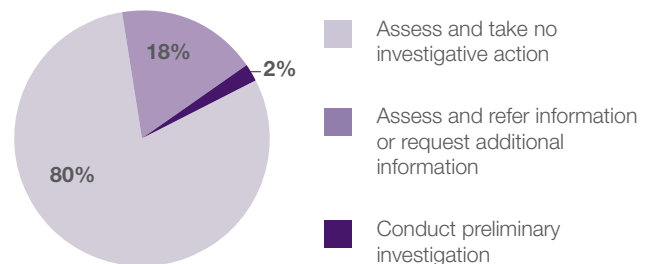
Once your report has been assessed, the ICAC's Assessment Panel will consider the matter. Most often, the panel decides that matters reported under s 11 should be left with the subject agency or another relevant agency to manage. Depending on the seriousness of the reported information, the range of actions the Assessment Panel⁸ 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 your intention 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 ICAC⁹
 - offering advice or assistance to the subject agency concerning corruption prevention issues
 - conducting a preliminary investigation.¹⁰

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). 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.

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



In 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

⁸ The Assessment Panel comprises the Chief Commissioner, Commissioners, and the executive directors of the legal, investigation and corruption prevention divisions.

⁹ 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.

¹⁰ Under s 20A of the ICAC Act.

- 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.

9. 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.

10. The benefits of s 11 reporting

For the majority of matters you report, the ICAC is likely to ultimately decide that your agency is well placed to continue to deal with the matter. Regrettably, this may give some impression of delay to your agency being able to progress any action it wishes to take, including any risk mitigation.

However, the ICAC may be privy to information that you are not aware of, and which could suggest the matter involves much more serious and/or systemic corrupt conduct than you suspect might have occurred. Such matters may require an investigation by the ICAC.

The ICAC also 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. 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.

In addition, developing and maintaining an effective capacity to satisfy your statutory obligation under s 11 of the ICAC Act will enable you to be better informed. This is because it will require your agency to have in place effective internal reporting systems for staff to report concerns or suspicions about corruption and an effective mechanism for receiving and responding to information from customers or contractors that may concern corruption.

11. 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 and internal agency systems to support it have been raised in ICAC public inquiries and reports. As seen in the ICAC's Operation Keppel investigation, failure to comply with this duty under s 11 of the ICAC Act can lead to a finding of corrupt conduct.

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. 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 both the agency's resources and the ICAC's resources if the ICAC is not required to use its coercive powers to compel information from you or your agency 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 5999.



INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

Level 7, 255 Elizabeth Street
Sydney NSW 2000 Australia

Postal Address: GPO Box 500
Sydney NSW 2001 Australia

T: 02 8281 5999

Toll free: 1800 463 909 (for callers outside metropolitan Sydney)

National Relay Service users: ask for 02 8281 5999

F: 02 9264 5364

E: icac@icac.nsw.gov.au

www.icac.nsw.gov.au

Business hours: 9 am to 5 pm, Monday to Friday