



## OMBUDSMAN INQUIRIES AND INVESTIGATIONS

### INFORMATION FOR AGENCIES

#### **Key Points**

- ❖ **The Ombudsman shares a key goal with all public sector officers – ensuring the best level of service is provided to Territorians.**
- ❖ **Complaint mechanisms (internal and external) are a vital tool for identifying and solving issues and improving government administration.**
- ❖ **Over 90% of complaints to our Office are resolved by informal interaction with the agency.**
- ❖ **To achieve informal outcomes, we rely on agencies to provide information by way of timely, well-considered and pertinent responses.**
- ❖ **When we seek information from an agency, restrictions relating to confidentiality, secrecy, privacy, and legal privilege do not apply.**
- ❖ **This does not mean that information provided to us will be disclosed to others. If an agency has concerns about disclosure to others, give us the information but tell us about any concerns.**
- ❖ **We do not take sides in a complaint. We do not represent a complainant or an agency.**
- ❖ **On investigation, we have very broad investigative powers, backed by substantial penalty provisions if there is non-compliance.**
- ❖ **We give people a chance to respond before making adverse comments in any final report.**



## Why are we here?

An external inquiry or investigation into decisions made or actions taken in an agency can often lead to a sense of uncertainty, stress and disruption.

Some agency officers may say, “We are the experts in this field.” “We are too busy doing our core business to deal with this.”

However, complaints by the public about actions of public sector agencies are an ever-present and indeed healthy feature of our system of democratic government. Dealing with them is core business.

People have the right to question decisions affecting them, whether they voice their concerns directly to the responsible agency or to the Ombudsman’s Office as an independent review body.

Responding to complaints in a timely and effective manner can not only improve agency relationships with clients and stakeholders but point the way to improvements in how an agency does its business.

Having a level of external review by the Ombudsman is part of a robust system of accountability in the Territory.

Our investigations regularly identify (most often in co-operation with the agency) potential improvements in agency practices and procedures.

## Process overview

### **Role**

The Ombudsman investigates administrative actions of NT public authorities (‘agencies’) in order to resolve individual complaints and improve the quality of decision-making and administrative practices.

The Ombudsman may investigate on the basis of:

- a complaint;
- a reference from the Legislative Assembly; or
- the Ombudsman’s own initiative (own motion).

### **Preliminary Inquiries**

Our Office can undertake preliminary Inquiries to establish whether we can and should investigate a matter.

The principal officer of an agency must give the Ombudsman reasonable help in the making of preliminary inquiries [s29].

Following preliminary inquiries, the Ombudsman may make a decision on a matter without the need for a formal investigation if satisfied, having regard to the nature and seriousness of the matter, it may be resolved expeditiously. The great majority of Ombudsman complaints are resolved in this way.

### **Investigation**

In some cases, the Ombudsman may decide to proceed to Investigation.

Following an Investigation, the Ombudsman provides a report to the agency and complainant (if there is one). The report may include recommendations for improvements in administrative practices. If it is proposed to include adverse comments in a report, the subject person or agency will be given a chance to respond before the report is finalised.

In some cases, a report may also be provided to the relevant Minister. Ultimately, a report may be tabled in the Legislative Assembly.

### **Obtaining information**

The Ombudsman seeks to work with agencies to resolve matters informally and expeditiously in the Preliminary Investigation phase. If the matter is not simply referred to the agency for action, the first step is usually to seek information from the agency.

### **Secrecy, confidentiality, privacy, privilege, DOES NOT STOP disclosure to Ombudsman.**

On occasion, agencies express concern about statutory provisions or an agreement that may restrict disclosure of information.

However, an agency cannot object to disclosing information to us on the grounds of a secrecy, confidentiality or privacy provision or legal professional privilege. The Act provides that for both preliminary inquiries and investigations:

- an obligation to maintain secrecy or other restriction on the disclosure of information obtained by or given to officers of a public authority, whether imposed by any law of the Territory or otherwise, does not apply to the disclosure of information;
- the Territory or a public authority is not entitled to any privilege that would apply in a legal proceeding to the production of documents, or the giving of evidence [s117].

This does not mean that information provided to us will necessarily be disclosed to anyone else. If an agency has concerns about disclosure of particular information to third parties **all information and documents should be provided to Ombudsman staff for review without editing, deletion or restriction**. At the same time, the agency can advise our Office of any concerns about disclosure to others. Consideration can then be given to whether and what information needs to be disclosed and any necessary restrictions on further disclosure.

There are also provisions that allow a principal officer of an agency to ask that information, a statement, document or thing, not be disclosed to anyone else [s30, s52(2)]. It should also be noted that Ombudsman staff are bound by a confidentiality provision [s120].

For individuals called on to provide information, subject to Part 6 of the Act, an individual has, for the giving of information and the production of documents or other things for preliminary inquiries or an investigation, equivalent privileges to the privileges the person would have as a witness in a proceeding in a court [s117(4)].

### Non-disclosure direction

Sometimes, it is important not to disclose the fact of a preliminary inquiry or investigation, or information relevant to the matter. For example, disclosure might prejudice an investigation.

The Ombudsman has the power to issue to a person a written notice directing non-disclosure. Failure to comply with a notice is an offence [s121].

There are also penalties for a person consulted by someone subject to a notice (eg, a legal practitioner) who subsequently discloses or makes improper use of such information [s122]

### Protections for complainants/witnesses

There are protections in place for complainants and witnesses which make it an offence punishable by a fine or imprisonment to:

- prevent or obstruct someone from making a complaint [s124];
- commit an act of reprisal against a person who has:
  - made or intends to make a complaint; or
  - cooperated or intends to cooperate with a person acting in an official capacity under the Act [s125].

### Updates / support during investigation

We make every effort to keep complainants and agencies updated about the progress of an investigation to the extent appropriate in the particular case.

Individual witnesses will not necessarily be kept updated unless there is need to obtain further information or to put a matter to the witness for comment.

Within an agency, the very existence of an investigation can give rise to a level of concern and conjecture. Rumours may circulate. They may or may not be accurate. Individuals involved in the process may be concerned about the potential for adverse comments or findings about them or their work group.

Subject to any non-disclosure obligations under ss121-122, it is important for the principal officer of an agency to consider to what extent (if any):

- the agency should provide information and offer support for individuals involved in or impacted by the investigation; and
- information about the investigation should be disclosed within the agency or to other stakeholders.

Our Office is happy to discuss issues of this nature with the agency but providing support and updates to agency staff will be a matter for the agency unless otherwise agreed.

### Investigation

#### **Process**

At the start of an investigation we must notify the principal officer of the agency, the responsible Minister and the complainant (if there is one) [s47].

The Ombudsman must conduct an investigation in private and must comply with natural justice [s.48(1), 49] but otherwise may conduct an investigation in the way the Ombudsman considers appropriate. The Ombudsman is not bound by the rules of evidence [s49].

A number of factors, such as the nature of the issue complained about, affect how an investigation is carried out. An assessment is made about what evidence is required, which normally involves reviewing agency files and which may or may not involve interviewing agency staff.

## **Powers on investigation**

For the purposes of an investigation, the Ombudsman has very broad powers, including the power to:

- obtain relevant information from the persons, and in the way, the Ombudsman considers appropriate;
- consult with the persons the Ombudsman considers appropriate;
- make the inquiries the Ombudsman considers appropriate;
- require information to be given on oath;
- require information or a document to be verified by statutory declaration;
- require a person to give the Ombudsman an oral or written statement; a stated document or thing; or all documents of a stated type;
- require a person to create and give the Ombudsman a document;
- hold a hearing;
- require a person to attend at a hearing and give information, answer questions, give a stated document or thing, or all documents of a stated type;
- enter and inspect premises occupied by a public authority;
- take extracts from or copy documents located at the premises;
- require an officer of the agency at the premises to provide reasonable help.

Those powers are backed by a range of offence provisions for non-compliance or providing misleading information or documents, with penalties ranging from substantial fines to imprisonment [s123, ss126-129].

## **Impartiality**

Our role is to attempt to ascertain the truth of a matter by uncovering all the relevant facts. We do not act as an advocate for the complainant, nor do we defend an agency's actions.

In the event that an investigator assigned to the case discovers a possible conflict of interest, he or she is required to immediately notify the Ombudsman, who will decide whether the case needs to be reassigned.

## **Natural justice and fairness**

Investigations are conducted in accordance with the principles of natural justice.

We make every effort to:

- provide a reasonable opportunity for people to put their case;
- inform people of the substance of allegations that may result in an adverse comment or finding in relation to them;
- make reasonable inquiries and consider any submissions before making a decision;
- act fairly and without bias;
- conduct the investigation without undue delay.

### **Confidentiality**

We are bound by the Act to maintain confidentiality of all information that is received by us in the course of our investigation and to disclose information only for the purposes of the investigation or reporting.

In certain circumstances there may be a need to maintain confidentiality of specific facts such as the identity of the complainant, witnesses and so on. Where we consider this to be necessary, we will inform agencies of the reasons for the decision.

### **Breach of duty or misconduct**

If during or after an investigation, the Ombudsman is satisfied that there is evidence of a breach of duty or misconduct by an officer of an agency, the Ombudsman must report the matter to the principal officer of the agency [s60].

### **How can agencies help?**

Even if an Investigation is commenced, our Office will continue to seek the cooperation and assistance of the agency to facilitate the timely and effective finalisation of the Investigation.

The Ombudsman must complete an investigation as soon as practicable [s48]. We therefore seek every assistance from agencies in the provision of information and other materials relevant to the matter.

Initially we will ask the principal officer of the agency to nominate a contact officer within the agency who we can deal with. The officer should be at a senior level with authority to make internal inquiries and decisions relevant to the investigation. The officer should be available for the likely duration of the Investigation.

Agencies can assist with investigations by:

- Responding promptly
- Responding within stated time limits or contacting us to seek an extension if there is good reason for delay
- Contacting us immediately if clarification of a request is necessary or provision of particular information or evidence would require an unreasonable commitment of resources by the agency
- Using Plain English
- Providing a clear, succinct and complete response
- Ensuring factual accuracy
- Arguing the case logically
- Supporting the argument with relevant facts
- Describing exemplary agency actions
- Acknowledging any error or mistake and considering making a fresh decision
- Acknowledging the complainant's argument
- Considering inadequacies of the agency's policies or procedures
- Offering a remedy if appropriate
- Avoiding repetition of the complaint by fixing matters promptly
- Ensuring that officers who deal with complaints have the power to make and change decisions.

If any member of the staff of an agency is required to attend before the Ombudsman and provide information or documents, we will advise them of their rights and obligations. Agencies can assist staff by advising them of the role of the Ombudsman and encouraging staff to contact us if they have any questions.

When we advise our intention to conduct interviews with agency officers, it will assist the investigation if the officers refresh their knowledge of the relevant actions by reviewing the agency file or their personal notes and by having handy relevant documents which can pinpoint key facts such as decisions and dates.

We recognise that an agency and some of its officers may find an investigation has a significant impact on them, either in terms of affecting their ability to conduct other work or in personal terms.

Our investigators are mindful of the impact of our work and seek to minimise disruption to the agency workplace. Our commitment is to act with discretion, respect and confidentiality at all times.

## Outcome of investigation

After completing an investigation, we must inform the complainant and the principal officer of the result of the investigation [ss57, 58]. Depending on the nature of the investigation and outcomes, this may take the form of a letter or a more formal report or reports.

Before finalising a report, if it is proposed to make an adverse comment in relation to a person or an agency, the Office will give the person or the principal officer of the agency, an opportunity to make a submission about the proposed comment. We will ensure that the submission is taken into account and fairly represented in finalising the report [s63].

When preparing a report, we must consider whether the investigation has disclosed any action that was:

- contrary to law;
- unreasonable, unjust, oppressive, or improperly discriminatory;
- in accordance with a rule of law or a provision of any law that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;
- taken for an improper purpose, on irrelevant grounds, or which took into account irrelevant considerations;
- a decision for which a reason should have been given but was not;
- based wholly or partly on a mistake of law or fact; or
- wrong.

If we make such a finding, we must consider whether:

- the action should be referred to the agency for further consideration;
- action could and should be taken to rectify or mitigate or alter the effects of the action;
- any practice should be varied;
- any law should be reconsidered;
- reasons or further reasons for action should be given; or
- any other steps should be taken.

If satisfied of the above, the Ombudsman must state in the report the reasons the Ombudsman is so satisfied [s59(1), (2)].

## Recommendations

A report to the principal officer of an agency may include any recommendations the Ombudsman considers appropriate [s62].

The Ombudsman may also request the principal officer of the agency to give written notice within a stated period of:

- steps taken or proposed to give effect to the recommendations; or
- the reasons for not taking all steps necessary to give effect to the recommendations.

If the Ombudsman considers that appropriate steps to give effect to the recommendations have not been taken within a reasonable time, the Ombudsman may give a copy of the report together with any comments of the principal officer, to the relevant Minister. At the same time, the Ombudsman may give the Minister a report on the matter for tabling in the Legislative Assembly [s63].

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