

# Ombudsman Act 1974 No 68

[1974-68]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**
  - [Child Protection \(Working with Children\) Act 2012 No 51](#) (not commenced)
  - [Inspector of Custodial Services Act 2012 No 55](#) (not commenced)
  - [Crime Commission Act 2012 No 66](#) (not commenced)

### Authorisation

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# Ombudsman Act 1974 No 68



New South Wales

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# Ombudsman Act 1974 No 68



New South Wales

An Act to provide for the appointment of an Ombudsman; to define the functions of the Ombudsman; and for purposes connected therewith.

## Part 1 Preliminary

### 1 Name of Act

This Act may be cited as the *Ombudsman Act 1974*.

### 2 Commencement

- (1) This Act, Part 3 excepted, commences on the date of assent to this Act.
- (2) Part 3 commences on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

### 3 (Repealed)

### 4 Act binds Crown

This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

### 5 Definitions

- (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

**administration** includes administration of an estate or a trust whether involving the exercise of executive functions of government or the exercise of other functions.

**appointed day** means the day appointed and notified under section 2 (2).

**conduct** means:

- (a) any action or inaction relating to a matter of administration, and
- (b) any alleged action or inaction relating to a matter of administration.

**Department** and **Department Head** have the same meaning as in the *Public Sector*

*Management Act 1988.*

**head** means:

- (a) in relation to a public authority that is a Department or who is a public servant or other person employed in or for the purposes of a Department—the Department Head of the Department, and
- (b) in relation to a public authority that is a local government authority, or a member or employee of a local government authority—the mayor (or other presiding officer) of the local government authority, and
- (c) in relation to a public authority that is a corporation sole, or who is a person employed by a corporation sole—the person constituting the corporation, and
- (d) in relation to a public authority that is any other body, whether incorporated or unincorporated, or who is a person employed by such a body—the chief executive officer of that body or, if the affairs of the body are directed by a governing body, the person who presides at meetings of that governing body, and
- (e) in any other case—the person prescribed by the regulations, or in the absence of any regulation prescribing a person, the person who, in the opinion of the Ombudsman, is the chief executive of the public authority.

**Joint Committee** means the joint committee called the Committee on the Office of the Ombudsman and the Police Integrity Commission, constituted under this Act.

**local government authority** means a council or a county council within the meaning of the *Local Government Act 1993*.

**person** includes an unincorporated body of persons.

**police conduct** means conduct of a police officer within the meaning of Part 8A of the *Police Act 1990*.

**public authority** means:

- (a) any person appointed to an office by the Governor,
- (b) any statutory body representing the Crown,
- (c) any Department or any public servant employed in a Department,
- (d) any person in the service of the Crown or of any statutory body representing the Crown,
- (e) any person in relation to whom or to whose function an account is kept of administration or working expenses, where the account:

- (i) is part of the accounts prepared pursuant to the *Public Finance and Audit Act 1983*,
  - (ii) is required by or under any Act to be audited by the Auditor-General,
  - (iii) is an account with respect to which the Auditor-General has powers under any law,
  - (iv) is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts where requested to do so by a Minister of the Crown,
- (f) any person entitled to be reimbursed his or her expenses, from a fund of which an account mentioned in paragraph (e) is kept, of attending meetings or carrying out the business of any body constituted by an Act,
- (f1) any accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979*,
- (g) any holder of an office declared by the regulations to be an office of a public authority for the purposes of this Act,
- (g1) any local government authority or any member or employee of a local government authority, and
- (h) any person acting for or on behalf of, or in the place of, or as deputy or delegate of, any person described in any of the foregoing paragraphs.

**regulations** means regulations made under this Act.

**responsible Minister** means:

- (a) in relation to a public authority that is a Department or who is a public servant or other person employed in or for the purposes of a Department—the Minister responsible for that Department or, in the case where more than one Minister is responsible for that Department, the Minister who, in the opinion of the Ombudsman, is most nearly connected with the conduct of that Department, and
- (b) in relation to a public authority that is a local government authority or a member or employee of a local government authority—the Minister administering the *Local Government Act 1993*, and
- (c) in relation to a public authority, not referred to in paragraph (a) or (b), involved in the administration of an Act or part of an Act—the Minister administering the Act or the relevant part of the Act, and
- (d) in relation to any other public authority—the Minister who, in the opinion of the Ombudsman, is the most nearly concerned with the conduct of the public



authority.

**Supreme Court** means the Supreme Court of New South Wales.

- (1A) In this Act, a reference to an investigation under this Act includes a reference to an investigation of police conduct under this Act pursuant to Part 8A of the *Police Act 1990*.
- (2) (Repealed)
- (3) A reference in this Act, except in section 37 (2) (e), to an officer of the Ombudsman includes a reference to an acting Ombudsman, a Deputy Ombudsman and an Assistant Ombudsman.
- (4) In this Act, a reference to:
- (a) a function includes a reference to a power, authority and duty, and
  - (b) the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.
- (5) Notes included in this Act do not form part of this Act.

#### **5A References to Presiding Officers**

- (1) In this Act, a reference to a Presiding Officer of a House of Parliament is a reference to the President of the Legislative Council or the Speaker of the Legislative Assembly.
- (2) If there is a vacancy in the office of President, the reference to the President is taken to be a reference to the Clerk of the Legislative Council.
- (3) If there is a vacancy in the office of Speaker, the reference to the Speaker is taken to be a reference to the Clerk of the Legislative Assembly.

## **Part 2 The Ombudsman**

### **6 Office of Ombudsman**

- (1) The Governor may, on the recommendation of the Minister, appoint an Ombudsman on such terms and conditions as are specified in the instrument of appointment.
- (2) Subject to this Act, the Ombudsman holds office for such period, not exceeding seven years, as is specified in the instrument of his or her appointment and is eligible for re-appointment.
- (3) A person is not eligible for appointment as Ombudsman if the person:
- (a) is of or above the age of 65 years, or
  - (b) is a member of the Legislative Council or the Legislative Assembly or is a member

of a House of Parliament of another State or of the Commonwealth.

- (4) The Ombudsman vacates the office of Ombudsman:
  - (a) on the day on which he or she attains the age of 65 years, or
  - (b) if he or she engages in any paid employment outside the duties of the office, or
  - (c) if he or she is nominated for election as a member of the Legislative Council or the Legislative Assembly or as a member of a House of Parliament of another State or of the Commonwealth, or
  - (d) if he or she resigns the office by instrument in writing addressed to the Governor and the Governor accepts the resignation.
- (5) The Ombudsman may, at any time, be removed from office by the Governor upon the address of both Houses of Parliament.
- (6) The provisions of the *Public Sector Management Act 1988* do not apply to the appointment of the Ombudsman and the Ombudsman is not subject to those provisions.
- (7) The Ombudsman is entitled to be paid:
  - (a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and
  - (b) such travelling and subsistence allowances as the Minister may from time to time determine in respect of the Ombudsman.
- (8) The Ombudsman has and may exercise the functions conferred or imposed on the Ombudsman by or under this or any other Act.
- (9) Despite subsection (4) (b), the Ombudsman does not vacate the office of Ombudsman if the Ombudsman engages in paid employment outside the duties of the office with the approval of the Minister.

#### **6A Veto of proposed appointment of Ombudsman**

- (1) A person is not to be appointed as Ombudsman until:
  - (a) a proposal that the person be appointed has been referred to the Joint Committee under section 31BA, and
  - (b) either the period that the Joint Committee has under that section to veto the proposed appointment has ended without the Committee having vetoed the proposed appointment or the Committee notifies the Minister that it has decided not to veto the proposed appointment.

- (2) A person may be proposed for appointment on more than one occasion.
- (3) In this section and section 31BA, **appointment** includes re-appointment.

## **7 Acting Ombudsman**

- (1) The Governor may, on the recommendation of the Minister, appoint an acting Ombudsman during the absence of the Ombudsman or during a vacancy in the office of Ombudsman.
- (2) An acting Ombudsman is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the Ombudsman.
- (3) No person shall be concerned to inquire whether or not any occasion has arisen requiring or authorising an acting Ombudsman to act as Ombudsman.
- (4) An acting Ombudsman when acting as Ombudsman is taken to be the Ombudsman.

## **8 Deputy Ombudsman and Assistant Ombudsman—appointment etc**

- (1) The Ombudsman may appoint one or more Deputy Ombudsman and Assistant Ombudsman.
- (1A) The Ombudsman must appoint a Deputy Ombudsman as the Community and Disability Services Commissioner for the purposes of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.
- (2) The provisions of section 6 (3) (b), (4) (b)–(d) and (5) apply to and in respect of a Deputy Ombudsman and an Assistant Ombudsman in the same way that they apply to and in respect of the Ombudsman.
- (3) The employment of a Deputy Ombudsman and an Assistant Ombudsman is subject to Part 2A of the *Public Sector Management Act 1988*, but is not subject to Part 2 of that Act.
- (4) Section 42Q (Removal of executive officers from office) of the *Public Sector Management Act 1988* applies to and in respect of a Deputy Ombudsman and an Assistant Ombudsman as if the references in that section to the Governor were references to the Department Head within the meaning of that Act.
- (5) If a Deputy Ombudsman or an Assistant Ombudsman is appointed as acting Ombudsman, he or she does not, on that account, cease to be Deputy Ombudsman or an Assistant Ombudsman.
- (6) Despite subsection (2), section 6 (4) (b) does not apply to or in respect of a Deputy Ombudsman or an Assistant Ombudsman if the Deputy Ombudsman or Assistant Ombudsman engages in paid employment outside the duties of the office of Deputy

Ombudsman or Assistant Ombudsman with the approval of the Ombudsman.

### **8A Deputy Ombudsman and Assistant Ombudsman—functions**

- (1) A Deputy Ombudsman may, to the extent to which he or she is directed by the Ombudsman to do so, exercise any function of the Ombudsman other than the following functions:
  - (a) a function conferred or imposed by section 9, 10, 10A, 21C or 30,
  - (b) the power to accept or to refuse to accept a delegation to which section 10B applies,
  - (c) the power to exercise or to refuse to exercise a function conferred on the Ombudsman as referred to in section 10B.
- (2) For the purposes of this Act (except section 37 (2) (d)), an Assistant Ombudsman is a special officer of the Ombudsman.

### **8B Acting Deputy Ombudsman and Assistant Ombudsman**

- (1) The Ombudsman may, from time to time, appoint a person to be an acting Deputy Ombudsman or Assistant Ombudsman, and the Ombudsman may revoke any such appointment.
- (2) In the absence of a Deputy Ombudsman or an Assistant Ombudsman, a person so appointed is to act in the place of the Deputy Ombudsman or Assistant Ombudsman.
- (3) While acting in the place of a Deputy Ombudsman or an Assistant Ombudsman, a person has all the functions of the Deputy Ombudsman or Assistant Ombudsman and is taken to be a Deputy Ombudsman or an Assistant Ombudsman.

## **9 Special officers**

The Ombudsman may appoint an officer of the Ombudsman to be a special officer of the Ombudsman.

## **10 Delegation**

- (1) Subject to subsection (2), the Ombudsman may delegate to a special officer of the Ombudsman the exercise of any functions of the Ombudsman, including any function which the Ombudsman may exercise pursuant to section 10B.
- (2) The Ombudsman may not delegate the exercise of:
  - (a) any function to make any report under this Act, except in accordance with subsection (2A),
  - (b) any function conferred by section 9, 10A or 21C, or the power to accept or to

refuse to accept a delegation to which section 10B applies or the power to exercise or to refuse to exercise a function conferred on the Ombudsman as referred to in that section,

(b1) any function conferred by section 19 (2), other than to an Assistant Ombudsman,  
or

(c) the function conferred by subsection (1).

(d), (e) (Repealed)

(2A) The Ombudsman may delegate the exercise of the function to make a report:

(a) under section 26 or 29, to an Assistant Ombudsman, and

(b) under section 28 or 29 (1) (a) or (2) (a), to a special officer of the Ombudsman.

(3) A delegation under this section may be made subject to conditions or limitations as to the exercise of any of the functions delegated, or as to time or circumstances.

(4) A delegation under this section must be made by instrument in writing.

(5) An instrument of delegation must specify:

(a) the functions the exercise of which is delegated, and

(b) any conditions or limitations on the delegation.

(6) The Ombudsman may revoke a delegation under this section at any time, whether made by the Ombudsman or not.

(7) A delegation under this section is not revoked by the happening of a vacancy in the office of Ombudsman or by an absence or disability of the Ombudsman, except to the extent that the instrument of delegation so provides.

(8) During a vacancy in the office of Ombudsman, if there is no acting Ombudsman, the Minister may revoke a delegation under this section.

(9) Notwithstanding any delegation made under this section, the Ombudsman may continue to exercise all or any of the functions delegated.

#### **10A Delegation to other Ombudsman**

(1) The Ombudsman may delegate the exercise of any functions of the Ombudsman under sections 13A, 18, 19 (1), 20 and 23 to a person who is empowered to exercise under a law of another State, the Commonwealth or a Territory of the Commonwealth functions similar to the functions exercised by the Ombudsman under this Act, where:

(a) the Ombudsman is of the opinion that an investigation authorised to be carried out by the Ombudsman under this Act may more effectively or more appropriately

be carried out by the person to whom it is proposed the delegation be made, and

- (b) the delegation is for the purpose of enabling that person to carry out that investigation.
- (2) A delegation under this section may be made subject to conditions or limitations as to the exercise of any of the functions delegated, or as to time or circumstances.
- (3) A delegation under this section must be made by instrument in writing.
- (4) An instrument of delegation must specify:
  - (a) the functions the exercise of which is delegated, and
  - (b) any conditions or limitations on the delegation.
- (5) The Ombudsman may revoke a delegation under this section at any time, whether made by that Ombudsman or not.
- (6) A delegation under this section is not revoked by the happening of a vacancy in the office of Ombudsman or by an absence or disability of the Ombudsman, except to the extent that the instrument of delegation so provides.
- (7) During a vacancy in the office of Ombudsman, if there is no acting Ombudsman, the Minister may revoke a delegation under this section.
- (8) Notwithstanding any delegation made under this section, the Ombudsman may continue to exercise all or any of the functions delegated.
- (9) Where the exercise of a function is delegated under this section, then, for the purpose of enabling a person to carry out an investigation, as referred to in subsection (1) (b), that investigation shall, for the purposes of:
  - (a) the provisions of this Act which confer or impose the delegated function, and
  - (b) the provisions of sections 21 and 24,be an investigation under this Act, and references in those provisions to the Ombudsman shall be construed as including references to the delegate.
- (10) Where the exercise of a function is delegated under this section, the provisions of sections 34, 35 and 35A apply to and in respect of the delegate and officers of the delegate in the same way as those provisions apply to and in respect of the Ombudsman and officers of the Ombudsman.

### **10B Delegation from other jurisdictions**

- (1) Where by or under the law of another State, the Commonwealth or a Territory of the Commonwealth any function is conferred on or delegated to the Ombudsman, the

Ombudsman may:

- (a) exercise the function so conferred or may refuse to exercise the function, or
- (b) accept the delegation and exercise the function so delegated or may refuse to accept the delegation.

(2) Except where otherwise expressly provided, a function exercised by the Ombudsman in pursuance of subsection (1) shall, for the purposes of this Act, be deemed to be exercised in the course of the Ombudsman's office or in the execution of this Act, as the case may require.

### **11 Effect of certain acts etc**

Any act or thing done, suffered or omitted:

- (a) pursuant to this or any other Act by an acting Ombudsman or a Deputy Ombudsman, or
- (b) pursuant to a delegation under section 10 or 10A,

has the same force and effect as if done, suffered or omitted by the Ombudsman.

## **Part 3 Investigations and conciliations**

### **12 Right to complain**

- (1) Subject to this section, any person (including a public authority) may complain to the Ombudsman about the conduct of a public authority unless:
  - (a) the conduct is of a class described in Schedule 1,
  - (b) the conduct took place more than twelve months before the date of assent to this Act,
  - (c) the conduct took place during the period of twelve months that last preceded the date of assent to this Act and the complaint was made more than twelve months after the appointed day, or
  - (d) the conduct, being conduct of a local government authority, took place before the day appointed and notified under section 2 (2) of the [Ombudsman \(Amendment\) Act 1976](#).
- (2) Where a person wishes to make a complaint under subsection (1), the complaint may, with the consent of that person, be made on his or her behalf by a member of Parliament.
- (3) Where a person is detained by, or in the custody of, a public authority and informs the public authority or another person having superintendence over him or her that he or

she wishes to make a complaint to the Ombudsman, the public authority or other person so informed shall:

- (a) take all steps necessary to facilitate the making of the complaint, and
  - (b) send immediately to the Ombudsman, unopened, any written matter addressed to the Ombudsman.
- (4) A complaint under subsection (1), and a consent for the purposes of subsection (2), must be in writing.
- (4A) However, the Ombudsman:
- (a) may accept a complaint that is not in writing if the Ombudsman considers it appropriate to do so, and
  - (b) in that event, must reduce the complaint to writing as soon as practicable.
- (5) Where a member of Parliament acts for a person under subsection (2) the member does not, except for the purposes of sections 15, 16, 26 (4) and 29, thereby become the complainant.
- (6) Where a member of Parliament publishes to a person for whom the member acts under subsection (2) any matter, or a copy of any matter, published to the member by the Ombudsman, the publication has, for all purposes, the same effect as if it had been published to that person by the Ombudsman.

### **13 Decision for investigation**

- (1) Where it appears to the Ombudsman that any conduct of a public authority about which a complaint may be made under section 12 may be conduct referred to in section 26, the Ombudsman may, whether or not any person has complained to the Ombudsman about the conduct, make the conduct the subject of an investigation under this Act.
- (2) Subsection (1) has effect notwithstanding anything in any Act passed before the passing of this Act.
- (3) The Ombudsman may discontinue an investigation under this Act.
- (4) Where any person has complained to the Ombudsman under section 12 about the conduct of a public authority, the Ombudsman, in deciding whether to make that conduct the subject of an investigation under this Act or whether to discontinue an investigation commenced by him or her under this Act:
  - (a) may have regard to such matters as he or she thinks fit, and
  - (b) without limiting paragraph (a), may have regard to whether, in his or her opinion:



- (i) the complaint is frivolous, vexatious or not in good faith,
- (ii) the subject-matter of the complaint is trivial,
- (iii) the subject-matter of the complaint relates to the discharge by a public authority of a function which is substantially a trading or commercial function,
- (iv) the conduct complained of occurred at too remote a time to justify investigation,
- (v) in relation to the conduct complained of there is or was available to the complainant an alternative and satisfactory means of redress, or
- (vi) the complainant has no interest or an insufficient interest in the conduct complained of.

(4A) In deciding whether to discontinue an investigation of police conduct, the Ombudsman shall have regard to the public interest.

(5) Notwithstanding any other provision of this section, the Ombudsman shall not investigate the conduct of a public authority, being a local government authority, if that conduct is subject to a right of appeal or review conferred by or under an Act unless the Ombudsman is of the opinion that special circumstances make it unreasonable to expect that right to be or to have been exercised.

### **13AA Preliminary inquiries**

- (1) The Ombudsman may make preliminary inquiries for the purpose of deciding whether to make particular conduct of a public authority the subject of an investigation under this Act.
- (2) The inquiries may be made whether or not any person has complained to the Ombudsman about the conduct under section 12.
- (3) If a complaint has been made under section 12 (whether in writing or otherwise), the Ombudsman may, by way of a preliminary inquiry with respect to the complaint, require the complainant to provide further written particulars of the complaint within the time specified by the Ombudsman.

### **13A Dealing with complaint by conciliation**

- (1) The Ombudsman may, at any time, decide to attempt to deal with a complaint by conciliation under this section.
- (2) The conciliator in any conciliation under this section is to be the Ombudsman or an officer of the Ombudsman. However, the conciliator may, with the agreement of the complainant, arrange for a mediator to assist in the conciliation.

- (3) Participation in the conciliation by the parties to a complaint is voluntary, and either party may withdraw at any time. The conciliator may also terminate the attempt at conciliation at any time.
- (4) Evidence of anything said or admitted during the conciliation (or attempted conciliation) and any document prepared for the purposes of any such conciliation are not admissible:
  - (a) in any subsequent investigation, under this Part, of the complaint concerned (unless the person who said or admitted the thing, or to whom the document relates, consents to its admission), or
  - (b) in any proceedings in a court or before a person or body authorised to hear and receive evidence.
- (5) If an attempt to deal with a complaint by conciliation under this section is unsuccessful, the complaint is to be treated under this Part as if the attempted conciliation had not taken place. However, the conciliator is excluded from participating as an investigating officer in any investigation of the complaint.
- (6) Nothing in this section prevents a complaint from being dealt with otherwise than in accordance with this section.

#### **14 Amendment of Schedule**

- (1) The Governor may, by proclamation published on the NSW legislation website, amend Schedule 1 so as to add to it, or to omit from it, any class of conduct of a public authority.
- (2) Where Schedule 1 is amended by adding to it any class of conduct of a public authority, and conduct the subject of an investigation or conciliation by the Ombudsman is or includes conduct of the added class, the Ombudsman shall discontinue the investigation or conciliation in so far as it relates to conduct of the added class and shall not make any report concerning conduct of the added class.
- (3) A proclamation under subsection (1):
  - (a) takes effect from the date of the publication of the proclamation or a later date specified in the proclamation, and
  - (b) shall be laid before each House of Parliament within fourteen sitting days of that House after the date of proclamation.
- (4) If either House of Parliament passes a resolution, of which notice has been given within fifteen sitting days of that House after a proclamation has been laid before it, disallowing the proclamation or any part thereof, the amendment of Schedule 1 made by the proclamation or part thereupon ceases to have effect.

- (5) For the purposes of subsections (3) and (4) sitting days shall be counted, whether or not they occur during the same session.
- (6) Where, by the operation of subsection (4), an amendment of Schedule 1 ceases to have effect, the Ombudsman may:
  - (a) resume any investigation or conciliation that he or she discontinued under subsection (2) by reason of the amendment, and
  - (b) make a report concerning the conduct to which the resumed investigation relates.

### **15 Reasons for refusal to conciliate, investigate or continue investigation**

- (1) Where:
  - (a) a complaint has been made to the Ombudsman under section 12 about the conduct of a public authority, and
  - (b) the Ombudsman:
    - (i) refuses to investigate the conduct complained of or to deal with the complaint by conciliation, or
    - (ii) discontinues an investigation of that conduct,

the Ombudsman shall inform the complainant in writing of his or her decision and the reasons for the decision.
- (2) Where the Ombudsman discontinues an investigation of police conduct, the Ombudsman shall inform the complainant and the Commissioner of Police in writing of the decision and the reasons for the decision.
- (3) Where the Ombudsman:
  - (a) refuses to carry out any other investigation, or
  - (b) refuses to deal with any other complaint, disclosure or allegation by conciliation, or
  - (c) discontinues any other investigation,

the Ombudsman must inform the complainant, or the person who made the disclosure or allegation, in writing of the decision and the reasons for the decision.

### **16 Notice of investigation**

- (1) Upon the Ombudsman deciding to make the conduct or police conduct of a public authority the subject of an investigation under this Act, the Ombudsman shall give notice of the decision:

- (a) where there is a complainant, to the complainant,
- (b) to the head of the public authority and, if practicable, to the public authority, and
- (c) as prescribed.

(2) A notice under this section must be in writing, must describe the conduct or police conduct the subject of the investigation and must, so far as practicable, identify the public authority.

## **17 Privacy**

An investigation under this Act shall be made in the absence of the public.

## **18 Public authority to give information etc**

(1) For the purposes of an investigation under this Act, the Ombudsman may require a public authority:

- (a) to give the Ombudsman a statement of information,
- (b) to produce to the Ombudsman any document or other thing, or
- (c) to give the Ombudsman a copy of any document.

(2) A requirement under this section must be in writing, must specify or describe the information, document or thing required, and must fix a time and specify a place for compliance.

## **19 Inquiries**

(1) In an investigation under this Act, the Ombudsman may make or hold inquiries.

(2) For the purposes of any inquiry under this section, the Ombudsman has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923* and that Act (section 13 and Division 2 of Part 2 excepted) applies to any witness summoned by or appearing before the Ombudsman in the same way as it applies to a witness summoned by or appearing before a commissioner, but section 11 (2) of that Act shall have effect subject to section 21 of this Act.

(3) A witness appearing before the Ombudsman is to be paid such amount as the Ombudsman determines, but not exceeding the amount that would be payable to such a witness if he or she were a Crown witness subpoenaed by the Crown to give evidence.

## **20 Entry on premises etc**

In an investigation under this Act, the Ombudsman may, at any time:

- (a) enter and inspect any premises occupied or used by a public authority as a public authority, and
- (b) inspect any document or thing in or on the premises.

## **21 Limits on secrecy and privilege**

- (1) This section applies if, in an investigation under this Act or an inquiry under section 19, the Ombudsman requires any person:
  - (a) to give any statement of information, or
  - (b) to produce any document or other thing, or
  - (c) to give a copy of any document, or
  - (d) to answer any question.
- (2) The Ombudsman must set aside the requirement if it appears to the Ombudsman that any person has a ground of privilege, whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Ombudsman that that person consents to compliance with the requirement.
- (3) The requirement may however be made despite, and is not required to be set aside because of:
  - (a) any rule of law which, in proceedings in a court of law, might justify an objection to compliance with a like requirement on grounds of public interest, or
  - (b) any privilege of a public authority which the public authority might claim in a court of law, or
  - (c) any duty of secrecy or other restriction on disclosure applying to a public authority.

### **21A Privilege as regards entry and inspections on public premises**

- (1) The Ombudsman must not exercise powers under section 20 if it appears to the Ombudsman that any person has a ground of privilege, whereby, in proceedings in a court of law, the person might resist inspection of the premises or document or thing or production of the document or thing and it does not appear to the Ombudsman that that person consents to the inspection or production.
- (2) The powers may however be exercised despite:
  - (a) any rule of law which, in proceedings in a court of law, might justify an objection to an inspection of the premises or document or thing or to production of the document or thing on grounds of public interest, or

- (b) any privilege of a public authority which the public authority might claim in a court of law, or
- (c) any duty of secrecy or other restriction on disclosure applying to a public authority.

**21B (Repealed)**

**21C Injunction**

- (1) The Supreme Court may, on an application made by the Ombudsman, grant an injunction restraining any conduct in which a public authority is engaging or in which a public authority appears likely to engage, where that conduct is the subject of, or affects the subject of, an investigation or proposed investigation by the Ombudsman.
- (2) The Supreme Court shall not grant an application under subsection (1) unless it is of the opinion that the conduct sought to be restrained is likely to prejudice or negate the effect or implementation of a recommendation which the Ombudsman might make pursuant to section 26 (2) were the Ombudsman to find that the conduct or part of the conduct, the subject of the investigation referred to in subsection (1), was conduct referred to in section 26.
- (3) The Ombudsman shall not be required, as a condition for the granting of an injunction pursuant to an application referred to in subsection (1), to give any undertaking as to damages.

**22 Cabinet information and proceedings**

- (1) This Act does not enable the Ombudsman:
  - (a) to require any person:
    - (i) to give any statement of information,
    - (ii) to produce any document or other thing,
    - (iii) to give a copy of any document, or
    - (iv) to answer any question,which relates to information that is Cabinet information under the [Government Information \(Public Access\) Act 2009](#) or to confidential proceedings of Cabinet or any committee of Cabinet, or
  - (b) to inspect any document or thing which so relates.
- (2) For the purposes of this section, a certificate of the Director-General or Deputy Director-General (General Counsel) of the Department of Premier and Cabinet that:
  - (a) information is Cabinet information under the [Government Information \(Public](#)

*Access) Act 2009*, or

- (b) any information, document, thing or question relates to confidential proceedings of Cabinet or of a committee of Cabinet,

is conclusive of that fact.

### **23 Expert assistance**

For the purposes of the exercise of any of the Ombudsman's functions, the Ombudsman may engage the services of any person for the purpose of getting expert assistance.

### **24 Persons to be heard**

- (1) In an investigation under this Act, the Ombudsman shall give an opportunity to make submissions on the conduct or police conduct the subject of the investigation:
  - (a) if practicable, to the public authority whose conduct or police conduct it is, and
  - (b) to any other person given notice under section 16.
- (2) Where, in an investigation under this Act, the Ombudsman considers that there are grounds for adverse comment in respect of any person, the Ombudsman, before making any such comment in any report, shall, so far as practicable:
  - (a) inform that person of the substance of the grounds of the adverse comment, and
  - (b) give the person an opportunity to make submissions.
- (3) Subsection (2) does not apply in relation to a report under section 28.

### **25 Consultation with responsible Minister**

- (1) In an investigation under this Act, the Ombudsman shall, on request by the responsible Minister, consult that Minister on the conduct or police conduct the subject of the investigation.
- (2) Before publishing a report under section 26, the Ombudsman:
  - (a) shall inform the responsible Minister that he or she proposes to publish such a report, and
  - (b) shall, on request by that Minister, consult that Minister.

## **Part 3A Child protection**

### **25A Definitions**

- (1) In this Part:

***child*** means a person under the age of 18 years.

**designated government agency** means any of the following:

- (a) the Department of Education and Training (including a government school) or the Department of Health,
- (a1) a Division of the Government Service (or a part of a Division of the Government Service) prescribed by the regulations for the purposes of this definition,
- (b) a local health district within the meaning of the *Health Services Act 1997*,
- (c) any other public authority prescribed by the regulations for the purposes of this definition.

**designated non-government agency** means any of the following:

- (a) a non-government school within the meaning of the *Education Act 1990*,
- (b) a designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* (not being a department referred to in paragraph (a) of the definition of **designated government agency** in this subsection),
- (b1) an approved education and care service within the meaning of the *Children (Education and Care Services) National Law (NSW)* or the *Children (Education and Care Services) Supplementary Provisions Act 2011*,
- (c) an agency providing substitute residential care for children,
- (d) any other body prescribed by the regulations for the purposes of this definition.

**employee** of an agency includes:

- (a) any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and
- (b) any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).

**head** of an agency means the chief executive officer or other principal officer of the agency. The regulations may specify the person who is to be regarded as the head of a particular agency for the purposes of this definition.

**investigation** of a matter includes any preliminary or other inquiry into, or examination of, the matter.

**reportable allegation** means an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct.

**reportable conduct** means:

- (a) any sexual offence, or sexual misconduct, committed against, with or in the



presence of a child (including a child pornography offence or an offence involving child abuse material (within the meaning of Division 15A of Part 3 of the *Crimes Act 1900*)), or

- (b) any assault, ill-treatment or neglect of a child, or
- (c) any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child. Reportable conduct does not extend to:

- (a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or
- (b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or
- (c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.

**Note—**

Examples of conduct that would not constitute **reportable conduct** include (without limitation) touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract attention or to restore order in the classroom; and conduct that is established to be accidental.

**reportable conviction** means a conviction (including a finding of guilt without the court proceeding to a conviction), in this State or elsewhere, of an offence involving reportable conduct.

- (2) A reference in this Part to a designated government or non-government agency is a reference to a designated government agency or a designated non-government agency.
- (3) A reference in this Part to a reportable allegation or a reportable conviction extends to any such allegation or conviction in respect of a matter occurring before the commencement of this Part.

**25B Ombudsman to keep relevant systems under scrutiny**

- (1) The Ombudsman is to keep under scrutiny the systems:
  - (a) for preventing reportable conduct by employees of designated government or non-government agencies or of other public authorities, and
  - (b) for handling and responding to reportable allegations, or reportable convictions,

involving those employees.

- (2) For that purpose, the Ombudsman may require the head of any such agency to provide information about those systems and their operation.

### **25C Reporting of reportable allegations or convictions to Ombudsman**

- (1) The head of a designated government or non-government agency must notify the Ombudsman of the following:
  - (a) any reportable allegation, or reportable conviction, against an employee of the agency of which the head of the agency becomes aware,
  - (b) whether or not the agency proposes to take any disciplinary or other action in relation to the employee and the reasons why it intends to take or not to take any such action,
  - (c) any written submissions made to the head of the agency concerning any such allegation or conviction that the employee concerned wished to have considered in determining what (if any) disciplinary or other action should be taken in relation to the employee.
- (2) The notification must be made as soon as practicable and, in the case of the notification of a reportable allegation or reportable conviction, must be made, in any event, within 30 days of the head of the agency becoming aware of the allegation or conviction (or within such further period as may be agreed to by the Ombudsman).
- (3) The head of the agency must make arrangements within the agency to require employees of the agency to notify the head of the agency of any such reportable allegation or conviction of which they become aware.

- (4) (Repealed)

### **25CA Ombudsman may exempt conduct from reporting**

- (1) The Ombudsman may exempt any class or kind of conduct of employees of an agency from being reportable conduct.
- (2) The Ombudsman is to notify the agency concerned of any such exemption.

### **25D Disclosure to Ombudsman of information about reportable conduct**

- (1) The head or other employee of a designated government or non-government agency may disclose to the Ombudsman or an officer of the Ombudsman, any information that gives the head or other employee reason to believe that reportable conduct by an employee of the agency has occurred.
- (2) (Repealed)

## **25E Monitoring by Ombudsman of investigations**

- (1) The Ombudsman may monitor the progress of the investigation by a designated government or non-government agency concerning a reportable allegation, or reportable conviction, against an employee of the agency if the Ombudsman considers it is in the public interest to do so.
- (2) The Ombudsman or an officer of the Ombudsman may be present as an observer during interviews conducted by or on behalf of the agency for the purpose of the investigation and may confer with the persons conducting the investigation about the conduct and progress of the investigation.
- (3) The head of the agency is to provide the Ombudsman with such documentary and other information (including records of interviews) as the Ombudsman may from time to time request with respect to the investigation.

## **25F Results of investigation and action taken to be reported to Ombudsman**

- (1) This section applies to an investigation concerning a reportable allegation, or reportable conviction, against an employee of a designated government or non-government agency that the Ombudsman monitors under this Part.
- (2) The head of the agency must, as soon as practicable after being satisfied that the investigation has been concluded:
  - (a) send to the Ombudsman a copy of any report prepared by or provided to the head of the agency as to the progress or results of the investigation, and copies of all statements taken in the course of the investigation and of all other documents on which the report is based, and
  - (b) provide the Ombudsman with such comments on the report and statements as the head of the agency thinks fit, and
  - (c) inform the Ombudsman of the action that has been taken or is proposed to be taken with respect to the reportable allegation or conviction the subject of the investigation.
- (3) After receiving that material and information, the Ombudsman may require the head of the agency or any officer involved in the investigation, or both of them, to provide such additional information as the Ombudsman considers necessary to enable the Ombudsman to determine whether the reportable allegation or conviction was properly investigated and whether appropriate action was taken as a result of the investigation.
- (4) In subsection (3), **appropriate action** includes (without limitation) any penalty for the making of a reportable allegation that is shown to be false and malicious.

### **25G Investigation of reportable conduct by Ombudsman**

- (1) The Ombudsman may conduct an investigation concerning any reportable allegation, or reportable conviction, against an employee of a designated government or non-government agency of which the Ombudsman has been notified under this Part or otherwise becomes aware.
- (2) The Ombudsman may also conduct an investigation concerning any inappropriate handling of or response to any such reportable allegation or reportable conviction, whether on the Ombudsman's own initiative or in response to a complaint.
- (3) The Ombudsman may exercise any conciliation or other relevant powers under this Act in connection with an investigation by the Ombudsman.
- (4) The head of the agency is to defer an investigation into the matter if the Ombudsman notifies the head that the Ombudsman intends to investigate the matter under this Act and that the investigation by the agency should be deferred.
- (5) At the conclusion of an investigation by the Ombudsman, or on a decision by the Ombudsman to refer the matter back to the agency, the Ombudsman is to provide the agency with any recommendations for action to be taken with respect to the matter, together with any necessary information relating to the recommendations.

### **25H Protection and other provisions relating to disclosures of information**

- (1) A provision of any Act or law that prohibits or restricts the disclosure of information does not operate to prevent or restrict the disclosure of information (or affect a duty to disclose information) under this Part.
- (2) If a disclosure of information is made under this Part, no liability for defamation or other civil liability is incurred because of the disclosure.
- (3) Nothing in this Part affects any obligation or power to provide information apart from this Part.

### **25I Extension of reporting and disclosure provisions to all public authorities**

The obligation to report under section 25C, and the authority to disclose information under section 25D, with respect to designated government agencies extend to public authorities that are not designated government agencies if the reportable conduct concerned arises in the course of employment with the public authority.

### **25J Application of other provisions of this Act**

- (1) The provisions of this Act apply in respect of a matter arising under this Part even though the matter does not involve the conduct of a public authority, subject to any modifications prescribed by the regulations.

- (2) For that purpose, a reference in those provisions to a public authority includes a reference to a designated government or non-government agency and its employees.

## **Part 4 Reports**

### **25AA Application of Part 4**

This Part, section 29 excepted, does not apply to or in respect of the investigation under this Act of police conduct.

### **26 Report of investigation**

- (1) Where, in an investigation under this Act, the Ombudsman finds that the conduct the subject of the investigation, or any part of the conduct, is of any one or more of the following kinds:

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

the Ombudsman is to make a report accordingly, giving his or her reasons.

- (2) In a report under this section, the Ombudsman may recommend:
- (a) that the conduct be considered or reconsidered by the public authority whose conduct it is, or by any person in a position to supervise or direct the public authority in relation to the conduct, or to review, rectify, mitigate or change the conduct or its consequences,
  - (b) that action be taken to rectify, mitigate or change the conduct or its consequences,
  - (c) that reasons be given for the conduct,
  - (d) that any law or practice relating to the conduct be changed,
  - (d1) that compensation be paid to any person, or

(e) that any other step be taken.

(3) The Ombudsman shall give a report under this section:

(a) to the responsible Minister,

(b) to the head of the public authority whose conduct is the subject of the report, and

(c) where the public authority is employed under the *Public Sector Management Act 1988*, to the Premier's Department.

(4) The Ombudsman may give a copy of a report under this section:

(a) where the investigation arises out of a complaint to the Ombudsman, to the complainant,

(b) to the public authority to whose conduct the report relates.

(5) The person to whom a report is given under subsection (3) (b) may, and on request by the Ombudsman shall, notify the Ombudsman of any action taken or proposed in consequence of a report under this section.

#### **26A Authority to pay compensation**

(1) If the Ombudsman recommends in a report under section 26 that compensation be paid to a person by a person other than a local government authority, the responsible Minister:

(a) at the request of the head of the public authority whose conduct is the subject of the report, and

(b) with the concurrence of the Treasurer,

may authorise the payment of compensation to the person out of the appropriate fund.

(2) If the payment of compensation authorised under this section is to be made by a Department referred to in Schedule 3 to the *Public Finance and Audit Act 1983*, the Treasurer may authorise payment out of the Consolidated Fund (but not otherwise), which is accordingly appropriated to the necessary extent.

(3) If the Ombudsman recommends in such a report that compensation be paid to a person by a local government authority, the local government authority may authorise the payment of compensation to that person out of its funds.

(4) The functions that may be delegated under section 377 of the *Local Government Act 1993* by a council do not include a function relating to the authorisation of the payment of compensation under this section.

- (5) Nothing in any other Act prevents the payment of compensation in accordance with an authority given under this section, and the amount of compensation paid may be the same as, or may be more or less than, any amount recommended in the Ombudsman's report.

## **27 Default in consequent action**

- (1) Where the Ombudsman is not satisfied that sufficient steps have been taken in due time in consequence of a report under section 26, the Ombudsman may make a report to the Presiding Officer of each House of Parliament and must also provide the responsible Minister with a copy of the report.
- (2) The responsible Minister must make a statement to the House of Parliament in which the Minister sits in response to the report not more than 12 sitting days after the report is made to the Presiding Officer.

## **28 Serious misconduct**

Where the Ombudsman is of the opinion that a public authority is or may be guilty of misconduct in the course of his or her functions to such an extent as, in the opinion of the Ombudsman, may warrant dismissal, removal or punishment, the Ombudsman shall report the opinion:

- (a) to the responsible Minister,
- (b) to the head of the public authority, and
- (c) where the public authority is employed under the *Public Sector Management Act 1988*, to the Premier's Department,

giving reasons for the opinion.

## **29 Report to complainant or the relevant person**

- (1) Where the Ombudsman investigates the conduct of a public authority pursuant to a complaint made under section 12 or investigates police conduct, the Ombudsman:
- (a) may from time to time report to the complainant on the progress of the investigation,
- (b) shall report to the complainant on the results of the investigation, and
- (c) may make such comments to the complainant on the investigation and its consequences as he or she thinks fit.
- (2) Where the Ombudsman carries out any other kind of investigation, the Ombudsman:
- (a) may from time to time report to the complainant, or the person who made the disclosure or allegation that led to the investigation, on the progress of the

investigation, and

- (b) may report to the complainant, or the person who made the disclosure or allegation that led to the investigation, on the results of the investigation, and
- (c) may make any comments to the complainant, or the person who made the disclosure or allegation that led to the investigation, on the investigation and its consequences that the Ombudsman thinks fit.

### **30 Annual reports**

- (1) The Ombudsman must, as soon as practicable after 30 June in each year, prepare a report of the Ombudsman's work and activities for the preceding 12 months and furnish the report to the Presiding Officer of each House of Parliament.
- (2) The *Annual Reports (Departments) Act 1985* is, in its application to the annual reports of the Ombudsman's Office, modified as follows:
  - (a) letters of submission under that Act are to be made to the Presiding Officer of each House of Parliament and not to the appropriate Minister,
  - (b) the annual report is to be submitted to the Presiding Officer of each House of Parliament and not to the appropriate Minister,
  - (c) provisions of that Act relating to the presentation of annual reports to the appropriate Minister and to the public availability of annual reports do not apply to the Ombudsman or the Ombudsman's Office.
- (3) Section 31AA applies to the annual report of the Ombudsman's Office as if it were a report made or furnished under this Part.

### **30A Public availability of annual reports**

- (1) The Ombudsman must, as soon as practicable after an annual report has been tabled in each House of Parliament or made public by a Presiding Officer, make copies of the report available for public sale or distribution.
- (2) The regulations may make provision for or with respect to the place or places at which the Ombudsman is to make copies of the report available.

### **31 Special report to Parliament**

- (1) The Ombudsman may, at any time, make a special report to the Presiding Officer of each House of Parliament and must also provide the Minister with a copy of the report on any matter arising in connection with the discharge of the Ombudsman's functions.
- (2) The Ombudsman may include in a report under subsection (1) or under section 27 a recommendation that the report be made public forthwith.



- (3) (Repealed)

**31AA Provisions relating to reports**

- (1) **Tabling** A copy of a report made or furnished to the Presiding Officer of a House of Parliament under this Part must be laid before that House on the next sitting day of that House after it is received by the Presiding Officer.
- (2) **Public reports** If a report includes a recommendation by the Ombudsman that the report be made public forthwith, the Presiding Officer of a House of Parliament may make it public whether or not that House is in session and whether or not the report has been laid before that House.
- (3) **Privileges and immunities** A report that is made public by the Presiding Officer of a House of Parliament before it is laid before that House attracts the same privileges and immunities as it would if it had been laid before that House.
- (4) **Report procedures** A Presiding Officer need not inquire whether all or any conditions precedent have been satisfied as regards a report purporting to have been made or furnished in accordance with this Act.

**31AB Ombudsman may furnish information to ICAC and DPP**

- (1) The Ombudsman may, at any time, furnish information obtained by the Ombudsman in discharging functions under this or any other Act to the Director of Public Prosecutions or to the Independent Commission Against Corruption.
- (2) However, the Ombudsman must not disclose information that could not otherwise be disclosed under this Act or could not:
  - (a) in the case of the Director of Public Prosecutions—be obtained by the Director under the *Director of Public Prosecutions Act 1986* or any other Act, or
  - (b) in the case of the Independent Commission Against Corruption—be obtained by the Commission under the *Independent Commission Against Corruption Act 1988* or any other Act.

**31AC Ombudsman may furnish information to public authority**

- (1) The Ombudsman may, at any time:
  - (a) furnish to a public authority information obtained by the Ombudsman in discharging functions under this Act with respect to a complaint against or relating to the public authority, and
  - (b) make such comments to the authority with respect to the complaint as he or she thinks fit.
- (2) The Ombudsman may also furnish any or all of the information referred to in

subsection (1) to any other public authority, and may make such comments (if any) to that public authority as the Ombudsman considers appropriate, if:

- (a) the Ombudsman is satisfied that the information concerned is relevant to the functions, policies, procedures or practices of that other public authority, and
- (b) the information does not disclose any personal information (within the meaning of the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*).

## **Part 4A Parliamentary Joint Committee**

### **31A Constitution of Joint Committee**

- (1) As soon as practicable after the commencement of this Part and the commencement of the first session of each Parliament, a joint committee of members of Parliament, to be known as the Committee on the Office of the Ombudsman and the Police Integrity Commission, is to be appointed.
- (2) The Joint Committee has and may exercise the functions conferred or imposed on it by or under this Act, the *Police Integrity Commission Act 1996*, the *Government Information (Information Commissioner) Act 2009*, the *Privacy and Personal Information Protection Act 1998*, or any other Act.

### **31B Functions**

- (1) The Joint Committee has the following functions under this Act:
  - (a) to monitor and to review the exercise by the Ombudsman of the Ombudsman's functions under this or any other Act,
  - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Ombudsman or connected with the exercise of the Ombudsman's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
  - (c) to examine each annual and other report made by the Ombudsman, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
  - (d) to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Office of the Ombudsman,
  - (e) to inquire into any question in connection with the Joint Committee's functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question.

- (2) Nothing in this Part authorises the Joint Committee:
- (a) to investigate a matter relating to particular conduct, or
  - (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
  - (c) to exercise any function referred to in subsection (1) in relation to any report under section 27, or
  - (d) to reconsider the findings, recommendations, determinations or other decisions of the Ombudsman, or of any other person, in relation to a particular investigation or complaint or in relation to any particular conduct the subject of a report under section 27, or
  - (e) to exercise any function referred to in subsection (1) in relation to the Ombudsman's functions under the *Telecommunications (Interception) (New South Wales) Act 1987*.
- (3) The functions of the Joint Committee may be exercised in respect of matters occurring before or after the commencement of this section.

**31BA Power to veto proposed appointments**

- (1) The Minister is to refer a proposal to appoint a person as Ombudsman, Director of Public Prosecutions, Information Commissioner, Privacy Commissioner, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.
- (2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.
- (3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.
- (4) A referral or notification under this section is to be in writing.
- (5) In this section, a reference to the Minister is:
- (a) in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act, and
  - (b) in the context of an appointment of Director of Public Prosecutions, a reference to the Minister administering section 4A of the *Director of Public Prosecutions Act*

1986, and

- (b1) in the context of an appointment of Information Commissioner, a reference to the Minister administering section 5 of the *Government Information (Information Commissioner) Act 2009*, and
- (b2) in the context of an appointment of Privacy Commissioner, a reference to the Minister administering section 35 of the *Privacy and Personal Information Protection Act 1998*, and
- (c) in the context of an appointment of Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, a reference to the Minister administering section 7 or 88 (as appropriate) of the *Police Integrity Commission Act 1996*.

### **31C Membership**

- (1) The Joint Committee is to consist of 7 members, of whom:
  - (a) 3 are to be members of, and appointed by, the Legislative Council, and
  - (b) 4 are to be members of, and appointed by, the Legislative Assembly.
- (2) The appointment of members of the Joint Committee is, as far as practicable, to be in accordance with the practice of Parliament with reference to the appointment of members to serve on joint committees of both Houses of Parliament.
- (3) A person is not eligible for appointment as a member of the Joint Committee if the person is a Minister of the Crown or a Parliamentary Secretary.

### **31D Vacancies**

- (1) A member of the Joint Committee ceases to hold office:
  - (a) when the Legislative Assembly is dissolved or expires by the effluxion of time, or
  - (b) if the member becomes a Minister of the Crown or a Parliamentary Secretary, or
  - (c) if a member ceases to be a member of the Legislative Council or Legislative Assembly, or
  - (d) if, being a member of the Legislative Council, the member resigns the office by instrument in writing addressed to the President of the Legislative Council, or
  - (e) if, being a member of the Legislative Assembly, the member resigns the office by instrument in writing addressed to the Speaker of the Legislative Assembly, or
  - (f) if the member is discharged from office by the House of Parliament to which the member belongs.

- (2) Either House of Parliament may appoint one of its members to fill a vacancy among the members of the Joint Committee appointed by that House.

### **31E Chair and Deputy Chair**

- (1) There is to be a Chair and a Deputy Chair of the Joint Committee, who are to be elected by and from the members of the Joint Committee.
- (2) A member of the Joint Committee ceases to hold office as Chair or Deputy Chair of the Joint Committee if:
  - (a) the member ceases to be a member of the Committee, or
  - (b) the member resigns the office by instrument in writing presented to a meeting of the Committee, or
  - (c) the member is discharged from office by the Committee.
- (3) At any time when the Chair is absent from New South Wales or is, for any reason, unable to perform the duties of Chair or there is a vacancy in that office, the Deputy Chair may exercise the functions of the Chair under this Act or under the [Parliamentary Evidence Act 1901](#).

### **31F Procedure**

- (1) The procedure for the calling of meetings of the Joint Committee and for the conduct of business at those meetings is, subject to this Act, to be as determined by the Committee.
- (2) The Clerk of the Legislative Assembly is to call the first meeting of the Joint Committee in each Parliament in such manner as the Clerk thinks fit.
- (3) At a meeting of the Joint Committee, 4 members constitute a quorum, but the Committee must meet as a joint committee at all times.
- (4) The Chair or, in the absence of the Chair, the Deputy Chair (or, in the absence of both the Chair and the Deputy Chair, a member of the Joint Committee elected to chair the meeting by the members present) is to preside at a meeting of the Joint Committee.
- (5) The Deputy Chair or other member presiding at a meeting of the Joint Committee has, in relation to the meeting, all the functions of the Chair.
- (6) The Chair, Deputy Chair or other member presiding at a meeting of the Joint Committee has a deliberative vote and, in the event of an equality of votes, also has a casting vote.
- (7) A question arising at a meeting of the Joint Committee is to be determined by a majority of the votes of the members present and voting.

- (8) The Joint Committee may sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament.
- (9) The Joint Committee may sit and transact business on a sitting day of a House of Parliament during the time of sitting.

**31FA Reporting when Parliament not in session**

- (1) If a House of Parliament is not sitting when the Joint Committee seeks to furnish a report to it, the Committee may present copies of the report to the Clerk of the House.
- (2) The report:
  - (a) on presentation and for all purposes is taken to have been laid before the House, and
  - (b) may be printed by authority of the Clerk, and
  - (c) if printed by authority of the Clerk, is for all purposes taken to be a document published by or under the authority of the House, and
  - (d) is to be recorded in the Minutes, or Votes and Proceedings, of the House on the first sitting day of the House after receipt of the report by the Clerk.

**31G Evidence**

- (1) The Joint Committee has power to send for persons, papers and records.
- (2) Subject to section 31H, the Joint Committee must take all evidence in public.
- (3) If the Joint Committee as constituted at any time has taken evidence in relation to a matter but the Committee as so constituted has ceased to exist before reporting on the matter, the Committee as constituted at any subsequent time, whether during the same or another Parliament, may consider that evidence as if it had taken the evidence.
- (4) The production of documents to the Joint Committee is to be in accordance with the practice of the Legislative Assembly with respect to the production of documents to select committees of the Legislative Assembly.

**31H Confidentiality**

- (1) If any evidence proposed to be given before, or the whole or a part of a document produced or proposed to be produced to, the Joint Committee relates to a secret or confidential matter, the Committee may, and at the request of the witness giving the evidence or the person producing the document must:
  - (a) take the evidence in private, or

(b) direct that the document, or the part of the document, be treated as confidential.

(1A) If any evidence proposed to be given before, or the whole or a part of a document produced or proposed to be produced in evidence to, the Joint Committee relates to the proposed appointment of a person as Ombudsman, Director of Public Prosecutions, Information Commissioner, Privacy Commissioner, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, the Committee must (despite any other provision of this section):

(a) take the evidence in private, or

(b) direct that the document, or the part of the document, be treated as confidential.

(1B) Despite any other provision of this section except subsection (6), the Joint Committee must not, and a person (including a member of the Committee) must not, disclose any evidence or the contents of a document or that part of a document to which subsection (1A) applies.

Maximum penalty: 20 penalty units or imprisonment for 3 months, or both.

(1C) Despite any other provision of this section except subsection (6), the Joint Committee (including a member of the Committee) must not, and any person assisting the Committee or present during the deliberations of the Committee must not, except in accordance with section 31BA (3), disclose whether or not the Joint Committee or any member of the Joint Committee has vetoed, or proposes to veto, the proposed appointment of a person as Ombudsman, Director of Public Prosecutions, Information Commissioner, Privacy Commissioner, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission.

Maximum penalty: 20 penalty units or imprisonment for 3 months, or both.

(2) If a direction under subsection (1) applies to a document or part of a document produced to the Joint Committee:

(a) the contents of the document or part are, for the purposes of this section, to be regarded as evidence given by the person producing the document or part and taken by the Committee in private, and

(b) the person producing the document or part is, for the purposes of this section, to be regarded as a witness.

(3) If, at the request of a witness, evidence is taken by the Joint Committee in private:

(a) the Committee must not, without the consent in writing of the witness, and

(b) a person (including a member of the Committee) must not, without the consent in writing of the witness and the authority of the Committee under subsection (5),

disclose or publish the whole or a part of that evidence.

Maximum penalty: 20 penalty units or imprisonment for 3 months, or both.

- (4) If evidence is taken by the Joint Committee in private otherwise than at the request of a witness, a person (including a member of the Committee) must not, without the authority of the Committee under subsection (5), disclose or publish the whole or a part of that evidence.

Maximum penalty: 20 penalty units or imprisonment for 3 months, or both.

- (5) The Joint Committee may, in its discretion, disclose or publish or, by writing under the hand of the Chair, authorise the disclosure or publication of evidence taken in private by the Committee, but this subsection does not operate so as to affect the necessity for the consent of a witness under subsection (3).
- (6) Nothing in this section prohibits:
- (a) the disclosure or publication of evidence that has already been lawfully published, or
  - (b) the disclosure or publication by a person of a matter of which the person has become aware otherwise than by reason, directly or indirectly, of the giving of evidence before the Joint Committee.
- (7) This section has effect despite section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*.
- (8) If evidence taken by the Joint Committee in private is disclosed or published in accordance with this section, sections 5 and 6 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* apply to and in relation to the disclosure or publication as if it were a publication of that evidence under the authority of section 4 of that Act.

**Note—**

The *Defamation Act 2005* makes provision for 2 defences in respect of the publication of defamatory matter that is contained in evidence taken by, or documents produced to, the Joint Committee in private, but only if the evidence or documents have been disclosed or published in accordance with this section.

Section 28 of the *Defamation Act 2005* (when read with clause 8 of Schedule 2 to that Act) ensures that such documents attract the defence relating to public documents in defamation proceedings.

Section 29 of the *Defamation Act 2005* (when read with clause 17 of Schedule 3 to that Act) ensures that proceedings in which such evidence is taken or documents produced attract the defences relating to fair reports of proceedings of public concern in defamation proceedings.

### **311 Application of certain Acts etc**

For the purposes of the *Parliamentary Evidence Act 1901* and the *Parliamentary Papers (Supplementary Provisions) Act 1975* and for any other purposes:

- (a) the Joint Committee is to be regarded as a joint committee of the Legislative Council



and Legislative Assembly, and

- (b) the proposal for the appointment of the Joint Committee is to be regarded as having originated in the Legislative Assembly.

### **31J Validity of certain acts or proceedings**

Any act or proceeding of the Joint Committee is, even though at the time when the act or proceeding was done, taken or commenced there was:

- (a) a vacancy in the office of a member of the Committee, or
  - (b) any defect in the appointment, or any disqualification, of a member of the Committee,
- as valid as if the vacancy, defect or disqualification did not exist and the Committee were fully and properly constituted.

## **Part 5 General**

### **32 Staff**

- (1) Such staff as may be necessary to enable the Ombudsman to exercise the Ombudsman's functions may be employed under and subject to the *Public Sector Management Act 1988*.
- (2) The Ombudsman may, with the approval of the responsible Minister, make use of the services of any public authority.
- (3) A person who is employed for the purposes of subsection (1), or whose services are made use of under subsection (2), is, while the person is so employed, or while his or her services are so used, an officer of the Ombudsman.
- (4) While a member of the Police Force is an officer of the Ombudsman by reason of the services of the member being made use of under subsection (2):
  - (a) the member may, under section 9, be appointed to be a special officer of the Ombudsman,
  - (b) where the member is a special officer of the Ombudsman, the Ombudsman may, under and subject to section 10, delegate to the member the exercise and performance of powers, authorities, duties and functions of the Ombudsman in respect of the investigation under this Act of police conduct, and
  - (c) the member shall retain rank, seniority and remuneration as such a member and may continue to act as a constable.
- (5) (Repealed)

### 33 Preservation of certain rights

- (1) In this section ***superannuation scheme*** means a scheme, fund or arrangement which is established by or under an Act and which provides for superannuation or retirement benefits.
- (2) Subject to subsection (3) and to the terms of his or her appointment, where the Ombudsman was, immediately before being appointed Ombudsman, an officer of the Public Service or a contributor to a superannuation scheme, the Ombudsman:
  - (a) shall retain any rights accrued or accruing to the Ombudsman as such an officer or contributor,
  - (b) may continue to contribute to any superannuation scheme to which he or she was a contributor immediately before being appointed Ombudsman, and
  - (c) shall be entitled to receive any deferred or extended leave and any payment, pension or gratuity under the superannuation scheme,  
as if the Ombudsman had continued to be such an officer or contributor during his or her service as Ombudsman and:
    - (d) the Ombudsman's service as Ombudsman shall be deemed to be service as an officer or employee for the purpose of any law under which those rights accrued or were accruing, under which the Ombudsman continues to contribute or by which that entitlement is conferred,
    - (e) the Ombudsman shall be deemed to be an officer or employee, and the Minister shall be deemed to be the Ombudsman's employer, for the purposes of the superannuation scheme to which the Ombudsman is entitled to contribute under this subsection.
- (3) Where, but for this subsection, the Ombudsman would be entitled under subsection (2) to contribute to a superannuation scheme or to receive any payment, pension or gratuity under that scheme, the Ombudsman shall not be so entitled upon becoming (whether upon being appointed Ombudsman or at any later time while holding office as Ombudsman) a contributor to any other superannuation scheme and the provisions of subsection (2) (e) cease to apply to or in respect of the Ombudsman and the Minister in any case where the Ombudsman becomes a contributor to another superannuation scheme.
- (4) Subsection (3) does not prevent the payment to the Ombudsman upon his or her ceasing to be a contributor to a superannuation scheme of such amount as would have been payable to the Ombudsman had he or she ceased, by reason of resignation, to be an officer or employee for the purposes of that scheme.
- (5) Subject to the terms of his or her appointment, where the Ombudsman was,

immediately before being appointed Ombudsman, an officer of the Public Service, the Ombudsman shall:

- (a) if he or she ceases to hold office as Ombudsman otherwise than pursuant to section 6 (5), and
- (b) if he or she is under the age of sixty years,

be appointed to some office in the Public Service not lower in classification and salary than that which he or she held immediately before being appointed Ombudsman.

- (6) The Ombudsman is not, in respect of the same period of service, entitled to claim a benefit under this Act and another Act.

### **34 Disclosure by Ombudsman or officer**

- (1) The Ombudsman shall not, nor shall an officer of the Ombudsman, disclose any information obtained by the Ombudsman or officer in the course of the Ombudsman's or officer's office, unless the disclosure is made:
  - (a) where the information is obtained from a public authority, with the consent of the head of that authority or of the responsible Minister,
  - (b) where the information is obtained from any other person:
    - (i) with the consent of that person, or
    - (ii) for the purpose of proceedings with respect to the discipline of police officers before the Commissioner of Police or the Industrial Relations Commission,
  - (b1) to a police officer, the Department of Community Services or any other public authority that the Ombudsman considers appropriate in the circumstances if the information relates to the safety, welfare or well-being of a particular child or young person (or a class of children or young persons),
  - (b2) to any person if the Ombudsman believes on reasonable grounds that disclosure to that person is necessary to prevent or lessen the likelihood of harm being done to any person (but only if the Ombudsman also believes on reasonable grounds that there is a risk of harm (including self-harm) being done to any person),
  - (b3) for the purpose of any proceedings under Part 5 of the *Government Information (Public Access) Act 2009* arising as a consequence of a decision made by the Ombudsman in respect of an access application under that Act,
  - (b4) for the purpose of any proceedings under section 167A of the *Police Act 1990*,
  - (c) for the purpose of any proceedings under section 37 or under Part 3 of the *Royal Commissions Act 1923* or Part 4 of the *Special Commissions of Inquiry Act 1983*,

(c1) to a police officer (or any other investigative authority that the Ombudsman considers appropriate) for the purpose of making any inquiry, or carrying out any investigation, to determine whether any proceedings referred to in paragraph (c) should be instituted, or

(d) for the purpose of discharging his or her functions under this or any other Act.

Maximum penalty: 10 penalty units.

(2) Subsection (1) does not prevent the Ombudsman from furnishing any information relating to:

(a) a matter arising under a law of another State, the Commonwealth or a Territory of the Commonwealth, or

(b) an undertaking that is or was being carried out jointly by New South Wales and another State, the Commonwealth or a Territory of the Commonwealth,

to a person exercising under a law of that other State, the Commonwealth or that Territory, as the case may be, functions similar to those exercised by the Ombudsman under this Act.

(2A) Subsection (1) does not operate to render admissible in evidence in any proceedings any document that would not have been so admissible if this section had not been enacted.

(3) Without limiting the operation of subsection (1) (a), in the application of subsection (1) to and in respect of information received in the course of an investigation under this Act of police conduct, the reference in that subsection:

(a) to a public authority—shall be construed as a reference to a police officer,

(b) to the head of that authority—shall be construed as a reference to the Commissioner, and

(c) to the responsible Minister—shall be construed as a reference to the Minister administering the *Police Act 1990*.

(4) If:

(a) the Ombudsman, or an officer of the Ombudsman, is to give evidence before, or to produce the whole or any part of a document to, the Joint Committee, and

(b) the evidence proposed to be given, or the whole or any part of the document proposed to be produced, would disclose information obtained by the Ombudsman or officer, in the course of his or her office, from a public authority or other person, and

(c) the public authority or other person has informed the Ombudsman or officer that

the information is confidential,

the Ombudsman or officer must make a request under section 31H (1) for the evidence to be taken in private or for a direction to be given that the document, or part of the document, be treated as confidential.

- (5) In the case of information obtained from a public authority or other person as referred to in subsection (4), a reference in section 31H to the consent in writing of a witness, in relation to the disclosure or publication of evidence, is to be construed as a reference to the consent in writing of the public authority or other person.

### **35 Ombudsman, officer or expert as witness**

- (1) The Ombudsman shall not, nor shall an officer of the Ombudsman who is not a member of the Police Force, be competent or compellable to give evidence or produce any document in any legal proceedings in respect of any information obtained by the Ombudsman or officer in the course of the Ombudsman's or officer's office.
- (2) Subsection (1) does not apply to any legal proceedings:
- (a) under section 21A, 35A, 35B or 37,
  - (b) under Part 3 of the *Royal Commissions Act 1923*,
  - (c) under Part 4 of the *Special Commissions of Inquiry Act 1983*,
  - (d) under Part 5 of the *Government Information (Public Access) Act 2009* arising as a consequence of a decision made by the Ombudsman in respect of an access application under that Act,
  - (e) under section 167A of the *Police Act 1990*.
- (3) Subsection (1) applies to a person whose services are engaged under section 23 in the same way as it applies to the Ombudsman and officers of the Ombudsman.

### **35A Immunity of Ombudsman and others**

- (1) The Ombudsman shall not, nor shall an officer of the Ombudsman, be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act unless the act, matter or thing was done, or omitted to be done, in bad faith.
- (2) Civil or criminal proceedings in respect of any act or omission referred to in subsection (1) shall not be brought against the Ombudsman or an officer of the Ombudsman without the leave of the Supreme Court.
- (3) The Supreme Court shall not grant leave under subsection (2) unless it is satisfied that there is substantial ground for the contention that the person to be proceeded

against has acted, or omitted to act, in bad faith.

### **35B Application to Supreme Court**

- (1) Where any question arises as to the jurisdiction of the Ombudsman to conduct an investigation or proposed investigation (whether under this or any other Act), the Ombudsman, or any interested party, may apply to the Supreme Court for a determination of that question.
- (2) On an application made under subsection (1) the Supreme Court may make such order as it considers appropriate.
- (3) For the purposes of subsection (1), the following persons are interested parties:
  - (a) the public authority the conduct of which is the subject of the investigation or proposed investigation,
  - (b) the head of that public authority,
  - (c) if the investigation arises from the making of a complaint under section 12 (1), the complainant.
- (3A) For the purposes of subsection (1), the following persons are interested parties in relation to the investigation of a community services complaint within the meaning of Part 4 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*:
  - (a) a service provider or a provider of a visitable service that is the subject of the investigation or proposed investigation,
  - (b) the chief executive or principal officer of that service provider or service,
  - (c) if the investigation arises from the making of a complaint under that Act, the complainant.
- (4) This section has effect notwithstanding section 35A.

### **35C Referral of legal question to Administrative Decisions Tribunal for advisory opinion**

- (1) The Ombudsman may refer to the Administrative Decisions Tribunal for the opinion of the Tribunal any legal question arising out of any decision made in the exercise of any of the functions of an agency that the Ombudsman is investigating, but only if the exercise of the function is a reviewable decision within the meaning of the *Administrative Decisions Tribunal Act 1997*.
- (2) On any such referral (and despite any contrary provisions of the *Administrative Decisions Tribunal Act 1997*), the Tribunal may hold such hearings (if any) and inform itself in such manner as it thinks appropriate for the purpose of determining the proceedings for an opinion.

(3) The decision of the Tribunal on any such referral does not operate as a binding declaration of right.

(4) In this section:

**agency** includes a service provider or a provider of a visitable service within the meaning of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

### **36 Incriminatory statement**

- (1) Where, under section 18, a person is required to give a statement that tends to incriminate that person, neither the requirement nor the statement may be used in any proceedings against that person except proceedings under section 37 (1) (c).
- (2) Subsection (1) applies whether the person required to give a statement objects to giving it or not.

### **37 Offences**

(1) A person shall not:

- (a) without lawful excuse, wilfully obstruct, hinder or resist the Ombudsman or an officer of the Ombudsman in the exercise of the Ombudsman's or officer's powers under this or any other Act,
- (b) without lawful excuse, refuse or wilfully fail to comply with any lawful requirement of the Ombudsman or an officer of the Ombudsman under this or any other Act, or
- (c) wilfully make any false statement to or mislead, or attempt to mislead, the Ombudsman or an officer of the Ombudsman in the exercise of the Ombudsman's or officer's powers under this or any other Act.

Maximum penalty: 10 penalty units.

(2) A person shall not directly or indirectly:

- (a) where he or she is not the Ombudsman—represent that he or she is the Ombudsman,
- (b) where he or she has not been appointed under section 7 as acting Ombudsman—represent that he or she has been so appointed,
- (c) where he or she is not a Deputy Ombudsman—represent that he or she is a Deputy Ombudsman,
- (c1) where he or she is not an Assistant Ombudsman—represent that he or she is an Assistant Ombudsman,
- (c2) where he or she has not been appointed under section 8B as an acting Deputy

Ombudsman or an Assistant Ombudsman—represent that he or she has been so appointed,

- (d) where he or she is not a special officer of the Ombudsman—represent that he or she is a special officer of the Ombudsman,
- (d1) where he or she is not a person to whom a delegation has been made pursuant to section 10A—represent that he or she is such a person,
- (e) where he or she is not an officer of the Ombudsman—represent that he or she is an officer of the Ombudsman, or
- (f) where he or she is not engaged in the administration or execution of this Act or of any other Act in so far as it confers or imposes on the Ombudsman or an officer or special officer of the Ombudsman any function—represent that he or she is so engaged.

Maximum penalty: 10 penalty units.

- (3) For the purposes of subsection (2), a person represents that a state of affairs exists if the person does or says anything, or causes, permits or suffers anything to be done or said, whereby it is represented, or whereby a belief may be induced, that the state of affairs exists.
- (4) A person who uses, causes, inflicts or procures any violence, punishment, damage, loss or disadvantage to any person for or on account of:
  - (a) his or her making a complaint to the Ombudsman, or
  - (b) his or her assisting the Ombudsman, or
  - (c) any evidence given by him or her to the Ombudsman,is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

- (5) An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Ombudsman is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

- (6) In any proceedings for an offence against subsection (5), it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reasons mentioned in subsection (5).
- (7) In this section, a reference to a person assisting the Ombudsman is a reference to a



person who:

- (a) has appeared, is appearing or is to appear as a witness before the Ombudsman, or
- (b) has complied with or proposes to comply with a requirement under section 18, or
- (c) has assisted, is assisting or is to assist the Ombudsman in some other manner.

### **38 Proceedings for offences**

- (1) Except where otherwise expressly provided by this Act, proceedings for an offence against this Act are to be dealt with summarily before the Local Court.
- (2) If an offence against this Act is an indictable offence, the Local Court may nevertheless hear and determine the proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and prosecutor consent.
- (3) If, in accordance with subsection (2), the Local Court convicts a person of such an offence, the maximum penalty that the court may impose is:
  - (a) in the case of an individual—the smaller of:
    - (i) a fine of 50 penalty units or imprisonment for 2 years, or both, or
    - (ii) the maximum penalty otherwise applicable to the offence when committed by an individual, or
  - (b) in the case of a corporation—the smaller of:
    - (i) a fine of 100 penalty units, or
    - (ii) the maximum penalty otherwise applicable to the offence when committed by a corporation.

### **39 Regulations**

The Governor may make regulations under this Act for or with respect to prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for the purpose of carrying out or giving effect to this Act.

### **40 Savings and transitional provisions**

Schedule 2 has effect.

## **Part 6 Complaint handling by relevant agencies**

### **41 Definitions**

- (1) In this Part:

**complaint** means a complaint (however described) that is made to a relevant agency.

**consent** includes consent that is given orally.

**relevant agency** means an agency specified in Schedule 1A.

**relevant complaints legislation**, in relation to a complaint, means the Act or statutory rule that governs the making of such a complaint.

**sensitive personal information**, in relation to a complainant, means information relating to the complainant's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, health or sexual activities.

(2) For the purposes of this Part:

- (a) a reference to a complaint having been made to a relevant agency includes a reference to a complaint having been referred to the agency under section 42, and
- (b) a reference to a complaint being within a relevant agency's jurisdiction is a reference to a complaint that a person is authorised by law to make to the agency or that the agency is authorised by law to deal with.

(3) Schedule 1A may be amended or replaced by proclamation published on the NSW legislation website.

#### **42 Referral of complaints between relevant agencies**

(1) Two or more relevant agencies may enter into an arrangement for the referral of complaints between them (a **complaint referral arrangement**).

(2) Under a complaint referral arrangement:

- (a) any agency that is party to the arrangement may be authorised to refer to any other such agency any complaint received by it that appears to be within, or partly within, the other agency's jurisdiction, and
- (b) a complaint that is within, or partly within, more than one agency's jurisdiction may be referred to one of them, some of them or all of them.

(3) A complaint may be referred under a complaint referral arrangement regardless of any action that has been taken in relation to the complaint by the agency that received it.

(4) Despite subsection (2), a complaint may not be referred from one agency to another except with the express consent of the complainant.

(5) Subject to the terms of the complaint referral arrangement, the referral of a complaint discharges the agency that received the complaint from any further obligations with respect to the complaint to the extent to which the complaint is not within its

jurisdiction, but does not prevent that agency from continuing to deal with the complaint to the extent to which the complaint is within its jurisdiction.

- (6) A complaint that is referred to an agency under this section is taken to have been duly made to that agency under the relevant complaints legislation.
- (7) An agency has the same immunities with respect to a complaint that it refers to another agency under this section as it has with respect to any complaint that it deals with under the relevant complaints legislation.
- (8) Any report in relation to complaints dealt with by a relevant agency that is prepared by the agency for the purposes of:
  - (a) the relevant complaints legislation, or
  - (b) the *Annual Reports (Departments) Act 1985*, or
  - (c) the *Annual Reports (Statutory Bodies) Act 1984*,must distinguish between those complaints that are made directly to the agency and those that are referred to the agency, whether under this Part or otherwise.
- (9) This section does not limit the operation of any other Act under which an agency is authorised or required to refer complaints to another agency.

#### **43 Sharing of information by relevant agencies**

- (1) Two or more relevant agencies may enter into an arrangement for the sharing of information held by them (an **information sharing arrangement**).
- (2) Under an information sharing arrangement, any agency that is party to the arrangement may be authorised to do either or both of the following (but only to the extent that the activity concerned is reasonably necessary to assist the agency to carry out its functions):
  - (a) to receive information obtained by any other such agency with respect to a complaint dealt with by that other agency,
  - (b) to be present during any investigation or hearing conducted by any other such agency with respect to a complaint.
- (3) An agency that, under an information sharing arrangement, is authorised to receive information obtained by some other agency may do so, and the agency by which the information was obtained may provide the information to the agency so authorised, despite any other Act or law.
- (4) An agency that, under an information sharing arrangement, is authorised to be present during an investigation or hearing conducted by some other agency may do so, despite any other Act or law.

- (5) For the purpose of enabling an agency so authorised to be present during such an investigation, the agency may exercise any power of entry exercisable by the other agency, and has all the immunities of the other agency with respect to the exercise of any such power, despite any other Act or law.
- (6) Despite any other provision of this section, an agency must not, except with the complainant's express consent:
  - (a) disclose to any other agency any information obtained by it with respect to a complaint, or
  - (b) permit any other agency to be present during any investigation or hearing conducted by it with respect to a complaint,if the agency has (or should have) reason to suspect that the information is or includes sensitive personal information about the complainant.
- (7) This section does not limit the operation of any other Act under which an agency is authorised or required to disclose information to another agency.

#### **44 Delegation**

Despite any other Act or law, a relevant agency may delegate any of its functions under this Part to an officer of the agency.

#### **45 Inter-agency agreements to be publicly available**

A relevant agency that enters into a complaint referral arrangement under section 42 or an information sharing arrangement under section 43 must ensure that copies of the arrangement are made available for public inspection at each of its offices.

### **Schedule 1 Excluded conduct of public authorities**

(Section 12)

#### **1 Conduct of:**

- (a) the Governor, whether acting with or without the advice of the Executive Council,
- (b) a Minister of the Crown, including a Minister of the Crown acting as a corporation sole, but not so as to preclude conduct of a public authority relating to a recommendation made to a Minister of the Crown,
- (c) Parliament,
- (d) the Houses of Parliament,
- (e) a committee of either House, or both Houses, of Parliament,
- (f) either House of Parliament,

- (g) a member of either House of Parliament, where acting as such,
- (h) an officer of Parliament or of either House of Parliament, where acting as such.

**2** Conduct of:

- (a) a court or a person associated with a court, or
- (b) a person or body (not being a court) before whom witnesses may be compelled to appear and give evidence, and persons associated with such a person or body, where the conduct relates to the carrying on and determination of an inquiry or any other proceeding.

For the purposes of this item, neither the Sheriff nor a sheriff's officer or any security officer within the meaning of the [Court Security Act 2005](#) are taken to be associated with a court referred to in paragraph (a) or a person or body referred to in paragraph (b).

**2A** Conduct of the Sheriff, or of any sheriff's officer or any security officer within the meaning of the [Court Security Act 2005](#), in relation to:

- (a) the maintenance of court security, or
- (b) the enforcement of a warrant of arrest or warrant of committal, or
- (c) the execution of a writ,

being conduct engaged in at the direction of a court, or of a Judge or Magistrate presiding over proceedings before a court, but excluding conduct engaged in otherwise than in accordance with such a direction.

**3** Conduct of a body of which one or more of the members is appointed by the Governor or a Minister of the Crown where:

- (a) at least one member of the body may be appointed by virtue of his or her being a Judge of the Supreme Court of New South Wales, a member of the Industrial Relations Commission of New South Wales, a Judge of the Land and Environment Court of New South Wales or a Judge of the District Court of New South Wales, and
- (b) such a person, if appointed as such a member, has a right or duty to preside at a meeting of the body at which the person is present.

**4** Conduct of a public authority relating to a Bill for an Act or the making of a rule, regulation or by-law.

**5 (Repealed)**

**6** Conduct of a public authority where acting as a legal adviser to a public authority or as legal representative of a public authority.

**7** Conduct of the Attorney General, or of the Solicitor General, or of the Director of Public Prosecutions, relating to the commencement, carrying on or termination of any proceedings before a court, including a coronial inquiry and committal proceedings before a magistrate.

**8** Conduct of a public authority relating to the carrying on of any proceedings:

- (a) before any court, including a coronial inquiry and committal proceedings before a magistrate, or
  - (b) before any other person or body before whom witnesses may be compelled to appear and give evidence.
- 9** Conduct of a public authority relating to an exercise of the prerogative of mercy.
- 10** Conduct of a public authority where acting as a commissioner under the *Royal Commissions Act 1923* or, by the authority of an Act, exercising the powers of such a commissioner.
- 11** Conduct of a public authority where acting as a Commissioner under the *Special Commissions of Inquiry Act 1983*.
- 12** Conduct of a public authority relating to:
- (a) the appointment or employment of a person as an officer or employee, and
  - (b) matters affecting a person as an officer or employee,
- unless the conduct:
- (c) arises from the making of a public interest disclosure (within the meaning of the *Public Interest Disclosures Act 1994*), or
  - (d) relates to a reportable allegation or reportable conviction (within the meaning of Part 3A of this Act), or to the inappropriate handling or response to such an allegation or conviction.
- 13** Conduct of a police officer when exercising the functions of a police officer with respect to crime and the preservation of the peace.
- 14** Conduct of a public authority relating to the investment of any funds.
- 15** Conduct of a public authority where the conduct is a decision made by the public authority in the course of the administration of an estate or a trust, being a decision as to the payment or investment of money or the transfer of property.
- 16 (Repealed)**
- 17** Conduct of a public authority relating to alleged violations of the privacy of persons.
- 18** Conduct of a mediator at a mediation session under the *Community Justice Centres Act 1983*.
- 19** Conduct of a public authority where acting as a member of the New South Wales Crime Commission, or the New South Wales Crime Commission Management Committee, under the *New South Wales Crime Commission Act 1985*.
- 20** Conduct of the Independent Commission Against Corruption, the Commissioner or an Assistant Commissioner or an officer of the Commission, where exercising functions under the *Independent*

*Commission Against Corruption Act 1988.*

**21 (Repealed)**

**22** Conduct of the Hen Quota Committee where exercising functions under the *Egg Industry (Repeal and Deregulation) Act 1989*.

**23 (Repealed)**

**24** Conduct of the Casino Control Authority or any other public authority when exercising functions under the *Casino Control Act 1992*.

**25** Conduct of the HomeFund Commissioner or a member of the staff of the HomeFund Commissioner, when exercising functions under the *HomeFund Commissioner Act 1993*.

**26** Conduct of the Legal Services Commissioner or a member of staff of the Commissioner, when exercising functions under Chapter 4 or 6 of the *Legal Profession Act 2004*.

**27** Conduct of a conciliator in relation to the conciliation of a complaint under the *Health Care Complaints Act 1993*.

**28 (Repealed)**

## **Schedule 1A Agencies**

(Section 41)

Audit Office of New South Wales

Community Services Commission

Department of Local Government

Health Care Complaints Commission

Information Commissioner

Legal Services Commissioner

Ombudsman

President of the Anti-Discrimination Board

Privacy Commissioner

## **Schedule 2 Savings and transitional provisions**

(Section 40)

### **1 Regulations**

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

*Community Services Legislation Amendment Act 2002* (but only to the extent that it amends this Act)

*Child Protection Legislation Amendment Act 2003*

*Ombudsman Amendment (Removal of Legal Professional Privilege) Act 2010*

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

## **2 Existing Deputy Ombudsman and Assistant Ombudsman**

Nothing in the *Community Services Legislation Amendment Act 2002* affects the appointment of a person who held office as a Deputy Ombudsman or an Assistant Ombudsman immediately before the substitution of section 8 (1) by that Act.

## **3 Child Protection Legislation Amendment Act 2003**

Subject to any regulations under clause 1, the amendments made to this Act by the *Child Protection Legislation Amendment Act 2003* extend to matters arising before the commencement of those amendments, but do not affect any action that is or has been taken by the Ombudsman, or by the head or any employee of an agency, in relation to a matter notified to the Ombudsman before that commencement.