THE ICAC ACT 2012
KEY ISSUES FOR LOCAL GOVERNMENT

INFORMATION PAPER 11
UNDERSTANDING MALADMINISTRATION

Revised October 2013

This Information Paper has been prepared by the Local Government Association with the assistance of Peter Lockett for the guidance of and use by member Councils. The LGA is the statutory peak body for Local Government in South Australia, representing all 68 Councils in the State. The Information Paper was first issued in March 2013 and revised in October 2013.
1. Introduction
This paper deals with some key issues for Council Members and Council officers involved in planning and building within the Council arising from the Independent Commissioner Against Corruption Act 2012 (SA) (the ICAC Act) and information for managers in this area.

This paper should be read in conjunction with the companion ‘ICAC Overview Paper’ which provides an overview of the legislative scheme set up by the ICAC Act.

2. Types of Behaviour
   - Corruption
   Corruption is not a single offence. It is an umbrella term to describe various criminal acts, including bribery, threats or reprisals, dishonesty, abuse of public office and other similar offences. These offences are listed in the ICAC Act and in the LGA’s ICAC Act Overview Information Paper.

   - Misconduct
   Misconduct is behaviour that is not necessarily criminal in nature but that could give grounds for disciplinary action against a person. It includes contravention of a Code of Conduct.

   - Maladministration
   Maladministration by a person may be intentional or unintentional and can stem from a practice, policy or procedure of the Council. Maladministration, as defined in the ICAC Act:
     (a) means:
        (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
        (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
     (b) includes conduct resulting from impropriety, incompetence or negligence; and
     (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

   In respect of all three types of behaviour (corruption, misconduct, and maladministration) the ICAC Act applies to conduct that—
     (a) occurred before the commencement of the ICAC Act; or
     (b) occurs outside this State; or
     (c) comprises a failure to act; or
     (d) is conduct of a person who was a public officer at the time of its occurrence but who has since ceased to be a public officer; or
     (e) is conduct of a person who was not a public officer at the time of its occurrence but who has since become a public officer.2

   In brief, it should be understood that maladministration can result from:
   o substantial delay or the provision of misleading or false information;
   o improper practices regarding expenditure of Council funds;
   o very unsatisfactory record keeping; and
   o negligent or incompetent actions taken by staff.

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1 ICAC Act s5(4)  
2 ICAC Act s5(5)
3. Maladministration in context
Maladministration does not refer to criminal behaviour, which is corruption under the ICAC Act. However, evidence of criminal behaviour by certain Council officers could lead to a complaint of maladministration on the part of other Council officers such as the Chief Executive or other members of the management team. It could be argued, for example, that if criminal behaviour occurred, there were other failures or deficiencies in Council administration such as ineffective risk management processes and/or a lack of appropriate or effective staff supervision, which amount to "substantial mismanagement" which is one type of maladministration.

Although maladministration is less serious than corruption, it is nonetheless a serious issue. It means failing to meet reasonable standards of performance in the discharge of duties.

In the ordinary course of events a finding of maladministration would result in some form of disciplinary action for the person or persons responsible. Serious maladministration could result in termination of employment, or cancellation of a contract. Such consequences would be, however, matters for the Council as the relevant "public authority". The ICAC itself would not impose penalties or sanctions for maladministration. However, depending on the nature of any investigation, the ICAC might make recommendations regarding actions that the Council should take.

4. Getting it right – good public administration
Councillors are required "to achieve and maintain standards of good public administration." This includes ensuring "that appropriate policies, practices and procedures are implemented and maintained in order to ensure compliance with any statutory requirements, and to achieve and maintain standards of good public administration."

The Local Government Act 1999 (the "LG Act") does not define "good public administration" although it is clear that much of the LG Act is concerned with this very issue. Some broad principles that must be observed by Councils, include:

- provide open, responsive and accountable government;
- use resources fairly, effectively and efficiently;
- provide equitable access to services, facilities and programs.

In 2009 the UK Parliamentary and Health Service Ombudsman published a report, Principles of Good Administration, based on more than 40 years of complaints handling. In summary, these principles are:

1. Getting it right. Public authorities act in accordance with the law, their own policies, procedures, guidelines and good practice, using appropriately trained and competent staff. Decisions are reasonable, and are based on all relevant considerations.

2. Being customer focused. Services should be accessible. Customers should be informed. Public authorities should honour their commitments and published service standards. Services should be helpful, prompt and sensitive to individual circumstances.

3. Being open and accountable. Public authorities should be open and clear about policies and procedures. Information should be clear, accurate and complete. Decision making criteria should be stated and reasons for decisions should be provided. Proper and
appropriate records should be kept and public authorities should take responsibility for their actions.

4. **Acting fairly and proportionately.** People should be treated impartially, with respect and courtesy. Issues should be dealt with objectively and consistently. Decisions and actions should be proportionate, appropriate and fair.

5. **Putting things right.** Mistakes should be acknowledged, and rectified quickly and effectively. Complaints handling procedures should be effective.

6. **Seeking continuous improvement.** Policies, procedures and practices should be reviewed regularly. Feedback, including lessons learned from complaints, should be used to improve services.

Part of “getting it right” requires Councils to comply with the law. Councils are subject to many laws, including but not limited to the LG Act. Attachment 1 gives a summary of many of the practices, and procedures required under the LG Act that are part of “good public administration.”

Failing to meet any of these broad requirements in Attachment 1 shows could reasonably be characterised as maladministration, but the facts of any particular situation will always be a determining factor. Simple errors or mistakes are not likely to be regarded as maladministration. On the other hand, systemic failures that lead to serious consequences, would be so regarded.

5. **Getting it wrong – further examples of maladministration**

Although the ICAC Act has a definition of “maladministration” (see above) there is no prescribed list of conduct or behaviour that would constitute maladministration. Perhaps the two most obvious instances of potential maladministration would be conduct that is:

- contrary to the law; or
- contrary to a Council’s own policies and procedures.

Conduct contrary to law would include, but is not limited to:

- committing an offence;
- failing to perform the tasks and functions required by law e.g. the requirements of the LG Act and other Acts;
- exceeding the authority prescribed or defined by law;
- making a decision or taking an action that is outside the boundary of lawfulness, e.g. tainted by:
  - unreasonable ness, which includes arbitrary or unfair decisions, applying policy in an inflexible manner without regard to the merits of an individual case, failure to take into account all relevant considerations or taking into account irrelevant considerations, serious delay, providing wrong, inaccurate or misleading advice, failure to rectify mistakes or errors and failure to properly investigate.
  - lack of jurisdiction; i.e., outside Council’s powers, or made by an officer who does not have properly delegated power from the Council to make such decisions; or
  - injustice i.e. partial, unfair, inequitable, unconscionable, or not justified by evidence;
  - oppressive conduct, which includes abuses of power, intimidation or harassment, and circumstances where there is no reasonable balance between the means used to achieve an outcome and the objective of the action.
  - improper motives, which includes bias, bad faith, conflict of interest, dishonesty, fraud and actions taken for the wrong purpose;

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7 See Attachment 1 below
Chief executives are required by to implement the policies and lawful decisions of Council—that is, the lawful decisions of Council Members. Failure to do so would be maladministration, for failing to comply with the law.

Councils are required to develop and implement an array of policies, procedures and practices to guide Council operations. Most of these are regarded as ‘internal’ because they fall within the executive responsibility of the Chief Executive and do not need to be endorsed by the Council Members. However, when considering the concept of maladministration, this distinction between internal and external policies is irrelevant. Council’s suite of policies, procedures and practices includes both, and conduct that is contrary to internal or external policies may constitute maladministration.

In the UK the examples of maladministration cited when the UK Parliamentary Ombudsman was first established in the late 1960’s included ‘bias, neglect, inattention, delay, incompetence, ineptitude, perversity …. and arbitrariness’. Since then the UK Parliamentary Ombudsman has provided further examples, including rudeness, refusing to answer reasonable questions, failing to inform complainants of their rights, bias and discrimination on the basis of colour, race, sex or any other grounds, management failure to monitor compliance with procedures, or failure to acknowledge the complainant’s rights.

6. Implications for Local Government

• Context - ‘new administrative law’

The creation of an ICAC in South Australia tasked with investigating and addressing maladministration in State and Local Government should be seen in the context of the significant changes that have occurred in Australian administrative law over the last 40 years.

All States and the Commonwealth have Freedom of Information legislation, Ombudsman offices, and Courts and/or administrative law tribunals which collectively define, administer and enforce the rights that individuals have when government processes affect their lives. The trend has been consistently in the direction of greater scrutiny of government decisions and decision-making processes, a strengthening of individual rights and higher standards of public administration. The creation of a South Australian ICAC and the associated Office of Public Integrity is now playing a new role in that process.

• Policies, practices and procedures

Good quality policies, practices and procedures form the practical foundation of good public administration. Together they provide clarity (in application, meaning, roles and responsibilities, accountabilities, etc), enable consistency of interpretation and application, and serve as a point of reference, especially for employees tasked with providing services to the public.

8 Public Sector Agencies Fact Sheet 13, Ombudsman NSW

9 LG Act s99

10 Richard Crossman, Leader of the House of Commons

11 Annual Report, UK Parliamentary Ombudsman 1993
Section 132A of the **LG Act** requires a Council to *implement* and *maintain* appropriate policies, practices and procedures, to achieve and maintain standards of good public administration. This implies that, of itself, the absence of appropriate policies, practices and procedures is likely to indicate maladministration.

However, ‘appropriate’ does not necessarily mean best practice. It almost certainly entails a degree of reasonableness that would be determined against such factors as:

- the nature of the activity to which these policies, practices and procedures apply and the harm or loss which might arise in their absence;
- common practice in other Councils;
- any relevant guidance and advice issued by the LGA; and
- the capacity (financial and otherwise) of the Council concerned.

The language used in section 132A suggests a Council will not be able to rebut a claim of maladministration simply by pointing to the existence of appropriate policies, practices and procedures. Section 132A requires that they must also be *implemented*. This suggests the ambit of any investigation into allegations of maladministration could be far reaching, and could potentially include:

- careful attention to such factors as recruitment practices (employing competent and ethical staff would seem to be a pre-requisite for good public administration);
- the actual efforts made to ensure staff are properly inducted, trained and understand Council policies, practices and procedures specific to their jobs and other general matters relevant to all staff;
- the quality of actual supervision used to ensure staff behave as they are required; and
- the processes used to review the application of these policies, processes and procedures in the light of actual experience, including customer feedback, advice and guidance from the ICAC itself, the Ombudsman’s office etc.

**Negligence**

The **ICAC Act** doesn’t change any of the principles of law relating to negligence. The risk that Council conduct might be considered negligent does not change. The **ICAC Act** however clearly creates a new forum or a new avenue to pursue claims of negligence that is likely to lead to more claims against Councils. This is because it will be much cheaper for complainants to outline cases to the ICAC and let the ICAC (or its delegate) establish the facts, than to go to the expense of establishing a case themselves.

**Incompetence**

Incompetence in public administration under the terms of the **ICAC Act** includes situations where a person performs a duty or function (i.e. the conduct of a public officer) in a manner that fails to meet acceptable (minimum) standards. But whenever incompetence is an issue it would seem the scope of the investigation could be quite wide in order to establish the ‘root cause’, and the degree of incompetence could extend well beyond the immediate point of service delivery.
For example a person employed to certify building plans may be incompetent because they lack the essential engineering qualifications. But the extent of an investigation into such incompetence would probably include the Council’s recruitment practices (including processes used to verify the applicant’s qualifications and actual experience in previous employment), and the quality of induction, on-the-job supervision, on-the-job training, performance management and so on, in order to understand why the issue has arisen, why it has not been identified earlier and why corrective measures have not been implemented accordingly.

- **Risk management**

Councils have considerable discretion to decide the range and quality of services they provide and the manner in which those services are provided.\(^{12}\)

All Councils provide a range of services that extend well beyond ‘roads, rates and rubbish’ and the risk of maladministration is encountered in virtually every aspect of these operations. The consequences of such conduct, which include the harm to the Council’s reputation and standing in the community, are potentially very significant. This means a Council should specifically assess the risk of maladministration in every aspect of its operations and implement appropriate control measures to mitigate the unacceptable risks.\(^{13}\)

The experience of authorities interstate and overseas suggests Councils in South Australia should pay particular attention to:

- the exercise of discretionary powers by Council officers;
- the competence of managers and supervisors and their ability to supervise staff effectively, identify ‘at risk’ behaviour and implement appropriate corrective action;
- procurement;\(^{14}\)
- community consultation and customer service;
- the proper and appropriate relationship between Council Members and Council staff, including the extent to which Council Members have access to information and direct contact with Council staff.

## 7. **Implications for Council officers and Council Members**

- **Chief Executives**

The responsibility for establishing a framework or system of appropriate policies, practices and procedures to deliver good public administration within a Council rests primarily with the Chief Executive. This arises because the Chief Executive is the person responsible and accountable for providing sound advice to Council Members, and the Chief Executive is the person responsible for implementing the lawful decisions of Council and the day-to-day operations of the Council.

The Chief Executive is responsible for ensuring an appropriate framework is in place to promote a culture of good public administration. This framework includes a risk management process to specifically identify and address the threats to good public administration within the Council. The Chief Executive is personally responsible and accountable for mitigating the most significant risk factors that would lead to corruption, misconduct and maladministration in Council’s operations if they remained unaddressed.\(^{15}\)

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The Chief Executive must behave in a way which, at all times, meets and promotes the standards of good public administration and must not behave in any way which could be construed as corrupt, misconduct or maladministration. Chief Executives need to be acutely aware of the impact of their own behaviour as a ‘leading indicator’ within Council, especially among Council staff, of what is and is not acceptable. In this regard Chief Executives must understand that they have a lawful obligation not to turn a blind eye: they must take all necessary and appropriate action wherever they see or suspect conduct that could be construed as corrupt, misconduct or maladministration.

- **Managers**
Managers assist the Chief Executive to develop the framework or system to deliver good public administration in their Council, and they are responsible and accountable for implementing the policies, practices and procedures required to achieve that end, within the functions for which they are responsible. In particular, managers are responsible and accountable for:
  - implementing sound risk management practices to identify and mitigate the risks of corruption, misconduct and maladministration which arise within their functional responsibilities;
  - implementing the lawful decisions of Council in the areas for which they have administrative responsibility;
  - recruiting, inducting, and training, competent staff and ensuring they fully understand all relevant Council policies, practices and procedures;
  - competently managing, supervising and developing their staff;
  - the proper use of Council resources;
  - taking all necessary steps to prevent corruption, misconduct and maladministration within their functional responsibilities, including not turning a blind eye to potential or actual problems; and
  - responding to feedback and reports which highlight deficiencies and weakness in current policies, processes and procedures.

- **Other Council staff**
All Council staff are obliged to:
  - inform themselves of relevant Council policies, practices and procedures;
  - implement Council’s policies, practices and procedures and comply with the requirements of Council’s Code of Conduct for employees; and
  - provide feedback to managers and supervisors so that Council’s policies, practices and procedures can be continuously improved.

- **Contractors, authorised officers and volunteers**
Increasingly Councils engage third parties through various commercial arrangements to deliver a range of services, such as waste management, civil construction and maintenance, programmed maintenance services, payroll, various compliance functions and the like. Councils also make extensive use of the services of volunteers, and it is not uncommon for the number of Council volunteers to exceed the number of Council employees. There are also a large number of Acts that require Councils to undertake activities through “authorised officers”, and Councils engage or appoint people with specific skills or expertise to exercise certain specific functions, for example as members of the Council’s Development Assessment Panel or Audit Committee.

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16 Such a code is a requirement under the LG Act s.110
There is a risk that these persons too might engage in conduct constituting misconduct or maladministration, so these risks need to be carefully considered, and appropriate strategies must be implemented to address any unacceptable risks.

- **Council Members**

The role of Council Members includes ensuring that the principles and standards of good public administration are maintained.\(^{17}\) This means Council Members need to understand these principles and standards, adhere to them, as they apply to their own conduct, and ensure appropriate mechanisms are in place for the Council as a whole to meet these standards. The latter obligation is especially relevant to the roles and responsibilities of the Audit Committee, and any sub-committee established to review the performance of the Chief Executive.

The experience of authorities interstate and overseas suggests Council Members should pay particular attention to:

- the risk of bias in decision-making, including the implications of lobbying, memberships of other organisations, and their employment relationships (including any work for a Member of Parliament or in a Ministerial office);
- the appropriate use of Council resources, including Council information; and
- appropriate relationships with Council employees to ensure there is no prospect that their behaviour could be construed as pressure, harassment, or dictating to staff (including directing staff what to write in submissions to Council).

### 8. Conclusion

The definition of maladministration in the ICAC Act covers a wide range of conduct or behaviour. The experience of authorities interstate and overseas shows how broadly the concept may be interpreted in South Australia.

The fact that maladministration can be interpreted so broadly, however, should not necessarily be of concern because there is much that Councils already do to foster standards of good public administration.

The best response to the risk of maladministration is to foster a culture of good public administration. In particular a Council should focus on:

- specifically considering the risk of corruption, misconduct and maladministration in all of Council’s activities, and implementing specific measures to mitigate all unacceptable risks
- developing appropriate policies, practices and procedures as part of the armoury of measures to mitigate such risks
- taking particular care to ensure Council staff, Council Members, contractors, and volunteers understand and abide by such policies, practices and procedures. This includes specific attention to recruitment and selection practices, induction, training and development, performance management and continuous improvement processes.

Good public administration doesn’t just happen. It is the outcome of persistent and diligent effort, especially by Council Chief Executives, senior management and Council Members.

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\(^{17}\) *LG Act s59*
ATTACHMENT 1

SOME REQUIREMENTS OF THE LOCAL GOVERNMENT ACT 1999 – part of “good public administration” –

This is not intended to be an exhaustive list. It is intended to alert Councils to the nature of “good public administration”. All references are to sections of the Local Government Act 1999.

Councils are required to:

- develop and maintain prudential management policies, practices and procedures for the assessment of projects (s. 48)
- develop and maintain policies, practices and procedures for procurement that deliver value in spending public money, are ethical and treat participants fairly, and ensure probity, accountability and transparency in procurement (s.49)
- record reasons for entering into contracts other than those resulting from a tender process (s.49).

Council Members are required to exercise their duties conscientiously and to the best of their abilities (s. 60), and are not allowed to use facilities or services provided by the Council for purposes unrelated to their official duties (s.78). Councils are required to prepare and adopt a training and development policy for Council Members to assist them to perform and discharge their functions and duties (s.80A).

Notice is to be given of all Council meetings (s.84) and committee meetings (s.88). These meetings are to be open to the public (s.90(1)) except in certain specific circumstances (s.90(2)). Minutes are to be kept of all Council and Council committee meetings (s.91) and these minutes are to be provided to Council Members and made available to the public. The Chief Executive must ensure an up-to-date schedule of dates, times and places for meetings of Council and Council committees is available on the internet (s.94A).

At all times Council employees are to act honestly, and with reasonable care and diligence in the performance of their duties (s.109). Council employees are to exercise delegated powers and functions efficiently and effectively (s.44(5)).

Council Members must complete an annual statement of their personal interests including the interests of family members, any family trust or family company. (s.66) A similar obligation applies to the Chief Executive, and any other employees of a class determined by the Council (s.113)

A Council Member who has an interest in a matter before the Council must fully disclose the interest to the Council, then refrain from proposing or seconding a motion relating to the matter, participating in the discussion or even being in the vicinity of the room or any other place in which the discussion is taking place, or voting on the matter (s.74).

Council employees, including the Chief Executive, are required to disclose their interest in matters in relation to which they have an interest and must not act in relation to those matters (s.120) except under certain circumstances specified in the Act.

Councils are required to prepare and adopt strategic management plans (s.122) and an annual business plan and budget (s.123). They are required to keep accounting records (s.124), ensure that appropriate policies, practices and procedures of internal control are implemented and maintained so the Council can carry out its activities in an efficient and orderly manner (s.125) prepare annual financial statements (s.127) and publish an annual report that meets certain prescribed requirements (s.131). A Council must have an audit
committee, and appoint an auditor who must express an annual opinion on the Council’s financial statements, and another opinion on the Council’s system of internal financial controls. (s.128)

Councils are also required to prepare and adopt a public consultation policy (s.50) and ensure that members of the public are given a reasonable opportunity to be involved in the development and review of its strategic management plans (s.122), its annual business plan and budget (s.123).

Councils are also required to develop and maintain policies, practices and procedures for dealing with reasonable requests for services to be provided or improved, or complaints about actions by Council, its employees or any person acting on behalf of Council (s.270 (a1)). Such requests must be dealt with in a manner which is timely, effective and fair, and the information gathered from the community about such services must be used (s.270 (a2),

Councils have the power to make by-laws under the Local Government Act itself or other specific Acts. In doing so, Councils are required to exercise this power according to a defined set of principles (s.247) which include consistency with the objectives of the enabling Act, not placing unreasonable burdens on the community, not restricting competition to an unreasonable degree, avoiding unreasonable duplication or overlap with other statutory requirements, and avoiding breaching the principles of justice and fairness. A by-law cannot unreasonably interfere with rights established by other laws (s.248).

Councils also have the power under the Local Government Act to make orders that compel owners or occupiers of land to act or refrain from acting in certain prescribed circumstances (s.254). Such orders may relate to the unsightly condition of land, hazards on land adjoining a public place, animals that may cause a nuisance or hazard, and the inappropriate use of vehicles on land. In exercising these powers a Council must (unless there is an immediate emergency) give written notice to the affected person, stating the proposed action required by the landowner, the reasons for the proposed order, the time frame in which action is needed, and allow reasonable time for the person to give reasons why the proposed action should not be taken.

After allowing a reasonable time for a response, the Council may then serve the order, including a statement setting out the land owner or occupier’s rights of review (s.256) Councils are also required to prepare and adopt policies governing the application of its power to make orders (s.259).
Related Information

The Papers in the LGA’s ICAC series are:

- Companion Paper - Overview of the ICAC Act;
- Paper 1: Information for Council Members and Chief Executive Officers;
- Paper 2: Information for Governance Managers;
- Paper 4: Information for Rates Administrators;
- Paper 5: Information for Financial Managers;
- Paper 6: Information for Procurement Managers;
- Paper 7: Information for Infrastructure and Engineering Managers;
- Paper 8: Information for Regulatory and Inspectorial Managers;
- Paper 9: Information for Human Resources Managers;
- Paper 10: ICAC Act Related Amendments; and
- Paper 11: Understanding Maladministration

All these Papers are available on the LGA’s website at www.lga.sa.gov.au/goto/ICAC.

In addition the mandatory “Code of Conduct for Council Members” is published in the Government Gazette 29 August 2013.