

# Ombudsman Act 1974 No 68

[1974-68]



New South Wales

## Status Information

### Currency of version

Historical version for 19 August 2022 to 4 September 2022 (accessed 19 November 2024 at 8:23)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

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

### Notes—

- **Does not include amendments by**
  - [Government Sector Finance Legislation \(Repeal and Amendment\) Act 2018 No 70](#), Sch 4.77[4] and [5] (not commenced)
  - [Public Interest Disclosures Act 2022 No 14](#) (amended by [Ombudsman Legislation Amendment Act 2022](#)) (not commenced)
  - [Voluntary Assisted Dying Act 2022 No 17](#) (not commenced — to commence on 28.11.2023)
  - [Casino Legislation Amendment Act 2022 No 36](#), Sch 3.3 (not commenced — to commence on 5.9.2022)
- **See also**
  - [ICAC and Other Independent Commissions Legislation Amendment \(Independent Funding\) Bill 2021](#) [Non-government Bill— the Hon Robert Borsak, MLC]

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 25 August 2022

# 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### 3 (Repealed)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.

**head** means—

- (a) in relation to a public authority that is a Public Service agency or a person employed in a Public Service agency—the head of the agency, and
- (a1) in relation to a person employed by a political office holder under Part 2 of the *Members of Parliament Staff Act 2013*—the chief of staff of the office of that office holder, 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 Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, constituted under this Act.

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

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

**public authority** means—

- (a) any person appointed to an office by the Governor,
- (b) any statutory body representing the Crown,
- (c) any Public Service agency or any person employed in a Public Service agency,
- (d) any person in the service of the Crown or of any statutory body representing the Crown,
- (d1) any person employed by a political office holder under Part 2 of the *Members of Parliament Staff Act 2013*,
- (e) an auditable entity within the meaning of the *Government Sector Audit Act 1983*,
- (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 accreditation authority or registered certifier within the meaning of the [Building and Development Certifiers Act 2018](#),
- (f2) any body declared by the regulations to be a public authority for the purposes of this Act,
- (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 Public Service agency or a person employed in a Public Service agency—the Minister responsible for that agency or, in the case where more than one Minister is responsible for that agency, the Minister who, in the opinion of the Ombudsman, is most nearly connected with the conduct of that agency, 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
- (c1) in relation to a public authority who is a person employed by a political office holder under Part 2 of the [Members of Parliament Staff Act 2013](#)—the Premier, 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.

**Note—**

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.



(1A), (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 a member of the Legislative Council or the Legislative Assembly, or

(b) is a member of a House of Parliament of another State or of the Commonwealth.

(4) The Ombudsman vacates the office of Ombudsman—

(a) (Repealed)

(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 office of Ombudsman is a statutory office and the provisions of the *Government Sector Employment Act 2013* relating to the employment of Public Service employees do not apply to that office.
- (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.

(1A) The Ombudsman may—

- (a) from time to time, appoint a Deputy Ombudsman or an Assistant Ombudsman to be an acting Ombudsman during an absence of the Ombudsman for a period of no more than 30 days, and
- (b) revoke the appointment.

(1B) An appointment of an acting Ombudsman by the Ombudsman is revoked on the appointment of an acting Ombudsman by the Governor.

(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**

(1) The Ombudsman may appoint one or more Deputy Ombudsman and Assistant Ombudsman.

(1A) The Ombudsman must appoint a Deputy Ombudsman as the Community Services Commissioner for the purposes of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

(1B) The Ombudsman is to appoint a Deputy Ombudsman for the purpose of enabling the Ombudsman to monitor and assess Aboriginal programs under Part 3B.

(2) The provisions of section 6 (3) (b), (4) (b) and (c) 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 offices of Deputy Ombudsman and Assistant Ombudsman are statutory offices and the provisions of the *Government Sector Employment Act 2013* relating to the employment of Public Service employees do not apply to those offices (except as provided by subsection (4B)).

(4) A Deputy Ombudsman and an Assistant Ombudsman hold office for such term, not exceeding 5 years, as may be specified in the instrument of appointment, but are eligible (if otherwise qualified) for re-appointment.

(4A) The employment of a Deputy Ombudsman and an Assistant Ombudsman is (subject to this section) to be governed by a contract of employment between the Deputy Ombudsman or Assistant Ombudsman and the Ombudsman.

- (4B) The following provisions of or made under the *Government Sector Employment Act 2013* relating to the employment of Public Service senior executives apply to a Deputy Ombudsman and an Assistant Ombudsman (but in the application of those provisions a reference to the employer of any such executive is to be read as a reference to the Ombudsman)—
- (a) provisions relating to the band in which an executive is to be employed,
  - (b) provisions relating to the contract of employment of an executive,
  - (c) provisions relating to the remuneration, employment benefits and allowances of an executive,
  - (d) provisions relating to the termination of employment of an executive.
- (4C) The office of a Deputy Ombudsman or an Assistant Ombudsman becomes vacant if the holder—
- (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) resigns the office by instrument in writing addressed to the Ombudsman, or
  - (d) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (e) becomes a mentally incapacitated person, or
  - (f) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or
  - (g) is removed from office under subsection (4B).
- (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—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 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) (Repealed)

### **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 (Repealed)**

### **10 Delegation**

- (1) Subject to subsection (2), the Ombudsman may delegate to an Assistant Ombudsman or an 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 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, 28 or 29, to an Assistant Ombudsman, and

(b) under section 28 or 29 (1) (a) or (2) (a), to an 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**

#### **11A Application of Part**

This Part applies to a person who was a public authority in relation to conduct occurring while the person was a public authority in the same way as it applies to a public authority.

#### **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) If a person detained by, or in the custody of, a public authority (a **detained person**) requests to make a complaint to the Ombudsman, the public authority or other person superintending the detained person must—
  - (a) take all steps necessary to facilitate the making of the complaint by the detained



person, and

(b) if the complaint is made orally—make reasonable arrangements for the detained person to make the complaint in a way that is not recorded or monitored, and

(c) if the complaint is made in writing—send to the Ombudsman, as soon as practicable, the written matter addressed to the Ombudsman, unopened.

(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.

## **12A Referral of complaints about public authorities for investigation**

(1) The Ombudsman may, if the Ombudsman considers it appropriate, refer a complaint about the conduct of a public authority to the public authority for investigation.

(2) The public authority must report to the Ombudsman on the outcome of the referral.

(3) The Ombudsman may, when referring the complaint to the public authority, make recommendations on whether, and in what way, the public authority may investigate or otherwise deal with the complaint.

(4) The Ombudsman may monitor the progress of the public authority's investigation of the complaint.

(5) The public authority must, on the request of the Ombudsman, provide documents and other information relating to the complaint.

(6) The Ombudsman may, if the Ombudsman considers it appropriate, also continue to deal with the complaint.

(7) In this section—

**complaint** includes part of a complaint.

### **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) (Repealed)
- (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.
- (4) A public authority that discloses information to the Ombudsman in response to an inquiry under this section is not required to comply with section 16, 17, 18 or 19 (1) of the *Privacy and Personal Information Protection Act 1998*.
- (5) Despite the *Health Records and Information Privacy Act 2002*—
  - (a) a public authority or other person or body may disclose health information (within the meaning of that Act) to the Ombudsman in response to an inquiry under this section, and
  - (b) the Ombudsman may use any such information for the purposes of this section.
- (6) For a provision in another Act providing an exception to confidentiality or non-disclosure, information provided in response to an inquiry made under this section is taken to be information provided in response to a requirement under this Act.

### **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.
- (7) The Ombudsman may charge the public authority reasonable fees for the following—
- (a) a conciliation provided under this section,
  - (b) the engagement of a mediator to assist in the conciliation.

#### **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 to investigate**

(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) However, if the complaint was made orally, the Ombudsman may inform the complainant orally of the Ombudsman's decision and the reasons for the decision unless the complainant asks to be informed of the Ombudsman's reason in writing.

(2A) Subsection (2) does not prevent the Ombudsman from informing the complainant in writing of the Ombudsman's decision and the reasons for the decision in relation to a complaint made orally if the Ombudsman is satisfied that it is appropriate to do so in the circumstances.

(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 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 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 Ombudsman may require information, document or other thing**

- (1) For an investigation under this Act, the Ombudsman may, by written notice, require a public authority to do the following—
- (a) give the Ombudsman a written or oral statement of information specified or described in the notice,
  - (b) produce, in accordance with directions in the notice, a document or other thing, or a copy of a document, specified or described in the notice.
- (2) The notice may—
- (a) require a person to attend at a specified time and place to give an oral statement of information, and
  - (b) specify the time within which the information must be provided.

### **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.
- (4) The Ombudsman may appoint an Australian legal practitioner to assist the

Ombudsman for the purposes of an inquiry held by the Ombudsman and the Australian legal practitioner may appear before the inquiry.

### **19A Restriction on publication of evidence**

(1) **Direction regarding publication** The Ombudsman may direct that—

- (a) any evidence given before an inquiry held by the Ombudsman, or
- (b) the contents of any document, or a description of any thing, produced to the Ombudsman, or
- (c) any information that might enable a person who has given or may be about to give evidence before an inquiry to be identified or located, or
- (d) the fact that any person has given or may be about to give evidence before an inquiry,

must not be published, or must not be published except in such manner, and to such persons, as the Ombudsman specifies.

(2) **Public interest** The Ombudsman is not to give a direction under this section unless satisfied that the direction is necessary or desirable in the public interest.

(3) **Offence** A person must not make a publication in contravention of a direction given under this section.

Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

(3A) It is not a contravention of a direction given under this section to provide information or evidence—

- (a) to a registered medical practitioner or registered psychologist for the purposes of providing medical or psychiatric care, treatment or counselling, including psychological counselling, to a person who has given or may give evidence before an inquiry, or
- (b) to an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry or an investigation relating to an inquiry.

(4) **Definition** In this section and sections 19B and 19C, ***inquiry*** means an inquiry held under section 19.

### **19B Publication of evidence given at inquiry**

(1) A person who was present at an inquiry must not publish, or permit to be published, any evidence given before the inquiry or any of the contents of a document produced at the inquiry, except to the Ombudsman, an officer of the Ombudsman or an Australian legal practitioner appointed under section 19 (4) or as permitted by the

Ombudsman or the regulations.

Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

- (2) Nothing in this section affects section 19A, but a person cannot be punished under both sections for the same publication.
- (3) This section does not apply to an officer of the Ombudsman or an Australian legal practitioner appointed under section 19 (4).
- (4) It is not a contravention of this section to provide information or evidence to—
  - (a) a registered medical practitioner or registered psychologist for the purposes of providing medical or psychiatric care, treatment or counselling, including psychological counselling, to a person who has given or may give evidence before an inquiry, or
  - (b) an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry or an investigation relating to an inquiry.

### **19C Disclosures prejudicing investigations**

- (1) A person who is—
  - (a) required under section 18 to produce a statement of information or to attend and produce a document or other thing, or
  - (b) by a summons under section 19 required to give evidence or to produce a document or other thing,

must not disclose any information about the requirement or summons that is likely to prejudice the investigation to which it relates.

Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

- (2) Subsection (1) does not apply to a requirement or summons unless it specifies that information about the requirement or summons must not be disclosed.
- (3) A person does not contravene this section if—
  - (a) the disclosure is made to an employee, agent or other person in order to obtain information to comply with the requirement or summons and the employee, agent or other person is directed not to inform the person to whom the information relates about the matter, or
  - (b) the disclosure is made to obtain legal advice or representation in relation to the requirement or summons, or
  - (c) the disclosure is made for the purposes of, or in the course of, legal proceedings, or



- (c1) the disclosure is made to a registered medical practitioner or registered psychologist in relation to the provision by that health practitioner of medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to a person required to give evidence by a summons under section 19, or
  - (d) the disclosure is made in accordance with guidelines issued by the Ombudsman or in accordance with the regulations.
- (4) A reference in this section to the disclosure of any information about a requirement or summons includes a reference to—
- (a) a disclosure about the existence or nature of the requirement or summons or of the investigation to which it relates, and
  - (b) a disclosure of any information to a person from which the person could reasonably be expected to infer the existence or nature of the requirement or summons or of the investigation to which it relates.

## **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 or a former 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 Secretary or 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 the subject of the investigation—

- (a) if practicable, to the public authority whose 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 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.

## **25A Review of complaints handling systems**

(1) The Ombudsman may review the systems of a public authority for handling complaints.

(2) The Ombudsman may, in carrying out the review, require the head of the public authority to provide information about the systems, including the operation of the systems.

(3) The Ombudsman may—

(a) report on issues relating to the systems, and

(b) review the policies and performance of the public authority in relation to handling complaints, and

(c) make recommendations the Ombudsman considers appropriate.

(4) A copy of a report containing recommendations—

(a) must be given to the relevant Minister in relation to the public authority, and

(b) may be given to another person or body the Ombudsman considers appropriate.

## **Part 3A**

### **25B-25JA (Repealed)**

## **Part 3B Aboriginal programs**

### **25K Aboriginal programs to which Part applies**

This Part applies to Aboriginal programs prescribed by the regulations.

### **25L Monitoring and assessment of Aboriginal programs**

- (1) The Ombudsman is to monitor and assess Aboriginal programs to which this Part applies.
- (2) Sections 17–24 and 36 apply to the exercise of the Ombudsman’s functions under this Part in the same way as they apply to an investigation of a complaint by the Ombudsman, subject to any necessary modifications and to any modifications prescribed by the regulations.

### **25M Provision of information**

- (1) It is the duty of the head of a public authority that has functions under an Aboriginal program to which this Part applies to provide the Ombudsman with full and unrestricted access to records that are under the person’s control (or whose production the person may, in an official capacity, reasonably require), being records to which the Ombudsman reasonably requires access for the purpose of exercising the functions of the Ombudsman under this Part in relation to the program.
- (2) Access to which the Ombudsman is entitled under this section includes the right to inspect and, on request, to be provided with copies of any such record and to inspect any non-documentary evidence associated with any such record.
- (3) A provision of any Act or law that restricts or denies access to records (other than a provision applied by section 25L (2)) does not prevent a person to whom this section applies from complying, or affect the person’s duty to comply, with this section.
- (4) The Ombudsman and the Minister responsible for an Aboriginal program to which this Part applies may consult each other on the monitoring and assessment of, or other matters relating to, the program.
- (5) The Ombudsman may, if the Ombudsman thinks it appropriate to do so, provide information obtained by the Ombudsman under this section to a public authority that has functions under an Aboriginal program to which this Part applies and that has a relevant interest.
- (6) The provision of information under this section—
  - (a) does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, and
  - (b) does not give rise to any liability for defamation or other civil liability.

### **25N Reporting on Aboriginal programs**

- (1) The Ombudsman may provide a report on any matter concerning an Aboriginal program to which this Part applies (including any recommendations for improvements in the delivery of the program) to the Minister responsible for the program and to any

other Minister or public authority affected, in the opinion of the Ombudsman, by the report.

- (2) The Minister responsible for the program is to furnish a copy of the report to the Presiding Officer of each House of Parliament within 1 month after receiving the report. Section 31AA applies to a copy of a report furnished under this section in the same way as it applies to a report under Part 4.

## **Part 3C**

### **250-25Z (Repealed)**

## **Part 4 Reports**

### **25AA (Repealed)**

### **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 a Public Service employee, to the Public Service Commissioner.
- (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 Public Service agency within the meaning of the [Government Sector Employment Act 2013](#), 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 a Public Service employee, to the Public Service Commissioner,

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, 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 Ombudsman, the Law Enforcement Conduct Commission and the Crime 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 *Law Enforcement Conduct Commission Act 2016*, the *Government Information (Information Commissioner) Act 2009*, the *Privacy and Personal Information Protection Act 1998*, the *Inspector of Custodial Services Act 2012*, the *Crime Commission Act 2012*, 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, Chief or other Commissioner of the Law Enforcement Conduct Commission or Inspector of the Law Enforcement Conduct Commission or the Commissioner for the New South Wales Crime 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 Chief or other Commissioner of the Law Enforcement Conduct Commission or Inspector of the Law Enforcement Conduct Commission, a reference to the Minister administering section 18 or 120 (as appropriate) of the *Law Enforcement Conduct Commission Act 2016*, and
- (d) in the context of an appointment of Commissioner for the New South Wales Crime Commission, a reference to the Minister administering section 8 of the *Crime Commission Act 2012*.

### **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, Chief or other Commissioner of the Law Enforcement Conduct Commission or Inspector of the Law Enforcement Conduct Commission, Commissioner for the New South Wales Crime Commission or Inspector of Custodial Services, 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, Chief or other Commissioner of the Law Enforcement Conduct Commission or Inspector of the Law Enforcement Conduct Commission, Commissioner for the New South Wales Crime Commission or Inspector of Custodial Services.
- 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.

(3A) The Ombudsman or an officer of the Ombudsman must make a request under subsection (1) for evidence to be taken in private, or for a direction to be given that a document, or part of a document, be treated as confidential, if—

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

(b) the evidence proposed to be given, or the whole or part of the document proposed to be produced, would disclose information obtained by the Ombudsman or officer, in connection with the administration or execution of this Act, 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.

(3B) If, at the request of the Ombudsman or an officer of the Ombudsman, evidence referred to in subsection (3A) is taken by the Joint Committee in private—

(a) the Committee must not disclose or publish the whole or part of the evidence without the written consent of the public authority or other person, and

(b) a person, including a member of the Committee, must not disclose or publish the whole or part of the evidence without—

(i) the written consent of the public authority or other person, and

(ii) the authority of the Committee under subsection (5).

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) or the consent of a public authority or other person under subsection (3B).
- (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) Persons may be employed in the Public Service under the [Government Sector Employment Act 2013](#) to enable the Ombudsman to exercise his or her functions.
- (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 police officer is an officer of the Ombudsman by reason of the services of the police officer being made use of under subsection (2), the police officer retains rank, seniority and remuneration as a police officer 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 appointment, if the Ombudsman was, immediately before being appointed Ombudsman, a Public Service employee or a contributor to a superannuation scheme, the Ombudsman—
  - (a) retains any rights accrued or accruing to the Ombudsman as such an employee or contributor, and
  - (b) may continue to contribute to any superannuation scheme to which the Ombudsman was a contributor immediately before being appointed Ombudsman, and

(c) is 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 employee or contributor during his or her service as Ombudsman and—

(d) the Ombudsman's service as Ombudsman is taken to be service as an 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, and

(e) the Ombudsman is taken to be an employee, and the Minister is taken 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 employee for the purposes of that scheme.

(5) Subject to the terms of appointment, if the Ombudsman was, immediately before being appointed Ombudsman, a Public Service employee, the Ombudsman is—

(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,

entitled to be employed at a work level and salary not lower than the level at which he or she was employed 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 of information**

(1) The Ombudsman or an officer of the Ombudsman must not disclose information obtained in connection with the administration or execution of this Act unless the disclosure is made as follows—

- (a) for information obtained from a public authority—with the consent of—
  - (i) the head of the authority, or
  - (ii) the responsible Minister,
- (b) for information obtained from another person—
  - (i) with the consent of the person, or
  - (ii) for proceedings relating to the discipline of police officers before the Commissioner of Police or the Industrial Relations Commission,
- (c) for information relating to the safety, welfare or well-being of a child or young person—to a police officer, the Department of Communities and Justice or another public authority the Ombudsman considers appropriate in the circumstances,
- (d) to a person, if the Ombudsman believes on reasonable grounds that—
  - (i) disclosure to the person is necessary to prevent or lessen the likelihood of harm being done to a person, and
  - (ii) there is a risk of harm, including self-harm, being done to a person,
- (e) for proceedings under the *Government Information (Public Access) Act 2009*, Part 5 arising as a consequence of a decision made by the Ombudsman in relation to an access application under that Act,
- (f) for proceedings under the *Police Act 1990*, section 167A,
- (g) for proceedings under the *Public Interest Disclosures Act 1994*, section 20 or 20B,
- (h) for criminal proceedings resulting from an investigation under this Act, if the investigation related, whether or not entirely, to a matter referred by the Inspector of the Law Enforcement Conduct Commission to the Ombudsman for investigation,
- (i) for proceedings under or in relation to the following—
  - (i) this section or section 19A, 19B, 19C, 31H or 37,
  - (ii) the *Royal Commissions Act 1923*, Part 3,
  - (iii) the *Special Commissions of Inquiry Act 1983*, Part 4,
- (j) to a law enforcement agency for an inquiry or investigation to determine whether proceedings referred to in paragraph (i) should be commenced,
- (k) to a registered medical practitioner or registered psychologist in relation to the provision of medical or psychiatric care, treatment or counselling, including psychological counselling, by the Ombudsman or an officer of the Ombudsman,

- (l) for information that relates or may relate to a breach of a law of the State, another State, the Commonwealth or a Territory—to a law enforcement agency,
- (m) to a Commission appointed under the *Royal Commissions Act 1923*,
- (n) to a special inquiry set up under the *Special Commissions of Inquiry Act 1983*,
- (o) in connection with the administration or execution of this Act.

Maximum penalty—50 penalty units.

- (2) Subsection (1) does not prevent the Ombudsman from disclosing information—
  - (a) to a person exercising functions under the law of another State, the Commonwealth or a Territory, which are similar to the functions exercised by the Ombudsman, if the Ombudsman is of the opinion the disclosure is appropriate, or
  - (b) about a decision made by the Ombudsman under section 13, 13AA, 13A or 15, including the commencement, progress, discontinuance or conclusion of an investigation, or
  - (c) to correct a public record about—
    - (i) an investigation under this Act, or
    - (ii) the exercise of a function of the Ombudsman.

- (3) In this section—

**law enforcement agency** means—

- (a) the NSW Police Force, or
- (b) a police force of another State or Territory, or
- (c) the Australian Federal Police, or
- (d) another authority or body responsible for the enforcement of the laws of the Commonwealth or of the State or another State or Territory.

### **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 of the following—
  - (a) proceedings under or in relation to section 19A, 19B, 19C, 21C, 31H, 34, 35A, 35B or 37,

- (b) proceedings under Part 3 of the *Royal Commissions Act 1923*,
  - (c) proceedings under Part 4 of the *Special Commissions of Inquiry Act 1983*,
  - (d) 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,
  - (e) proceedings under section 167A of the *Police Act 1990*,
  - (f) proceedings under section 20 or 20B of the *Public Interest Disclosures Act 1994*,
  - (g) criminal proceedings resulting from an investigation under this Act, but only if the investigation related (whether or not entirely) to a matter referred by the Inspector of the Law Enforcement Conduct Commission to the Ombudsman for investigation.
- (3) Subsection (1) applies to the following persons in the same way as it applies to the Ombudsman and officers of the Ombudsman—
- (a) a former Ombudsman,
  - (b) a former officer of the Ombudsman,
  - (c) an Australian legal practitioner who is or was appointed under section 19 (4) to assist the Ombudsman,
  - (d) a person whose services are or were engaged under section 23.
- (4) Subsection (3) extends to information obtained by those persons before its substitution by the *Ombudsman and Public Interest Disclosures Legislation Amendment Act 2014*.
- (5) The Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission is to review the operation of subsections (3) and (4) as soon as possible after 5 March 2016.

### **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.

- (4) An Australian legal practitioner assisting the Ombudsman or representing a person at an inquiry held by the Ombudsman has the same protection and immunity as a barrister has in appearing for a party in proceedings in the Supreme Court.

### **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 Civil and Administrative Tribunal for advisory opinion**

- (1) The Ombudsman may refer to the Civil and Administrative 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 an administratively reviewable decision within the meaning of the *Administrative Decisions Review Act 1997*.



- (2) On any such referral (and despite any contrary provisions of the *Civil and Administrative Tribunal Act 2013*), 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*.

### **35D Inter-relationship between Ombudsman and NCAT**

- (1) The Ombudsman and President of the Civil and Administrative Tribunal may enter into arrangements regarding any of the following—
  - (a) matters that the Tribunal will refer to the Ombudsman where it considers that the matter can be the subject of a complaint, inquiry, investigation or other action under the *Ombudsman Act 1974* and that it would be more appropriate for the Ombudsman to deal with the matter,
  - (b) matters that the Ombudsman will refer to the Tribunal where the Ombudsman considers that the matter can be the subject of an administrative review application and that it would be more appropriate for the Tribunal to deal with it,
  - (c) matters that are the subject of an administrative review application and that are also the subject of a complaint, inquiry, investigation or other action under the *Ombudsman Act 1974*,
  - (d) the co-operative exercise of the respective functions of the Ombudsman and the Tribunal.
- (2) The Ombudsman and President are jointly to cause notice of any arrangements entered into under this section to be published in the Gazette as soon as is practicable after they are entered into. However, a failure to publish any such arrangements does not affect their validity.
- (3) The Ombudsman and the Civil and Administrative Tribunal are empowered to exercise their functions in conformity with any relevant arrangements entered into under this section.
- (4) An administrative review application may be made to the Civil and Administrative Tribunal whether or not a complaint has been made to the Ombudsman in relation to the decision.
- (5) Without limiting subsection (3)—

- (a) the Ombudsman may (despite anything in this Act) decline, discontinue or defer a complaint made under this Act to give effect to an arrangement entered into under this section, and
- (b) the Ombudsman may (despite any provision of this Act but in conformity with the [Civil and Administrative Tribunal Act 2013](#)) disclose any information to the Tribunal duly obtained by the Ombudsman in relation to any matter referred to the Civil and Administrative Tribunal to give effect to an arrangement entered into under this section, and
- (c) the Tribunal may dismiss, adjourn or stay proceedings relating to an administrative review application to give effect to an arrangement entered into under this section, and
- (d) the Ombudsman may entertain any complaint under this Act, or the Tribunal may entertain an administrative review application, duly made by a person on the basis of a referral under arrangements entered into under this section.

(6) In this section—

**administrative review application** has the same meaning as in the [Civil and Administrative Tribunal Act 2013](#).

### **35E Referral of online complaints about public authorities**

- (1) If the Ombudsman receives an online complaint that appears to relate to the conduct of a public authority, the Ombudsman is required to refer the complaint to the public authority.
- (2) The Ombudsman is not required to refer an online complaint under subsection (1) if the Ombudsman is otherwise required to deal with the complaint under this Act or any other Act.
- (3) This section does not apply to—
  - (a) a complaint that may be dealt with under a complaint referral arrangement under section 42, or
  - (b) a matter that may be dealt with under an arrangement between the Ombudsman and the President of the Civil and Administrative Tribunal under section 35D.
- (4) In this section, **online complaint** means a complaint (however described) that is made about a public authority through an online system approved by the Minister that enables members of the public to lodge complaints about public authorities online.

### **36 Protection against self-incrimination**

- (1) If an individual is required to give a statement or evidence under section 18 or 19, the

statement or evidence is not admissible in evidence against the individual in criminal proceedings, other than proceedings under section 37(1)(c).

- (2) Subsection (1) applies whether or not the individual objects to giving the statement or evidence.

### **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—50 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) (Repealed)
- (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 of the Ombudsman any function—represent that he or she is so engaged.

Maximum penalty—50 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,
- (i) the Children's Guardian or an officer of the Children's Guardian in relation to a matter—
  - (i) that is an inquiry, complaint, notification or investigation under Part 3A of this Act, as in force immediately before its repeal, and
  - (ii) that was transferred to the Children's Guardian under the [Children's Guardian Act 2019](#).

#### **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*).
  - (d), (e) (Repealed)
- 13** Conduct of the NSW Police Force or a member of the NSW Police Force.
- 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 an executive officer of the New South Wales Crime Commission, or as a member of the New South Wales Crime Commission Management Committee, under the *Crime Commission Act 2012* (unless the conduct relates to a matter referred to the Ombudsman by the Inspector of the Law Enforcement Conduct Commission under the *Law Enforcement Conduct Commission Act 2016*).
- 20** Conduct of the Independent Commission Against Corruption, a Commissioner or an Assistant Commissioner or an officer of the Commission, where exercising functions under the *Independent Commission Against Corruption Act 1988*, unless the conduct relates to a matter referred to the Ombudsman by the Inspector of the Commission under the *Independent Commission Against Corruption Act 1988*.
- 21** Conduct of the Law Enforcement Conduct Commission, or an officer of the Commission, where exercising functions under the *Law Enforcement Conduct Commission Act 2016* (unless the conduct relates to a matter referred to the Ombudsman by the Inspector of the Law Enforcement Conduct

Commission under the [Law Enforcement Conduct Commission Act 2016](#)).

**22, 23 (Repealed)**

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

**25 (Repealed)**

**26** Conduct of the Legal Services Commissioner or a member of staff of the Commissioner, when exercising functions under Chapter 5 or 7 of the [Legal Profession Uniform Law \(NSW\)](#).

**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

Office 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](#)

any other Act that amends this Act

- (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.

## **4 Joint Committee**

The change to the name of the Joint Committee made by the amendment to section 31A by the *Crime Commission Act 2012* does not affect the identity of that Committee or the exercise by that Committee of its functions under this or any other Act.

## **5 Royal Commissions and Ombudsman Legislation Amendment Act 2013**

The amendments to sections 34 and 35 by the *Royal Commissions and Ombudsman Legislation Amendment Act 2013* extend to information obtained prior to the commencement of those amendments.

## **6 Child Protection Legislation Amendment Act 2015**

- (1) Section 25GA extends to information in relation to an investigation that commenced before the commencement of that section.
- (2) Section 25WA extends to information in relation to an investigation that commenced before the commencement of that section.

**7 Statute Law (Miscellaneous Provisions) Act (No 2) 2019**

Section 6, as amended by the *Statute Law (Miscellaneous Provisions) Act (No 2) 2019*, extends to the person who held office as Ombudsman immediately before the commencement of the amendment.