



REVIEW OF THE *OMBUDSMAN ACT 1978*

POSITION PAPER

MAY 2004

Office of the Ombudsman

*This paper has been prepared for discussion purposes only.
Any conclusions expressed in this Paper are preliminary only,
and may be revised in the light of the consultation process.*

CONTENTS

BACKGROUND TO THE PROJECT	3
BACKGROUND – THE ACT.....	4
ISSUES RELATING TO JURISDICTION.....	5
The Jurisdiction of the Ombudsman.....	5
Decisions of courts and members of courts	8
Tribunals	8
Contracting Out.....	9
The power to undertake cross-jurisdictional investigations.....	11
ISSUES RELATING TO COMPLAINTS	12
Providing for complaints to be made orally.....	12
Time limit on bringing complaints	13
The discretion to decline to investigate a complaint.....	14
ISSUES RELATING TO INVESTIGATIONS.....	15
Inquiries /Assessments.....	17
Investigations	17
Investigation - Informal	18
Investigation - Standard.....	18
Investigation – high level (Inquiries).....	18
OTHER POWERS OF THE OMBUDSMAN.....	20
Alternative dispute resolution	20
Power to stay an action	21
Deputy Ombudsman	22
Appendix 1 Comparison of Issues across jurisdictions	24

BACKGROUND TO THE PROJECT

As part of the State Government's program of law and justice reforms, in 2002 the Attorney-General appointed the State Service Commissioner to undertake a review of administrative appeal processes in Tasmania. The State Service Commissioner released his *Report of the Review of Administrative Appeals Processes* in April 2003. One of the recommendations was that a review of the *Ombudsman Act 1978* be conducted.

The Department of Justice established a Steering Committee to oversight and set timelines for the implementation of projects arising from the Review of Administrative Appeal Processes. A specific project is the Review of the Ombudsman Act which is being managed from within the Office of the Ombudsman.

The project outputs are as follows:

Output	Description
A. Discussion Paper	A paper which forms the basis of reference group consultation.
B. Position paper	Refinement of discussion paper based on first consultation phase, may include options.
C. Cabinet Submission	Submission to Cabinet on suggested amendments to Ombudsman Act.
D. Amended Legislation	Change to Ombudsman Act to reflect Review

The initial discussion phase involved direct discussion with two reference groups:

- A group representing the Local Government Sector, coordinated through the Local Government Association of Tasmania; and
- A group of Agency representatives drawn from the nine (9) central Agencies.

Following the refinement of the discussion paper based on the first consultation phase, the Position Paper has been developed for the purposes of broader public consultation.

Please provide responses in writing by Friday 11 June 2004 to the Project Manager:

Anne Horner
Principal Investigation Officer (Special Projects)
Office of the Ombudsman
99 Bathurst St
HOBART
Phone: 6233 6217 e-mail: anne.horner@justice.tas.gov.au

BACKGROUND – THE ACT

Under the *Ombudsman Act 1978*, the Ombudsman receives complaints related to the administrative actions of State Government Departments, Local Government bodies and specified public authorities. The Ombudsman will investigate complaints that fall within jurisdiction and make a report on any evidence of defective administration, which will include recommendations for rectifying action. While the Ombudsman has no power to enforce recommendations and is dependent on persuasive arguments, it is rare for an authority not to accept the Ombudsman's recommendations.

The Ombudsman offers a free service, and operates on the principles of independence, impartiality, equity, fairness and accessibility, with a commitment to procedural informality.

The *Ombudsman Act* has not been systematically reviewed, nor had any major amendment, since it commenced 25 years ago. A preliminary review was carried out in 1999/2000 by the Department of Justice and all agencies were consulted as part of that process. Some of the issues raised in that review remain pertinent and are included in this Position Paper.

As part of the preparation of the Paper, the Ombudsman consulted widely with other Ombudsmen in Australia and New Zealand and a survey of Ombudsman Acts in all Australian States and Territories has been undertaken. A summary of the relevant features of these Acts is contained in Appendix 1.

The issues contained in the Paper have been identified by the Ombudsman from an operational level working with the legislation, from consultation with the Agency and Local Government Reference Groups, from Ombudsman experience in other jurisdictions and from a comparison of legislation across jurisdictions.

The identified issues have been divided into four areas:

- Jurisdiction
- Complaints
- Investigations
- Other Powers of the Ombudsman.

Comments on these matters are sought.

In addition, as part of the overall review of the Act, comment on any other aspect of the Act and in relation to any other matters relevant to the Ombudsman's powers and functions are invited.

ISSUES RELATING TO JURISDICTION

The Jurisdiction of the Ombudsman

The Ombudsman's jurisdiction is currently prescribed by means of Schedule 1 of the Act, which specifies that all government departments, councils, and over 70 named authorities are subject to the Ombudsman's jurisdiction. The Schedule may be amended by Order of the Governor in accordance with s.4 of the Act.

Over the last 25 years, the Schedule has been amended on an *ad hoc* basis, as part of consequential amendments to legislation relating to the various bodies. The amendments have not been made consistently as part of legislative drafting processes. It is only since the commencement of Tasmania's Consolidated Legislation Online, and by making regular checks of the legislation database, that the Ombudsman is made aware of changes to the Schedule.

The first major and systematic revision of the Schedule was carried out at the request of the Ombudsman in 1999 and resulted in the making of an Order in December 1999. The Order mainly updated the listing of existing bodies, omitted reference to a number of bodies which had ceased to exist, and included government business enterprises. (Many of the GBEs had been listed previously in the Schedule but when they restructured consequent upon the *Government Business Enterprises Act 1995*, they "fell out" of jurisdiction.) It did not include other new bodies which had been created since 1978.

There is an anomaly whereby the Ombudsman has jurisdiction over a number of state authorities in relation to the *Freedom of Information Act 1991* and the *Public Interest Disclosures Act 2002*, but does not have jurisdiction over the same authorities under the *Ombudsman Act*. The *Freedom of Information Act* and the *Public Interest Disclosures Act* have definitions of "prescribed authority" and "public body" which are inclusive definitions.

There is a need to ensure that the Ombudsman's jurisdiction is up to date and accurate.

Options:

1. Maintain the Status Quo

This option would retain the Schedule and the method for including authorities in the Schedule as provided for in the existing legislation.

An initial, exhaustive review of all State authorities needs to be undertaken and the Schedule amended accordingly. There are more than 250 State authorities or bodies which are created by Statute and which are listed in the Indexes to the Legislation of Tasmania published by the Office of Parliamentary Counsel. Most of these are created under relatively recent Acts which were enacted well after the commencement of the *Ombudsman Act*. Many of these authorities should be included in a revised Schedule.

The Schedule would then need to be revised regularly in a systematic manner. Experience has shown that this does not work well. Many bodies created since 1978 have not been included in the Schedule, and bodies listed in the Schedule may change their names or are replaced with similar bodies, meaning that they inadvertently “fall out” of jurisdiction. In addition, such a Schedule needs to be constantly revised and updated, and there is no consistent legislative practice to ensure that this occurs. This method of determining jurisdiction tends to be a “catch up” process. The public is disadvantaged by this method of defining the jurisdiction. A revision to the Schedule does not have any retrospective application.

Whilst not requiring any legislative change, this method does not guarantee that all authorities are identified and even if a major review is carried out, the Schedule would once again become out of date in a short period of time. The process of amendment would need to be ongoing, and historically, this has not happened.

The advantage of this system is that by listing those bodies which are in jurisdiction by name, there is certainty as to whether a body is or is not in jurisdiction. It is either listed, or it is not.

This is not the preferred option.

2. Provide for an Inclusive Definition of Public Authority

Another way of achieving this is to provide for a general ‘inclusive’ definition of a public authority in the interpretation section of the Act. The result would be that all authorities that fit into the definition would come into jurisdiction unless expressly stated otherwise. A concomitant amendment would provide that a specific public authority may be excluded from the Ombudsman’s jurisdiction, as is the case at the moment in relation to the Tasmanian Audit Office. A provision similar to the existing Schedule 2 would also be retained. Schedule 2 excludes some administrative actions from the Ombudsman’s jurisdiction, such as certain action taken by the Tasmanian Industrial Commission and State Service Commissioner. Bodies such as electricity entities which are subject to the *Electricity Ombudsman Act 1998* would also be excluded to avoid “double dipping” complaints.

The advantage of this method of establishing jurisdiction is that by defining an authority there is no need to identify and list all authorities up front. Upon its creation, subject to the definition, a new authority would automatically come within jurisdiction. Authorities would not ‘fall out’ of jurisdiction simply because of a legislative or name change and authorities that ceased to exist would automatically be deleted from jurisdiction without the need to remove them formally.

This approach is consistent with other more recent Tasmanian Acts, such as the *Freedom of Information Act*, *Public Interest Disclosures Act* and the proposed *Personal Information Protection Bill 2004* (in all of which the Ombudsman has a role) as well as Ombudsman legislation in other jurisdictions. The definition of a public authority should be similar across all those Acts that generally govern the administration of such bodies.

The definition of a public authority could be similar to that of a ‘public body’ in the *Public Interest Disclosures Act* which covers:

- (a) an agency (*a State Service Agency and the Police Service*) or
- (b) a local authority (*a council, or a committee of council, a single, controlling or joint authority established under the Local Government Act as per item 2 in Schedule 1 of the Ombudsman Act*); or
- (c) a body, whether corporate or unincorporate, that is established by or under an Act for a public purpose; or
- (d) a body whose members, or a majority of whose members, are appointed by the Governor or a Minister of the Crown; or
- (e) a Government Business Enterprise; or
- (f) a State-owned company; or
- (g) the holder of an office established by or under an Act to which the right to appoint is vested in the Governor or a Minister.

The above definition includes a State-owned company. There are a number of State-owned companies, all of which are subject to the *Public Interest Disclosures Act*, and all except the T-T Line are subject to the *Freedom of Information Act*. State-owned companies have been set up under Corporations law and are at arms length to Government, although the company members are two Ministers and the State may make loans to the companies. It could be argued that to make these corporations subject to the Ombudsman’s jurisdiction could place them at a competitive disadvantage to the private sector. It is noted that in the Commonwealth and other States and Territories, the Ombudsman has jurisdiction over similar companies. (Two Tasmanian State-owned companies are subject to the Electricity Ombudsman’s jurisdiction already, and thus would be excluded from the Ombudsman’s jurisdiction.)

Some authorities not currently in jurisdiction may be resistant to being subject to review by the Ombudsman. However, there is a strong argument to support accountability by all public bodies for the use of government resources.

The use of an ‘inclusive’ definition may result in some additional workload for the Ombudsman by bringing into jurisdiction new bodies, but in the interests of administrative fairness, and given that the Ombudsman already has jurisdiction over those bodies under other Acts, it is appropriate to do so.

This is the preferred option.

POSITION

The Ombudsman recommends that the Act be amended to provide for an inclusive definition of public authority, in terms similar to that in the *Public Interest Disclosures Act 2002*. All authorities covered by the definition would come into jurisdiction unless expressly excluded.

Decisions of courts and members of courts

The Act provides at s12(5) that the Ombudsman is not entitled to question the merits of any decision made, amongst other things, by a court or a person as a member of a court. Other jurisdictions either have a similar provision to the Tasmanian Act, or else specifically exclude courts from their definitions of a public authority.

There is an issue in relation to the meaning of a “decision” by a court. Three types have been identified:

- those which are clearly judicial (such as decisions of court) – and thus not subject to an Ombudsman’s investigation;
- those which are obviously administrative functions performed by registry staff – and therefore are currently within the Ombudsman’s jurisdiction; and
- some hybrid “judicial-administrative” functions – which arise under a justice’s statutory powers.

The third category needs clarification as to whether it is within the Ombudsman jurisdiction.

Examples of the third category include the Chief Magistrate’s powers under the *Magistrates Court Act 1987* (in Part II), whereby the Chief Magistrate has the statutory responsibility for determining the places where lower courts (including some tribunals) sit, determining the jurisdictions to be exercised, allocating magistrates and times of sittings, allocating all listings of matters and preparing practice directions. Under the *Coroners Act 1995* (at sections 8, 22, 24, 41 and 43) and *Listening Devices Act 1991* (at sections 6 and 7) the Chief Magistrate has the power to issue directions and under the *Police Service Act 2003* a magistrate may authorise certain actions under an integrity test.

The issue may also apply to the judicial-administrative functions of Supreme Court justices. For example, under the *Criminal Code Act 1924* (at section 12A) and the *Supreme Court Civil Procedure Act 1932* (at Part III) a majority of judges (one of whom is the Chief Justice) may give directions fixing the sitting times, places and purposes for the criminal or civil jurisdiction of the Supreme Court respectively.

POSITION

The Ombudsman recommends that the Act be amended to expand the meaning of a “decision” made by a court or a person as a member of a court to include not only judicial decisions but also administrative decisions made in the performance of a function authorised under an Act.

Tribunals

As stated above, s12(5) provides that the Ombudsman is not entitled to question the merits of any decision made by a court or a person as a member of a court. This prohibition does not apply to tribunals and at present, some tribunals are included in Schedule 1 to the Act and therefore come under the Ombudsman’s jurisdiction (the

Alcohol and Drug Dependency Tribunal, Mental Health Tribunal, Parole Board and Guardianship and Administration Board). As a matter of practice, the Ombudsman does not question the merits of a decision of one of these tribunals, but would investigate administrative actions surrounding the decision, or the administrative actions of the tribunal's registry or support staff.

If the method of determining jurisdiction is changed as suggested in this Paper, then a number of other tribunals would automatically come under the Ombudsman's jurisdiction. These tribunals range from the Resource Management and Planning Appeals Tribunal, which sits as a full time tribunal, to small tribunals which only convene as necessary, such as the Forest Practices Tribunal.

Most of the tribunals have powers similar to a court – for example, they may take evidence on oath and issue summons for the appearance of witnesses or the production of documents. Most tribunals, must be chaired by, or at least include, a legal practitioner of some years standing. However, tribunals are part of the administrative arm of government and it could be argued they should be subject to oversight by the Ombudsman.

Schedule 2 of the Act excludes administrative action taken by the Industrial Commission in relation to State employees. With the growth of tribunals and other quasi-legal bodies, consideration should be given to amending section 12(5), or Schedule 2 so as to also provide that the Ombudsman cannot investigate an administrative action taken by a tribunal, or a member of a tribunal, in the performance of the tribunal's deliberative functions. The Ombudsman would continue to have jurisdiction to investigate obviously administrative functions performed by registry staff. "Tribunal" would need to be defined.

POSITION

The Ombudsman recommends that the Act be amended to provide that the Ombudsman must not investigate administrative action taken by a tribunal, or a member of a tribunal, in the performance of the tribunal's deliberative functions.

Contracting Out

When the Act commenced operation in 1979, government undertook a far wider range of services directly for the public. Changes in procedures over recent years have resulted in the contracting out of many of these government services to the private sector, whether in the provision of health care services, or maintenance of government utilities, or, as is the case in some other jurisdictions, the contracting out of whole units such as prisons and detention centres. It can be argued that the contracting out of government services has reduced the accountability of government to the public for the manner in which services are provided.

Section 12(1) of the *Ombudsman Act* states that the Ombudsman may investigate any administrative action taken by or on behalf of a public authority.

The Solicitor-General advises that in its current form, the legislation only confers jurisdiction where the administrative action in question is taken ‘on behalf of’ a public authority. It is conceivable, however, that there may be instances where the contractor is acting for the Crown in substitution for the public authority, that is, in its own right. In such a circumstance, the Ombudsman would have no jurisdiction to investigate.

While it would be a matter for parliamentary counsel to draft appropriately, it is suggested that s12(1) be amended to elucidate what is meant by “on behalf of” so as to ensure that it extends to include contractors acting in substitution for a public authority.

A number of other jurisdictions deem the third party contractor to be the ‘agency’ within jurisdiction. For example, in the Queensland *Ombudsman Act 2001*, an administrative action of an agency includes, at s.10(c), ‘*an administrative action taken for, or in the performance of functions conferred on, an agency, by an entity that is not an agency*’. This provision was deliberately intended to capture administrative actions that are outsourced. The Commonwealth legislation does not include contractors in the Ombudsman’s jurisdiction, however the Commonwealth Joint Committee of Public Accounts and Audit has recommended that the Commonwealth *Ombudsman Act 1976* be amended to extend the jurisdiction of the Ombudsman to include all government contractors.

It can be argued that authorities must remain accountable for the administrative actions of third party contractors acting on their behalf in the delivery of services to the public, so that citizens may have an effective means of redress. To this end, the *Ombudsman Act* requires amendment to clarify that administrative action is taken ‘on behalf of’ a public authority if it is taken in the exercise of the powers or in the discharge of the functions of a public authority under contract with or instructions from the authority (or Crown). In this way, the administrative actions of third party contractors can clearly be brought within the Ombudsman’s jurisdiction.

The proposed amendment would allow the Ombudsman to investigate the actions of a contractor, which could result in an adverse recommendation. However, such a recommendation would be made to the relevant public authority under s28(2).

It is suggested that in relation to existing contracts, the amendment may impose an unfair burden on a contractor that could not have been expected at the time the contract was entered into. One option is that the amendment apply only to new contracts or renewed contracts and not apply to existing contracts.

On the other hand, some contracts may be entered into for very lengthy periods. For example, a contract for a major infrastructure work may be entered into for decades. If the transitional provision applied, the contractors may never be required to be accountable to the Ombudsman. Most contracts entered into by the Crown would have a provision which allows the principal to have some oversight of the operation of the contract by way of investigation and review. Therefore it may not be particularly onerous to require that existing contractors also be subject to the Ombudsman’s jurisdiction. If the Crown already has the power of oversight, there is no reason why the Ombudsman could not piggy back onto such existing provisions. Any suggestion of

unfairness to the contractor would be overridden by the public interest in and the benefits of ensuring good public administration. A second option is that the provision apply to all existing contracts and thereafter to all new contracts. There would be no transitional provision.

A third option could be that there be a transitional provision of, say, two years, or until a contract is renewed, which date occurs first.

POSITION

The Ombudsman recommends that the Act be amended to extend to third party contractors. The amendment would take effect upon its commencement and would apply to existing contracts and any contracts entered into thereafter.

It is noted that any recommendations arising out of an investigation involving a contractor would be made to the relevant public authority.

The power to undertake cross-jurisdictional investigations

The issue of cross-jurisdictional investigations has emerged as an issue of particular significance with regard to the monitoring of law enforcement activity with a cross-border dimension. It is being considered in a number of different forums including the Australasian Police Ministers' Council, the Australian Crime Commissioners' Forum and the National Counter Terrorism Committee

The matter is currently on the agenda of the Standing Committee of Attorneys-General (SCAG). At the November 2003 SCAG meeting Ministers agreed to request Ombudsman and Privacy Commissioners to report to SCAG on the three matters that they have identified as requiring further consideration for improving legislative and administrative arrangements for cross-border forensic investigations. The three matters are:

- whether there are any gaps, either at a federal, state or territory level, in the accountability framework applying to cross-border law enforcement activity;
- whether there is inconsistency and room for harmonisation in the laws and administrative arrangements of the participating jurisdictions, concerning oversight, monitoring and accountability of cross-border enforcement activity; and
- whether there are legislative impediments in any participating jurisdiction to joint investigation and monitoring of cross-border law enforcement activity.

The report has been deferred to the July 2004 SCAG meeting. At this stage any decision about the specific matters referred to above needs to await the outcome of SCAG deliberations. However, in addition to law enforcement activities, it would be sensible to enable the sharing of information between Ombudsman in relation to matters generally.

Cross border issues are not limited to law enforcement activities and could also include environmental issues or the management of exotic diseases.

Under section 26(3) of the Tasmanian *Ombudsman Act*, the Ombudsman's capacity to be involved in cross-jurisdictional investigations is restricted to providing information to other Ombudsman. What is required, however, is provision for cross referral between the Ombudsman and his or her counterparts in other States, Territories and the Commonwealth regarding complaints involving conduct in one or more jurisdictions. This approach is evident under the New South Wales Act, where the (New South Wales) Ombudsman may delegate some of his functions to and accept referrals from other Ombudsmen. The delegation is made for the purpose of enabling the delegate to carry out an investigation which may more effectively be carried out in the other jurisdiction. Under the current law, if there was a cross border complaint each jurisdiction could carry out its own investigation, and then share the information gained. Under the NSW provision, one jurisdiction would have a delegation from the other, and there would be only one investigation. The Victorian Act also provides for the sharing of information arising out of joint undertakings between the Victorian Ombudsman and another State, Territory or Commonwealth Ombudsman.

There are two options:

- Defer this issue pending the outcome of SCAG deliberations; or
- Amend the Act initially to provide for general cross-jurisdictional powers (similar to NSW and/or Victoria); and await the outcome of the SCAG deliberations in relation to the specific cross-jurisdictional law enforcement matters.

POSITION

The Ombudsman recommends that the Act be amended to provide for general cross-jurisdictional powers.

ISSUES RELATING TO COMPLAINTS

Providing for complaints to be made orally

By allowing oral as well as written complaints, the *Ombudsman Act* would reflect the reality that most initial contacts with the Ombudsman are made orally.

Section 14 of the *Ombudsman Act* states that a complaint may be made in writing and makes no specific provision for complaints to be made orally. In the majority of cases, the first contact from a complainant is by telephone. The practice in the past was to deal with minor complaints orally. However, nowadays, the complainant is requested to put the complaint in writing and a complaint form and stamped addressed envelope is sent to the complainant. (Occasionally in the case of an urgent matter or if it appears that a complainant is unable to make the complaint in writing, an oral complaint will be accepted.) While the requirement that the complaint be in writing has the effect of ensuring certainty as to the detail of a complaint, it also causes considerable delays and statistics indicate that in excess of 50% of contacts fail to return the complaint form, despite the Office sending follow up letters. This failure to pursue a complaint may reflect the fact that the initial contact was frivolous, or the matter was able to be resolved

independently, or it may reflect difficulties some members of the public may have in dealing with a paper driven bureaucracy.

Precedent for a provision allowing complaints to be made orally is contained in the Commonwealth *Ombudsman Act* and the relevant legislation of a number of other states. The legislation in Queensland, Northern Territory, Australian Capital Territory, Western Australia and the Commonwealth also provides the Ombudsman with the discretion to decline to investigate a complaint until the complainant reduces it to writing.

There are a number of potential problems in relation to receiving oral complaints. It may be difficult to establish the identity of an aggrieved party; there may be an increase in frivolous or vexatious complaints; and there is potential for a verbal complaint to be misinterpreted or important details not be provided.

On the other hand, people with poor written English skills or who may be intimidated by dealing formally with matters in writing should not be precluded from lodging complaints.

As a matter of good administrative practice, if complaints are accepted orally, the processes within the office of the Ombudsman would ensure that any complaint received orally is reduced to writing and verified with the complainant before the start of the investigation. If appropriate, an interpreter may be used and, in certain circumstances, a personal representative may make the complaint if a person is unable to act for him or herself.

POSITION

The Ombudsman recommends that section 14 of the Act be amended to allow the Ombudsman to receive a complaint either orally or in writing with the discretion to decline to investigate a complaint until the complainant reduces it to writing.

Time limit on bringing complaints

Section 19 of the Act provides that, subject to certain exceptions, the Ombudsman shall not commence an investigation into any administrative action that occurred more than two years prior.

The Acts in other jurisdictions have a one year limitation.

There is some argument for reducing the time frame. It is suggested that it is difficult for a public authority to address properly the concerns raised if too much time has passed. Memories are not fresh. Staff move on. Unless the complainant has been actively pursuing the matter over a period of time, a lengthy delay in bringing a complaint may raise questions about the genuineness of the complaint.

Experience and anecdotal evidence suggests that most complaints are brought within a relatively short time after the action complained of. In many cases where there is a substantial delay, the complainant and the authority have been involved in ongoing

discussions throughout the period and it is only if the matter cannot be satisfactorily resolved that the complainant finally raises it with the Ombudsman.

POSITION

The Ombudsman is of the opinion that the two year time frame in section 19 is not unreasonable, but the matter is open for discussion.

The discretion to decline to investigate a complaint

Any member of the Tasmanian community who feels they have been ‘wronged by the system’ with respect to a service provided by a public authority, may make a complaint to the Ombudsman. It is recommended, however, that persons should try to resolve their grievances directly with the authority concerned, before taking their matter to the Ombudsman.

Once a complaint is made to the Ombudsman, the Ombudsman must determine if it is within jurisdiction, whether it is a matter which may be refused – for example – it is frivolous or trivial – or whether there are alternative remedies available.

Section 20 of the Act provides for circumstances where the Ombudsman is given a discretion not to investigate where there is an alternative avenue of review available. These alternatives include where the person has a right to have the matter reviewed by a court or tribunal (s.20(1) & (2)) or where there is an existing administrative review process in existence (s.20(3)). In both situations the Ombudsman may exercise the discretion to refuse to investigate a matter.

Clearly, in practice, where a person has the right to a review by a lower court or a tribunal, the Ombudsman will decline to investigate except in exceptional circumstances. The *Judicial Review Act 2000* provides that a person who is aggrieved by an administrative decision made under an enactment may apply to the Supreme Court for an order of review relating to the decision. It is possible that many complainants who come to the Ombudsman may have a right to apply to the Supreme Court under Judicial Review however whether the Ombudsman exercises a discretion would depend on the circumstances of each case.

Similarly, if a public authority has established “an administrative practice for the review of action” such as the Housing Services Complaint Unit in the Department of Health and Human Services and the Internal Investigations Unit in Tasmania Police, the Ombudsman will generally decline to investigate and will refer the person to that process. In some situations the Ombudsman may decide to deal with the complaint directly, if she is satisfied that it is unreasonable to require the complainant to go through the alternative review process.

Despite section 20(3), the Act is silent in the situation where there is no established administrative review process. Although in practice complainants may be referred to the authority to try to resolve their grievance directly with the authority first, there needs to be a provision which explicitly states so.

The discretion to decline a complaint that has not been raised with an authority in the first instance reflects the role of the Ombudsman as an office of last resort and the importance of authorities establishing complaints handling mechanisms.

The Commonwealth *Ombudsman Act* at s6(1A) clearly states that where a person has not complained to the authority in the first instance, the Ombudsman may, in his or her discretion, decide not to investigate the matter until the complainant so complains to the authority. It then goes on to provide that once the complaint has been taken to the authority, the Ombudsman may then investigate the matter if either no redress has been granted or if the redress is not adequate. (The Australian Capital Territory and the Northern Territory Acts have similar provisions.)

There are particular advantages both for the complainant and the authority as a service provider in complaints being dealt with at the source of service provision. However, there are times when for various reasons an aggrieved person may be opposed to taking their complaint directly to the organisation concerned. It is necessary therefore, that the Ombudsman have the discretion to accept the complaint in the first instance.

POSITION

The Ombudsman recommends that section 20 be amended to include a provision giving the Ombudsman the discretion to decline to investigate a complaint where the complainant has not first raised the matter with the authority.

ISSUES RELATING TO INVESTIGATIONS

The Act provides that inquiries may be made prior to an investigation. The Act as drafted requires that all investigations be carried in an extremely formal manner. In practice, most complaints are dealt with either at the inquiry stage or as very informal investigations. Only the most serious matters are dealt with using the formal powers as set out in the Act.

The proposal being put forward is to amend the *Ombudsman Act* to recognise the investigation process as a continuum. The amendments will allow for more flexibility and less formality, they will reflect current practices and facilitate the early resolution of complaints. Apart from other recommendations in the Position Paper, the proposal does not suggest additional powers for the Ombudsman.

CURRENT LAW AND PRACTICE

Part III Division 3 of the Act provides for the conduct of investigations. The Division sets out the procedures for investigation and the Ombudsman's powers in an investigation.

Investigations under Division 3 are commonly referred to as 'formal investigations' and these powers and processes are only invoked in major investigations. The vast majority of complaints received are currently dealt with as inquiries, which range from simple inquiries to more comprehensive inquiries which are, in effect, informal investigations.

The inquiry process, as provided for in s23 and s21 commences with determining jurisdiction, or if there are alternative avenues for review or if the Ombudsman should otherwise refuse to investigate (ss19 and 20).

If the above matters do not apply, inquiries are made to determine if the complaint has substance and, if so, whether it may be resolved with the cooperation or assistance of the public authority. The inquiries may be carried out in a variety of ways. They may be quick and simple or lengthy and complicated. Most involve an initial communication, between the Ombudsman and the principal officer of the authority or relevant divisional manager or the like. There may be letters and telephone calls to and from, and meetings with, the authority. The authority may provide copies of documents or provide access to files. Site inspections may occur.

The majority of complaints are dealt with in this way and will normally result in a preliminary opinion that the complaint has substance, either in part or in full, or has no substance. If the complaint has substance, the Ombudsman then proceeds to make recommendations to the authority with a view to a satisfactory resolution of the matter, if appropriate. In many cases, the authority takes action to resolve or rectify the issue without any need for the Ombudsman's further involvement.

The method of dealing with complaints described above does not involve formal notification of the principal officer, or the use of formal investigative powers, formal recommendations or reports, and does not involve the responsible Minister.

In a small number of more serious and complex complaints, the Ombudsman commences a "formal" investigation.

The features of a formal investigation include

- notification to the responsible Minister and principal officer of the authority;
- powers of a Commission of Inquiry under the *Commissions of Inquiry Act*;
- reporting requirements including reporting to the principal officer and Minister; and
- the power to provide a copy of the report to the Premier and to table the report in Parliament.

The issue is that the Act does not fully recognise the inquiry and informal investigation process. While s21 and s23 provide the legal basis, the inquiry process is almost included as an aside. Given that most complaints are dealt with in this manner, the

authority for doing so needs to be made clearer. Other States' Acts have been amended since their enactment to recognise the accepted practice of carrying out inquiries, informal investigations and the ability for the Ombudsman to resolve matters informally with the principal officer.

PROPOSALS FOR CHANGE

As indicated above, the complaint process can be divided into two stages, an initial inquiry stage; and an investigation stage which may range from very informal to formal. The amendments will recognise the investigation process as a continuum – which ranges from very low level informal investigations which can be resolved cooperatively with the parties, to the most serious Commissions of Inquiry investigations.

Inquiries /Assessments

Although the inquiry stage is provided for in s23(4) and s21(2), for clarification, it is suggested that s21(2) be replaced with a new section in Part III Division 2 which provides that –

The Ombudsman may conduct an assessment for the purpose of determining whether an investigation should be conducted; and the principal officer of the authority must assist the Ombudsman (or give reasonable help) in the conduct of an assessment.

The assessment process would be limited to the initial stages of considering a complaint such as:

- clarification of the complaint issues;
- jurisdiction, or
- if the matter is within time (s19),
- whether there are alternative remedies available and there is no special reason justifying an Ombudsman investigation (s20);
- whether the complaint should be refused because the matter is trivial; or vexatious; or the person does not have sufficient interest; or having regard to all the circumstances, an investigation is unnecessary or unjustifiable (s21).

Investigations

After the initial assessment process, there would be the general power to carry out an investigation. The general powers of investigation under the Act would continue to apply to all investigations. These powers include the provision that the Ombudsman may regulate the procedures of an investigation in such manner as the Ombudsman considers appropriate; and that the Ombudsman must maintain confidentiality, is not required to hold a hearing and may obtain information from such persons and in such manner and make such inquiries as he or she thinks fit.

The investigation process is seen as being a continuum but the Act would be amended to provide that the Ombudsman may conduct an investigation informally or by exercising powers as currently set out in Part III Division 3 of the Act. The decision as to what type of investigation occurred would depend on the circumstances of each complaint.

Investigation - Informal

At the lowest (and most commonly used) end of investigation continuum would be the ability to conduct an investigation informally.

The features of an informal investigation would include:

- an informal investigation process;
- the cooperation and assistance of the principal officer;
- coercive powers of a Part III investigation would not be available to the Ombudsman;

Unless the complaint is dismissed, the outcomes of an informal investigation could be:

- resolution of the complaint to the satisfaction of the parties without the need for the Ombudsman to make any finding or recommendation; or
- exercising existing recommendatory and reporting provisions to the principal officer in accordance with s28 which sets out the procedure on completion of an investigation;
- no requirement that a copy of any report be sent to the Minister.

Investigation - Standard

The middle level of the investigation continuum would have more formal features and powers. It would be used for:

- The situation where resolution of the complaint could not be achieved; or
- The situation where, after being advised of a finding and recommendations in an informal investigation, a public authority refuses to accept a recommendation from the Ombudsman or has declined to act on a recommendation of the Ombudsman; and the Ombudsman is of the opinion that the matter is sufficiently serious or important to warrant further action;
- An investigation that requires stronger investigation powers;
- A major systemic issue;
- An own motion investigation by the Ombudsman.

The features of such an investigation would be similar to the features of a current “formal” investigation and include:

- notification to the principal officer of the authority;
- availability of coercive powers under Part III Division 3;
- no requirement that the Ombudsman notify the Minister.

The outcomes of an investigation would be similar to those of an informal investigation with the additional provision that the Ombudsman would have a discretion to report to the Minister.

Investigation – high level (Inquiries)

At the top end of the investigation continuum, would be investigations which have all the features of an investigation as set out above, but are reserved for the most serious complaints.

These matters would apply to the investigation of:

- A reference by the Governor (s15) or Parliament (s16);

- A complaint where the Commissions of Inquiry powers are required (s24(1));
- Any complaint that the Ombudsman is of the opinion that the Minister needs to be informed about.

The additional features of such an investigation would be

- the notification of the Minister (as well as the principal officer);
- powers of a Commission of Inquiry under the *Commissions of Inquiry Act*;
- on completion of an investigation, the requirement that a copy of the report be provided to the Minister.

As indicated above, it is suggested that there is no need to make a formal notification to the Minister for most investigations. However, formal notification to the Minister is a prerequisite if the Ombudsman intends to invoke the powers of a Commission of Inquiry or report to the Minister, Premier and Parliament.

In conclusion, while referring to the different levels for clarity, the process is intended to be seamless. The main change to the current processes set out in the Act is to regularise informal investigations and to remove the requirement that the Minister be notified before commencing every investigation.

POSITION

To achieve the proposal it is recommended that an amendment be made to Part III Division 2 - Initiation of investigations:

Assessment

1. The existing inquiry provisions be clarified by providing that the Ombudsman may conduct an assessment for the purpose of determining whether an investigation should be conducted; and the principal officer of the authority must assist the Ombudsman (or give reasonable help) in the conduct of an assessment.

POSITION

To achieve the proposals it is recommended that amendments be made to Part III Division 3 – Conduct of investigations:

Investigations

2. That investigations may be (a) informal or (b) by exercising formal powers.
3. That the principal officer of a public authority must be notified before an investigation, other than an informal investigation, commences.
4. That if the Ombudsman proposes to invoke the powers of a Commission of Inquiry, or is acting on a reference from Parliament, the Minister must be notified.
5. That the Ombudsman has a discretion to notify or report to the Minister in relation to any investigation.

POSITION

To achieve the proposals it is recommended that amendments be made to Part III Division 4 – Action on Investigation:

Procedures on completion of investigation

6. That the procedures on completion of an investigation include the power to take any action considered appropriate to resolve a matter informally with the principal officer.
7. That the procedures on completion of an investigation provide that the Ombudsman make a report or recommendation to the principal officer.
8. That the procedures on completion of an investigation provide that the Ombudsman make a report or recommendation to the Minister if the Commissions of Inquiry powers are invoked, or if the investigation relates to a reference from Parliament, or if the Ombudsman intends to report to the Premier and Parliament.

OTHER POWERS OF THE OMBUDSMAN

Alternative dispute resolution

It is suggested that the Ombudsman should have a range of dispute resolution techniques available to resolve complaints. ADR could include mediation, conciliation and facilitating mutually agreed outcomes.

Conciliation is a form of alternative dispute resolution that could complement the Ombudsman's investigatory function. The benefits of conciliation include:

- Improving communication between parties, reducing hostility and achieving positive gains through cooperation;
- Maximising the exploration of options while addressing the needs of all parties;
- Maximising the commitment to agreed resolutions; and
- Reducing the costs associated with lengthy formal investigations.

It is argued that the inclusion of a specific legislative provision for the resolution of complaints by conciliation would legitimise and encourage a less formal process providing for mutually acceptable outcomes.

Conciliation is a widely acknowledged and increasingly important alternative dispute resolution process providing real benefits over the more traditional adversarial system of dispute resolution. Provisions providing the Ombudsman with a formal conciliation power have operated apparently successfully in South Australia and New South Wales.

The *Health Complaints Act 1995* provides for the conciliation of complaints. Such conciliation is privileged and voluntary. The aim of the conciliation is for the parties to reach agreement and to settle the issues. Any agreement reached between the parties in the course of the conciliation process may be put in a form that is binding on them.

It should be noted that conciliation is voluntary and there would be no power for the Ombudsman to determine or enforce damages or compensation. If the complaint cannot be resolved at conciliation, the complaint would proceed under the Act as if the conciliation had not occurred.

There are some disadvantages to conciliation. There are cost factors involved and it may be time consuming. Complainants may be seeking impracticable remedies. The issue of who would pay for the conciliation needs to be resolved.

However, as the State Service Commissioner's *Report of the Review of Administrative Appeals Process* noted, alternative dispute resolution methods are becoming accepted practice, and may in the long run be a cost-saving by expediting the resolution of complaints.

A formal conciliation power has a valuable role to play when the Ombudsman forms an opinion that a complainant has cause to be aggrieved but pursuit of a full investigation may be unreasonable in the circumstances but it appears that the matter may be resolved through conciliation.

POSITION

The Ombudsman recommends that the Act be amended to provide that the parties to a complaint may be referred for conciliation. Conciliation would be privileged and voluntary.

Power to stay an action

It is proposed that the Ombudsman have the power to stay an action an authority may take that may affect the rights, interests or liabilities of the aggrieved person, pending the conclusion of an investigation. This would operate on the same principles as an injunction, the intention being to stop the authority proceeding to take a potentially irreversible action, until the investigation is concluded and the report or recommendations considered. A similar provision exists in South Australia.

The Ombudsman's jurisdiction is remedial. Remedies proposed can be defeated if an action is taken in circumstances where the Ombudsman forms an opinion that there has been defective administration and the action ought not to have been taken.

The Act requires that on completion of a formal investigation, the Ombudsman report her opinions and the reasons with recommendations to the principal officer of the authority, and send a copy to the Minister. There is a power to check whether the recommendations have been implemented and if not report to Parliament. The power to prevent, for a limited time, an authority from proceeding to take an irreversible action is an important tool in complaint resolution, and may in some circumstances prevent a matter proceeding to litigation against the Crown.

The principles governing a stay order would be similar to these in relation to an injunction and would include:

- the order being of limited duration;
- being used only if the action is likely to affect a person's rights, interests or liabilities and potentially deprive them of a remedy; and
- if there was no detriment or disadvantage to the authority in deferring the action.

The power would be confined to the relatively rare formal investigations (on average, there would be no more than 4 or 5 formal investigations per year), and could be limited to a defined period of up to 21 days.

There may be practical problems with a stay of action order. For example, some administrative decisions and actions have time lines specified in legislation together with consequences for not meeting the time lines. A planning decision, if not made within the required timeline, becomes a deemed approval.

A stay of action could result in liability arising for a public authority by way of negligence for failing to act. For example, if a stay of action affects an abatement notice addressing an issue of public safety. A stay of action could also have serious consequences on an authority's budget expenditure if works are delayed. The rescheduling of works may result in renegotiation of contract terms and may result in extra unrecoverable costs.

An alternative option would be the power for the Ombudsman to apply to the Supreme Court for an injunction restraining a public authority from engaging in conduct where the conduct may affect an investigation. Such a power exists in New South Wales, although it has never been used.

POSITION

The Ombudsman has no firm position on this proposal. It is open for discussion.

Deputy Ombudsman

The Tasmanian Ombudsman holds a number of statutory positions. In addition to the general Ombudsman role, the Ombudsman is the Tasmanian Health Complaints Commissioner under the *Health Complaints Act 1995*, and the Electricity Ombudsman, under the *Electricity Ombudsman Act 1998*. The Ombudsman also has a responsibility to review decisions related to requests for information under the *Freedom of Information Act 1991*, to carry out reviews under the *Adoption Act 1988*, to oversee compliance by Tasmania Police with the provisions of the *Telecommunications (Interception) Tasmania Act 1999*, to hear appeals under the *Witness Protection Act 2000*, to investigate disclosures under the *Public Interest Disclosures Act 2002* and it is proposed under the *Personal Information Protection Bill 2004* that the Ombudsman have the function of investigating complaints about breaches of privacy principles.

The Ombudsman also undertakes a number of functions which complement the more conventional functions of the Office. For example, in December 2003, the Ombudsman entered into a Memorandum of Understanding with the Department of Justice (DJ) in

relation to Prison Service Governance Issues. The MOU provides that the Ombudsman will have external oversight of a new performance monitoring process for the Prison Service established by DJ. Similarly, the Ombudsman is currently undertaking a major review of claims of child abuse in State care in co-operation with the Department of Health and Human Services. The trend towards a focus on audit, review and monitoring roles is identifiable in other State and Territory Ombudsman offices.

Given the increasing complexity of complaints and the breadth of the Ombudsman's jurisdiction, it may be appropriate to establish a statutory office of Deputy Ombudsman. It could have a specific function or a general function. With the demands of the various jurisdictions involving the Ombudsman, it is quite possible that there may be occasions when the Ombudsman is not available to carry out powers that are limited to the Ombudsman only. For example, although the Ombudsman may delegate functions to officers, the power under the Ombudsman Act to make any report or recommendation cannot be delegated. The Act provides that if the Ombudsman is absent from duty or from Tasmania, the Governor may appoint a person as Acting Ombudsman. This process is cumbersome and has rarely, if ever, been used to cover absences by the Ombudsman due to interstate meetings or recreation leave. It has been mainly used when there has been a vacancy in the office.

A precedent for such an office in Tasmania can be found in the *Electoral Act 1985*, under which a Deputy Chief Electoral Officer may be appointed. Under that Act, if the Chief Electoral Officer is unable to perform the duties of his or her office, the Deputy Chief Electoral Officer has all the functions, powers and duties of the Chief Electoral Officer. Such a provision would be sensible in the Ombudsman Act.

The office of Deputy Ombudsman exists in other jurisdictions – for example, the Commonwealth, New South Wales and Victoria.

The alternative to creating a statutory position is to amend the delegation provision. There may be an issue of conflict of interest, as staff of the Ombudsman are employees of the Department of Justice under the *State Service Act*.

POSITION

The Ombudsman supports the amendment of the Act to provide for the appointment of a Deputy Ombudsman.

Appendix 1: Comparison of Issues across Jurisdictions

Ombudsman Legislation

Tasmania	<i>Ombudsman Act 1978</i>
Victoria	<i>Ombudsman Act 1973</i>
Queensland	<i>Ombudsman Act 2001</i>
South Australia	<i>Ombudsman Act 1972</i>
Northern Territory	<i>Ombudsman (Northern Territory) Act</i>
New South Wales	<i>Ombudsman Act 1974</i>
Australian Capital Territory	<i>Ombudsman Act 1989</i>
Western Australia	<i>Parliamentary Commissioner Act 1971</i>
Commonwealth	<i>Ombudsman Act 1976</i>

Jurisdiction

	Provision	Effect
Tas	s 12 s 4, Sched 1 Sched 2	Ombudsman may investigate 'any administrative action taken by or on behalf of a public authority' (s 12(1)) Act applies to govt departments and authorities specified in Schedule 1 Excluded administrative action contained in Schedule 2
Vic	s 13	Function of Ombudsman to investigate 'any administrative action taken in any Government Department or Public Statutory Body to which this Act applies or by any member of staff of a municipal council' (s 13(1)) Excluded authorities and branches of authorities are contained in Schedule to Act Exclusions are also contained in s 13(3) (eg admin action taken by a court of law, judge or magistrate)
Qld	s 12(a)	Function of Ombudsman is 'to investigate administrative actions of agencies' (agency defined as a department, local government or public authority)
	s 16	Principal exclusions contained in s 16 (eg policy decisions made by a Minister or Cabinet)
SA	s 13 s 3	Ombudsman may investigate any administrative act (s 13(1)) (defined as one of an agency) Agency defined as a department, an authority, a council Inclusions and exclusions by way of definitions of 'administrative act', 'agency to which this Act applies', 'authority', 'council' and 'department'
NT	s 3(1)	Function is to investigate administrative action taken by, in or on behalf of dept or authority to which Act applies Exclusion from jurisdiction by way of definition of 'administrative action', 'authority', 'department' and 'local government council'
NSW	s 5 Sched 1	Established by way of definition of 'conduct', 'local government authority' and 'public authority' Excluded conduct of public authorities contained in Schedule 1
ACT	s 3 s 5(2)	Established by definition of 'prescribed authority', 'agency', 'taking of action' Further exclusions contained in setting out functions of Ombudsman
WA	s 4, s 4A s 13	Established by definition of 'authority', 'department', 'contractor' Exclusions and further explanations contained in s 13 (Departments and authorities subject to investigation)
Cth	s 5(1)(a) s 3	Ombudsman investigates action relating to matter of administration taken by dept or prescribed authority Jurisdiction established by definitions of 'prescribed authority', 'department', 'Commonwealth-controlled company', 'officer'
	s 5	Exclusions contained in s 5 (eg action taken by a Minister, s 5(2)(a))

Exclusion of courts and tribunals from the Ombudsman’s jurisdiction

	Provision	Effect
Tas	s 12(5) Schedule 2	In exercise of powers under Act, the Ombudsman is not entitled to question merits of decision made by Minister, a court or an authority where the decision does not involve administrative action within jurisdiction Action taken by the Tasmanian Industrial Commission is excluded from Ombudsman’s jurisdiction
Vic	s 13(3)	Ombudsman not authorised to investigate administrative action taken by a court of law, judge or magistrate, or a board, tribunal or commission or other body presided over by a Judge, magistrate or legal practitioner presiding as such by virtue of a statutory requirement and appointment.
Qld	s 9	A court or holder of a judicial office connected with a court when acting judicially is excluded. However, a tribunal may come within the extensive definition of ‘public authority’
SA	s 5 s 3	Act does not apply to any Commission or tribunal declared by proclamation to be a Commission or tribunal to which this Act does not apply
NT	s 3	An act done in the discharge of a judicial authority is not an administrative act Excludes action of persons discharging judicial responsibilities, coroners, and magistrates or Justices discharging responsibilities relating to a preliminary examination under Part V of the <i>Justices Act</i> . Also excludes named Tribunals, for example the Appeals Tribunal under the <i>Planning Act</i>
NSW	Schedule 1	Courts and various other bodies 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
ACT	s 5(2)	Ombudsman is not authorised to investigate action taken by a Minister, a judge or master of the supreme court or the registrar or deputy registrar of the Supreme or Magistrates Court when performing a judicial function, or action taken by a magistrate or coroner, a royal commission, board of inquiry or a judicial commission
WA	s 4 Schedule 1	The key aspects of the definition of ‘authority’ are a body or the holder of an office, post of position established for a public purpose under a written law or established by the Governor or a Minister The Act does not apply to the Supreme, District, Family, Children’s, or Liquor Licensing Courts, any other court of law, a commissioner or a coroner
Cth	s 3	The definition of a ‘prescribed authority’ excludes ‘a body that has the power to take evidence on oath or affirmation and is required, or is expressly permitted, by an enactment to be constituted by, or to include among its members, a person who is a Justice or Judge of a court created by the Parliament or a person who has, by virtue of an Act, the same status as a Justice or Judge of such a court’

Government services contracted to third parties

	Provision	Effect
Tas	s 12	Subject to the Act, Ombudsman may investigate any administrative action taken by or on behalf of a public authority
Vic	s 13(6)	Where administrative action taken by a third party under instructions from an authority to which the Act applies, the action will be deemed to be that of the authority to which the Act applies
Qld	s 10(c)	An 'administrative action of an agency' includes 'an administrative action taken for, or in the performance of functions conferred on, an agency, by an entity that is not an agency.' Explanatory note: 'By providing for actions taken for an agency or an officer of an agency, the [section] intends to capture administrative actions that are outsourced.'
SA	s 3	'Administrative Act' means 'an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency' Note: the <i>Ombudsman (Honesty and Accountability in Government) Act 2002 (SA)</i> is designed to expand the Ombudsman's jurisdiction to include outsourced government services, government business enterprises, state-owned corporations, and to give the Ombudsman an 'administrative audit' role. It has not been brought into operation.
NT	s 14(8)	Powers of the Ombudsman extend to administrative action taken 'on behalf of, or in the exercise of any functions conferred on a person or body to which this act does not apply', subject to subsection (9)
	s 14(9)	Where administrative action taken by 3 rd party under instructions from dept or authority to which the Act applies, the action will be deemed to be that of the dept or authority to which the Act applies
NSW	s 5	Paragraph (h) of the definition of 'public authority': 'Any person acting for or on behalf of, or in the place of, or is deputy or delegate of, and person described in any of the forgoing paragraphs'
ACT	s 3	'Officer', in relation to an administrative unit, includes a person 'authorised to exercise powers or perform functions on behalf of that administrative unit'. In relation to a 'prescribed authority', it includes 'a person authorised by the authority to exercise any powers or perform any functions of the authority or on behalf of the authority'. Action of an officer of an admin unit/prescribed authority is deemed to be the action of the administrative unit
WA	s 4A(1)(f)	A contractor or subcontractor is an 'authority' for the purposes of the Act
Cth	N/A	Note: the Commonwealth Joint Committee of Public Accounts and Audit recommended that the <i>Ombudsman Act 1976 (Cth)</i> be amended to extend the jurisdiction to include all government contractors. ¹

¹ Parliament of Australia Joint Committee of Public Accounts and Audit, *Contract Management in the Australian Public Service (2000)*, available from <http://www.apf.gov.au/house/committee/jpaa/contracts/contents.htm>

Time Limit on Bringing Complaints

	Provision	Effect
Tas	s 19	Shall not investigate any action where more than 2 years have elapsed, unless satisfied there are substantial grounds why in the public interest the investigation should be carried out
Vic	s 15	May refuse to investigate if complainant aware of action more than 12 months before the complaint was made
Qld	s 20	Complaint must be made within 1 year of day the complainant first had notice of the action
SA	s 16	Must not be entertained if made after 12 months from the day the complainant first had notice of the action unless the Ombudsman is of the opinion it is proper to do so
NT	s 18	May refuse to investigate if complainant aware of action more than 12 months before the complaint was made.
NSW	s 12	
ACT	s 6	May decline to investigate if complainant aware of action more than 12 months before the complaint was made.
Cth	s 6	May decline to investigate if complainant aware of action more than 12 months before the complaint was made.

Format of Complaints

	Provision	Effect
Tas	s 14(1)	A complaint may be made in writing
Vic	s 14	A complaint shall be made in writing (s 14(2)(b)) Ombudsman may conduct own motion investigation (s 14(1))
Qld	s 20	Complaints may be made orally or in written form (s 20(1)(a)) Ombudsman may give a person the help necessary to put their complaint in writing (s 20(4)) Ombudsman may decline to investigate an oral complaint until the complaint is put in writing (s 20(3)(a))
SA	s 13(2)	Ombudsman may make investigation on receipt of a complaint or on the Ombudsman's own initiative [not specific regarding format]
NT	s 17(2)	A complaint shall, if the Ombudsman so directs, be made in writing by the person or body aggrieved but no special form shall be required
NSW	s 12(4), (4A)	Complaint must be in writing, however Ombudsman may accept a complaint that is not in writing where they consider appropriate to do so; in that event, the complaint must be put in writing as soon as practicable
ACT	s 7(1), (2)	Complaint to Ombudsman may be made orally or in writing; where made orally, at any time the Ombudsman may put the complaint in writing or require the complainant to do so. Where Ombudsman makes such a requirement of the complainant, Ombudsman may decline to investigate until complainant complies.
WA	s 17(1)	Complaint shall be made in writing
Cth	s 7	A complaint may be made orally or in writing Where made orally, the Ombudsman may reduce the complaint to writing or at any time require the complainant to reduce the complaint to writing and, where the Ombudsman makes such a requirement of a complainant, may decline to investigate the complaints until the complainant reduces the complaint to writing

Discretion to decline to investigate if matter not first raised with Agency

	Provision	Effect
Tas	s 20(3)	Where adequate provision is made under administrative practice for review of action to which complaint relates, Ombudsman may refuse to investigate if action has/will be reviewed in accordance with the practice, or it would be reasonable for the aggrieved person to have to action reviewed in accordance with the practice
Qld	s 23(1)(d)	Ombudsman may refuse to investigate a complaint where the complainant has a right of appeal, reference or review, or another remedy, that the person has not exhausted and it would be reasonable in the circumstances to expect them to do so before the Ombudsman investigates
SA	s 13(3)(a)	Ombudsman must not investigate a complaint where the complainant is provided with a right of appeal, reference or review to a court, tribunal, person or body under any enactment, unless the Ombudsman is of the opinion that it is unreasonable to expect the complainant should resort to that right
NT	s 18(1A)(a)	Ombudsman may decide not to investigate where complainant has not complained to the relevant department or authority in respect of the action
NSW	s 13(4)(b)(v)	In deciding whether to investigate, Ombudsman may have reference to whether there is or was an alternative and satisfactory means of redress available to the complainant
ACT	s 6(2)	Where complainant has not complained to the agency, Ombudsman may decide not to investigate the action until the complainant so complains
Cth	s 6(1A)	Where complainant has not complained to the department or authority, Ombudsman may decide not to investigate the action until the complainant so complains
Vic, WA	N/A	(cf p157 of <i>Final Report: Review of the Ombudsman (Northern Territory) Act</i> , which suggests that in Vic, there <u>is</u> discretion to refuse to investigate where complainant has not pursued matter with agency. This is not evident in the Vic Act, however)

Making of inquiries to determine whether complaint can be resolved informally

	Provision	Effect
Tas	s 21(2)	Ombudsman may make enquiries to determine whether may refuse to investigate
Vic	s 13(A)(1)	Ombudsman may conduct an enquiry to determine whether (a) an investigation should be conducted; or (b) the matter may be resolved informally
Qld	s 24	The Ombudsman may conduct an investigation or part of an investigation (a) informally; or (b) by exercising powers under part 4 (Powers and procedures for investigations)
SA	s 18	Ombudsman may make a preliminary investigation of an administrative act to determine whether to proceed with a full investigation
NT	s 17A	Where complaint has been made, Ombudsman may make preliminary inquiries to determine the complaint expeditiously and without an investigation (s 17A(1)(b)(ii))
NSW	s 13AA	Such an investigation is not an investigation for the purposes of s 19 (procedures for investigations) (s 17A(2)) May make preliminary inquiry for purpose of determining whether to investigate
ACT	s 8	May make preliminary inquiries to determine whether the Ombudsman is authorised to investigate or may decline to do so
WA	s 19	If the Commissioner is of the opinion that a complaint could be investigated and resolved expeditiously by conducting an informal investigation then (a) may notify the principal officer orally; and (b) the Commissioner may notify the responsible minister, but does not have to do so.
Cth	s 7A(1)	May make preliminary inquiries to determine whether the Ombudsman is authorised to investigate or may decline to do so

Power to stay an action until an investigation is complete

	Provision	Effect
SA	s 19A	<p>(1) Ombudsman may direct an agency to refrain from performing an administrative act for a period</p> <p>(2) Must not be for more than 45 days in aggregate</p> <p>(3) Must not issue a notice under this section unless satisfied:</p> <p>(a) that the relevant administrative act is likely to prejudice (i) an investigation; (ii) the effect/implementation of a recommendation made as a result of an investigation; and</p> <p>(b) that the compliance with the notice by the agency would not result in the agency breaching a contract or other legal obligation or cause third parties undue hardship; and</p> <p>(c) that issue of the notice is necessary to prevent serious hardship to a person</p> <p>(4) Ombudsman may revoke a notice under this section, and must if not satisfied that criteria fulfilled</p> <p>(5) Agency may not comply if of opinion that failure to comply with notice would be reasonable and justifiable</p> <p>(6) If an agency fails to comply with a notice, the following provisions apply:</p> <p>(a) the principal officer of the agency must report to the Ombudsman within the time allowed on the reason for the agency's failure to comply with the notice;</p> <p>(b) if, following receipt of the principal officer's report, the Ombudsman is of the opinion that the agency's failure to comply was unjustified/unreasonable, Ombudsman may make report to the Premier;</p> <p>(c) Ombudsman may forward copies of any report to the premier to the Speaker of the House of Assembly and the President of the Legislative Council with a request that they be laid before their respective houses.</p>
NSW	s 21C	Supreme Court may grant injunction restraining any conduct in which public authority is engaging or appears likely to engage
Tas, Vic, Qld, NT, ACT, WA, Cth	N/A	

Power to undertake cross-jurisdictional investigation

	Provision	Effect
Tas	s 26(3)	Except as provided in s 26(4) (certification by Attorney-General), s 26(1) (secret) does not prevent Ombudsman from providing information to another Ombudsman relating to a matter arising under the law of that Ombudsman's jurisdiction
Vic	s 20A	Ombudsman may communicate to state, territory and Commonwealth Ombudsman any information obtained or received in the course of functions under Act
SA	s 9	Ombudsman may delegate powers or functions (except power of delegation) to any person
NT	s 23(1)(a)(iii)(C) s 14A s 12	Information obtained in an investigation may be disclosed for exchange of information between Ombudsmen By arrangement with the Cth Ombudsman, NT Ombudsman may deal with a complaint made to, or complete an investigation begun by, the Cth Ombudsman, as thought the complain had been made under the NT Act Ombudsman may, with the consent of the Minister, delegate to any other person, any of his powers under this Act except the power of delegation and the powers relating to reports
NSW	ss 10A, 10B	May delegate to other Ombudsmen where of the opinion that an investigation may be more effectively or appropriately carried out by the other Ombudsman; may accept delegation/conferral of function
ACT	s 32 s 10 s 6A(1)	May delegate powers (except reporting) to any person; Ombudsman authorised to accept delegations May make arrangement with the Ombudsman of the Commonwealth, a state, or two or more of them, with respect to particular matters of administration May refer matters to other statutory office holders (stat office holder defined as a person holding an office established under law of ACT, Cth or other state or territory)
Cth	s 8A s 34 N/A	May make arrangement with the Ombudsman of the a state, or two or more of them, with respect to particular matters of administration May delegate powers (except reporting) to any person; may exercise delegated powers
Qld, WA		

Formal conciliation power

	Provision	Effect
SA	s 17A	(1) Ombudsman may decide to attempt to deal with a complaint by conciliation; (2) may act personally or through some other person; (3) If satisfied that the conciliation has resolved the subject of the complaint, Ombudsman may determine that the complaint should not be further investigated under the Act
NSW	s 13A	Ombudsman may attempt conciliation at any time; conciliator must be the Ombudsman, or an officer of the Ombudsman; may arrange for mediator assistance; participation is voluntary and either party may withdraw at any time If attempt to deal with the complaint by conciliation is unsuccessful, the complaint is to be treated as if the conciliation had not taken place
Tas, Vic, Qld, NT, ACT, WA, Cth	N/A	

Deputy Ombudsman

	Provision	Effect
Vic	s 6A	Governor in Council may appoint a Deputy Ombudsman (Police Complaints)
NSW	s 8(1)	Ombudsman may appoint one or more Deputy Ombudsman and Assistant Ombudsman
WA	s 5(1)(a)	The Parliamentary Commissioner shall be assisted by a Deputy Commissioner, to be known as the Deputy Parliamentary Commissioner for Administrative Investigations
Cth	s 6A	Deputy Commissioner shall act in the officer of Commissioner during absence, vacancy or suspension
	s 4(1)	There shall be at least one and not more than three Deputy Commonwealth Ombudsmen
Tas, Qld, NT, SA, ACT	N/A	