

**REVIEW OF
SCHEDULE I OF THE
OMBUDSMAN ACT 1974**

**Report of the Committee on the Office of the
Ombudsman & the Police Integrity Commission**

November 1997

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CONTENTS

	<i>Page</i>
Committee Membership	1
Functions of the Committee	2
Terms of Reference	5
Chairman's Foreword	6
Executive Summary	7
Summary of Recommendations	9
Chapter 1 <i>Background to the Review</i>	
1.1 Introduction	13
1.2 Impetus for review	13
1.3 Call for submissions	14
1.4 Submissions received	14
1.5 The submission from the Office of the Ombudsman	14
1.6 Public hearings	15
Chapter 2 <i>Who is excluded from the Ombudsman's Jurisdiction</i>	
2.1 History of Schedule 1	16
Table 2.1 - History of clauses contained in Schedule 1	18
Chapter 3 <i>The process by which conduct is excluded from the Ombudsman's jurisdiction</i>	
3.1 How clauses in Schedule 1 currently are amended	24
3.1.1 Amendments made by proclamations	24
3.1.2 Amendments made by statute	26
3.2 Consultation with the Ombudsman	27
3.3 Consultation with other bodies	28
3.4 Comparison of interstate Legislation	29
Table 3.4 - Comparison of interstate Legislation	30
Chapter 4 <i>Other mechanisms to exclude conduct from the Ombudsman's jurisdiction</i>	
4.1 Conduct excluded from the Ombudsman's jurisdiction by means other than Schedule 1.	33
4.2 Should Schedule 1 be the only mechanism for excluding conduct from the Ombudsman's jurisdiction?	34
Chapter 5 <i>The scope of administrative conduct excluded from the Ombudsman's jurisdiction</i>	
5.1 Introduction	37
5.2 Parliamentary and legislative exemptions (nos. 1&4)	38
5.3 Judicial and legal exemptions (nos. 2,3,6-11)	41

5.4	Law enforcement exemptions (nos. 13&21)	50
5.5	Mediation and conciliation exemptions (nos. 18&27)	54
5.6	Exclusion of independent statutory bodies (nos. 19&20)	55
5.7	Exclusions from the Ombudsman's jurisdiction by protocols (no. 17)	59
5.8	Exclusions which are out of date (nos. 22&25)	63
5.9	Investment practices exclusions (nos. 14&15)	65
5.10	Other exclusions (nos. 12,16,24&26)	67

Chapter 6 Further issues arising from the review

6.1	Is there a need for guiding criteria for excluding conduct from the Ombudsman's jurisdiction?	75
6.2	Should Schedule 1 be subject to regular review?	78

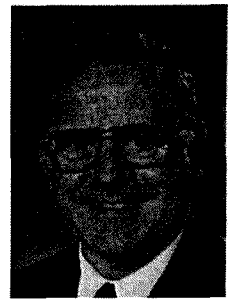
Appendices

1. List of Submissions
2. Submission from the Office of the Ombudsman
3. Extract from the Fourth General Meeting between the Committee and the Ombudsman
4. Schedule 1 of the *Ombudsman Act 1974*
5. Jurisdiction of the Ombudsman - Interstate Legislation
6. Minutes

COMMITTEE MEMBERSHIP

Legislative Assembly

Mr B J Gaudry MP (Chairman)
 Mr J Anderson MP
 Mr A R G Fraser MP
 Mr J S P Kinross MP
 Mr P G Lynch MP
 Ms R P Meagher MP
 Ms C Moore MP
 Mr A P Stewart MP



Legislative Council

The Hon M Gallacher MLC
 The Hon E B Nile MLC
 The Hon A B Kelly MLC^
 The Hon P J Staunton MLC (Vice Chairman)*



Secretariat

Ms H Minnican - Director
 Ms R Miller - Clerk to the Committee
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 Ms N O'Connor - Assistant Committee Officer

Committee on the Office of the Ombudsman and the Police Integrity Commission (left to right):
 Bryce Gaudry MP (Chairman), James Anderson MP, Andrew Fraser MP, Jeremy Kinross MP, Paul
 Lynch MP, Reba Meagher MP, Clover Moore MP, Anthony Stewart MP, The Hon Michael Gallacher
 MLC, The Hon Elaine Nile MLC, ^The Hon Anthony Kelly MLC (from 24 September 1997)(not
 pictured) and *The Hon Patricia Staunton MLC (resigned from Parliament on 2 September 1997)

FUNCTIONS OF THE COMMITTEE

The Committee on the Office of the Ombudsman and the Police Integrity Commission is constituted under Part 4A of the Ombudsman Act 1974. The functions of the Committee under the Ombudsman Act 1974 are set out in section 31B (1) of the Act as follows:

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

These functions may be exercised in respect of matters occurring before or after the commencement of this section of the Act.

Section 31B (2) of the Ombudsman Act specifies that the Committee is not authorised:

- ◆ to investigate a matter relating to particular conduct; or
- ◆ to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or
- ◆ to exercise any function referred to in subsection (1) in relation to any report under section 27; or
- ◆ to reconsider the findings, recommendations, determinations or other decisions of the Ombudsman, or of any other person, in relation to a particular investigation or complaint or in relation to any particular conduct the subject of a report under section 27; or
- ◆ to exercise any function referred to in subsection (1) in relation to the Ombudsman's functions under the Telecommunications (Interception) (New South Wales) Act 1987.

The Committee also has the following functions under the Police Integrity Commission Act 1996:

- ◆ to monitor and review the exercise by the Commission and the Inspector of their functions;
- ◆ to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of their functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- ◆ to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing, or arising out of, any such report;
- ◆ to examine trends and changes in police corruption, and practices and methods relating to police corruption, and report to both Houses of Parliament any changes which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector; and
- ◆ to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

The Act further specifies that the Joint Committee is not authorised:

- ◆ to investigate a matter relating to particular conduct; or
- ◆ to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, a particular matter or particular conduct; or
- ◆ to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or a particular complaint.

The Statutory Appointments (Parliamentary Veto) Amendment Act, assented to on 19 May 1992, amended the Ombudsman Act by extending the Committee's powers to include the power to veto the proposed appointment of the Ombudsman and the Director of Public Prosecutions. This section was further amended to provide the Committee with the same veto power in relation to proposed appointments to the positions of Commissioner for the PIC and Inspector of the PIC. Section 31BA of the Ombudsman Act provides:

- “(1) The Minister is to refer a proposal to appoint a person as Ombudsman, Director of Public Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.
- (2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.

- (3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.
- (4) A referral or notification under this section is to be in writing.
- (5) In this section, a reference to the Minister is;
 - (a) in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act;
 - (b) in the context of an appointment of Director of Public Prosecutions, a reference to the Minister administering section 4A of the Director of Public Prosecutions Act 1986; and
 - (c) in the context of an appointment of Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, a reference to the Minister administering section 7 or 88 (as appropriate) of the Police Integrity Commission Act 1996.”

TERMS OF REFERENCE

The Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission has resolved to review and report to Parliament on Schedule 1 of the *Ombudsman Act 1974*, with particular reference to:

- a) the scope of the administrative conduct excluded from the Ombudsman's jurisdiction;
- b) how determinations are made about the exclusion of conduct under Schedule 1;
- c) the process by which conduct is excluded from the Ombudsman's jurisdiction and amendments are made to Schedule 1;
- d) any other matter that the Committee considers relevant to the review.

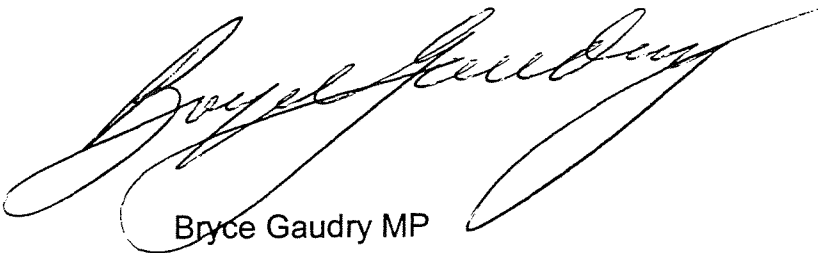
CHAIRMAN'S FOREWORD

This report on the review of Schedule 1 of the *Ombudsman Act 1974* is the first comprehensive examination of conduct excluded from the Ombudsman's jurisdiction since the establishment of the Office of the Ombudsman in 1974. The review not only examined the scope of the administrative conduct excluded from the Ombudsman's jurisdiction, but also the process by which conduct is excluded from the Ombudsman's jurisdiction and how amendments are made to Schedule 1.

The review dealt with a number of difficult, and at times contentious issues. The recommendations contained in the Committee's report are aimed at ensuring that the conduct excluded from the Ombudsman's jurisdiction is appropriately excluded, that amendments to Schedule 1 are not done on an ad hoc basis, and that the schedule is reviewed regularly.

On behalf of the Committee I would like to thank the witnesses who gave evidence, and those groups and individuals who made submission for the review. The Office of the Ombudsman provided a comprehensive submission which focused on the scope of conduct currently excluded from her jurisdiction, and suggestions for improving the process by which amendments are made to Schedule 1. Other submissions can roughly be placed into two categories. One category dealt with the process by which conduct is excluded from the Ombudsman's jurisdiction. The Cabinet Office provided a key submission in this category. The other category dealt with the scope of conduct excluded under Schedule 1 of the *Ombudsman Act 1974*. A number of these submissions came from those public authorities whose conduct is currently exempt from investigation by the Ombudsman and generally put forward arguments as to why they should remain excluded from her Office's jurisdiction.

I would particularly like to express my thanks to Committee Members for their involvement throughout the public hearings and the deliberative process. I would also like to thank the Committee Secretariat for their work and assistance throughout the review.



Bryce Gaudry MP
Chairman

Executive Summary

Schedule 1 of the *Ombudsman Act 1974* lists the types of conduct of public authorities which are excluded from investigation by the Ombudsman. This review of Schedule 1 is the first systematic examination of conduct excluded from the Ombudsman's jurisdiction since the establishment of the Office of the Ombudsman 22 years ago. The Committee resolved to conduct the review after concerns were expressed on a number of occasions by the Ombudsman about the scope of administrative conduct excluded from her jurisdiction and the process by which such conduct is included in Schedule 1.

In undertaking this review the Committee has been primarily concerned with inquiring into the appropriateness of matters removed from the Ombudsman's purview and, consequently, each clause of Schedule 1 has been individually examined. The Committee also looked into wider issues such as the process by which conduct is included in Schedule 1 and the mechanisms used to define the extent of the Ombudsman's jurisdiction.

On close examination of the Schedule the Committee found that several clauses were inappropriate or unclear. It has been recommended that certain clauses be repealed to bring conduct within the Ombudsman's jurisdiction and that changes be made to several others to clarify the extent of the Ombudsman's jurisdiction.

The process for amending Schedule 1 is outlined in section 14 of the *Ombudsman Act 1974* which provides that the Governor may, by proclamation published in the Gazette, amend Schedule 1 so as to add to it, or omit from it, any class of conduct of a public authority. The proclamations are subsequently put before Parliament and may be subject to disallowance. Additionally, the Schedule may be amended through legislation. Evidence taken by the Committee indicates that clauses have been included in the Schedule on a fairly ad hoc basis and the majority of amendments have been effected through legislation rather than by proclamation.

Although the proposed legislation amending Schedule 1 would have been debated in the Parliament, the Committee was concerned that changes to the Ombudsman's jurisdiction may not have been subject to full debate, given that the amending legislation would not have focussed directly on the Ombudsman. The Committee heard evidence that proclamations are subject to the same consultative process for submission to Cabinet as that which applies to proposed legislation.

At the conclusion of proceedings, the Committee formed the view that Schedule 1 had not been adequately reviewed and assessed in the past and that further changes to the Ombudsman's jurisdiction through the Schedule should be systematically monitored. Consequently, the Committee has recommended that the Schedule should be reviewed by a parliamentary committee on two levels. Firstly, at the time any proposed amendments are made to Schedule 1 and, secondly, at a regular period of five years. This proposal is aimed at ensuring that the clauses in Schedule 1 are appropriate, up to date and consistent with new legislation. It also would provide an opportunity to comprehensively examine the changes to the Schedule as a result of legislation not primarily relating to the Ombudsman.

The Committee has further proposed the development of guiding characteristics and principles on the type and scope of conduct appropriate for exclusion from the Ombudsman's jurisdiction. This would be a valuable tool for use when amendments to Schedule 1 are being proposed or when changes to the Ombudsman's jurisdiction through legislation are being considered by the Parliament. For instance, the Committee considers that conduct has been appropriately removed from the Ombudsman's jurisdiction if the primary function of the excluded public authority is of a legislative or judicial nature, if law enforcement, investigatory and inquisitorial powers are the primary function of the excluded public authority excluded, or if the conduct excluded is done so on the basis of privilege be it legal, professional or parliamentary. Obviously, this Committee would have a significant advisory role to play in the formulation of such characteristics and principles in full consultation with the Ombudsman.

The Ombudsman's jurisdiction also may be specified in legislation relating to statutory schemes such as Freedom of Information. The Ombudsman's functions within such legislation are outlined as part of comprehensive statutory schemes and need to be considered in the overall context of each scheme in order that they may be fully understood. Nevertheless, the Committee considers that it would be highly desirable for the *Ombudsman Act 1974* to include a schedule which, for ease of access, lists those pieces of principal legislation under which the Ombudsman has functions.

The report contains a number of minor recommendations relating to consultation with the Ombudsman and all bodies affected by any proposed amendments to Schedule 1. Finally, the Committee seeks to emphasise in the report that the limitations on the Ombudsman's jurisdiction set out in Schedule 1 are to be read and interpreted narrowly.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Committee recommends that the Committee on the Office of the Ombudsman and Police Integrity Commission should review all proposed amendments to Schedule 1, whether they are made by proclamation or legislative action.

Recommendation 2

The Committee recommends that specific minor amendments should be made to Schedule 1 by proclamation. Such amendments would include changes to names or to reword clauses in order to make them consistent with new legislation and up to date. The Committee further recommends that major amendments involving additions to the Schedule should be made by statute in order that they are subject to full consultation and debate.

Recommendation 3

The Committee recommends that amendments affecting the jurisdiction of the Ombudsman are matters on which the Ombudsman should be consulted. The Committee further recommends that all bodies affected by the proposed amendments to Schedule 1 should be consulted on those amendments.

Recommendation 4

The Committee recommends that a second schedule be included in the *Ombudsman Act 1974* which specifies or lists the Ombudsman's functions under other statutes and would provide easy access to the conduct within the Ombudsman's jurisdiction.

Recommendation 5

The Committee recommends that clauses 1 and 4 remain unchanged in Schedule 1 as both are appropriate exclusions from the Ombudsman's jurisdiction.

Recommendation 6

The Committee recommends that clauses 2 and 3 be consolidated into one clause which specifies that it is the exercise of judicial functions and powers, and the conduct of judicial officers, which are excluded from the Ombudsman's jurisdiction. In doing so it is necessary to identify those people associated with a court whose conduct should be excluded by clause 2.

Recommendation 7

The Committee recommends the conduct of staff performing the administrative work of the courts, who are public sector staff, should be within the Ombudsman's jurisdiction.

Recommendation 8

The Committee recommends that clause 6 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Recommendation 9

The Committee recommends that clause 7 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Recommendation 10

The Committee recommends that clause 8 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Recommendation 11

The Committee recommends that clause 9 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Recommendation 12

The Committee recommends that clause 10 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Recommendation 13

The Committee recommends that clause 11 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Recommendation 14

The Committee recommends that clause 13 and clause 21 be consolidated into one clause which excludes the conduct of police officers and transit police officers from the Ombudsman's jurisdiction.

Recommendation 15

The Committee recommends that clauses 18 and 27 be repealed and replaced with a consolidated clause which excludes the conduct of a public authority when acting as a mediator or conciliator under an Act where the Act stipulates that anything said or any admission made or document prepared for the purposes of the mediation or conciliation is not admissible in evidence in any proceedings before any court, tribunal or body.

Recommendation 16

The Committee recommends that clause 19 be amended to refer to the New South Wales Crime Commission instead of the State Drug Crime Commission.

Recommendation 17

The Committee recommends that clause 19 be further amended to exclude the conduct of the Commissioner or an Assistant Commissioner of the New South Wales Crime Commission, the New South Wales Crime Commission Management Committee, or any member of staff of the Commission who is acting under the supervision of the Commissioner or an Assistant Commissioner of the Commission, under the *New South Wales Crime Commission Act 1985*.

Recommendation 18

The Committee recommends that clause 20 be amended to ensure that it is consistent with the provisions of the *Protected Disclosures Act 1994*. This would mean that the conduct of the ICAC is excluded from the Ombudsman's jurisdiction unless the conduct arises from the making of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*) to the Ombudsman or to another person who has referred the disclosure to the Ombudsman under Part 4 of that Act for investigation or other action.

Recommendation 19

The Committee recommends that a new clause be included in Schedule 1 which excludes from the Ombudsman's jurisdiction conduct of:

- (a) The Police Integrity Commission;
- (b) The Inspector of the Police Integrity Commission or an Officer of the Inspector; and
- (c) The Commissioner of the Police Integrity Commission or an officer of the Commission (except in relation to matters referred to the Ombudsman by the Inspector) where exercising functions under the *Police Integrity Commission Act 1996*.

Recommendation 20

The Committee recommends that section 125 of the *Police Integrity Commission Act 1996*, which sets out the Ombudsman's relationship with the PIC, be amended to include an officer of the Inspector. This will ensure that officers of the Inspector are excluded from the Ombudsman's jurisdiction as is the case with the PIC Inspector, the Commissioner of the PIC and any officer of the PIC.

Recommendation 21

The Committee recommends that clause 17 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Recommendation 22

The Committee recommends that the *Ombudsman Act 1974* be amended to clarify that the Ombudsman's jurisdiction should include all incidences of maladministration in the Department of Community Services in respect of which the Community Services Commission has declined jurisdiction.

Recommendation 23

The Committee recommends that clause 22 be repealed in order to bring Schedule 1 up to date.

Recommendation 24

The Committee recommends that when the HomeFund Commissioner has completed his work and his period of appointment clause 25 be repealed.

Recommendation 25

The Committee recommends that clause 14 be narrowed to make it clear that the excluded conduct is the decision made by the public authority as to the investment of funds as distinct from maladministration which may occur in relation to the investment.

Recommendation 26

The Committee recommends that clause 15 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Recommendation 27

The Committee recommends that clause 12 be narrowed to allegations made by an individual about their own appointment or employment as an officer or employee, or allegations made by an individual about matters affecting them as an officer or employee, provided that person has available to them an alternative and satisfactory means of redress. This would appropriately limit the conduct excluded from the Ombudsman's jurisdiction to 'industrial matters'.

Recommendation 28

The Committee recommends that clause 16 be repealed to bring the conduct of the Privacy Committee within the Ombudsman's jurisdiction.

Recommendation 29

The Committee recommends that clause 24 be repealed in order to bring the administrative conduct of the Casino Control Authority within the Ombudsman's jurisdiction.

Recommendation 30

The Committee recommends that clause 26 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Recommendation 31

The Committee recommends that:

- (a) guiding characteristics and principles be developed about what conduct should fall outside the Ombudsman's jurisdiction;
- (b) such characteristics and principles should not be binding as exceptions are likely to arise; and
- (c) proposed exemptions continue to be examined on a case by case basis.

Recommendation 32

The Committee recommends that a provision be included in the *Ombudsman Act 1974* which puts beyond doubt that the limitations on the Ombudsman's jurisdiction set out in Schedule 1 are to be read and interpreted narrowly.

Recommendation 33

The Committee recommends that the *Ombudsman Act 1974* be amended to provide for a review of Schedule 1 by the Committee on the Office of the Ombudsman and the Police Integrity Commission at five-yearly periods.

CHAPTER 1

BACKGROUND TO THE REVIEW

1.1 Introduction

The Office of the Ombudsman was established in 1974 to provide for an independent redress of complaints regarding maladministration within Government Departments and organisations. The first NSW Ombudsman was appointed in 1975 with the power, under the *Ombudsman Act 1974*, to investigate the conduct of public authorities and officials.¹ However, there are a number of matters that the Ombudsman cannot investigate.

The Legislation - Section 12 of the *Ombudsman Act 1974* specifies who may complain to the Ombudsman and the types of conduct which the Ombudsman may investigate. It states:

12 Right to complain

(1) *Subject to this section, any person (including a public authority) may complain to the Ombudsman about the conduct of a public authority unless:*

- (a) *the conduct is of a class described in Schedule 1,*
- (b) *the conduct took place more than twelve months before the date of assent to this Act,*
- (c) *the conduct took place during the period of twelve months that last preceded the date of assent to this Act and the complaint was made more than twelve months after the appointed day, or*
- (d) *the conduct, being conduct of a local government authority, took place before the day appointed and notified under section 2(2) of the Ombudsman (Amendment) Act 1976.*

Schedule 1 of the *Ombudsman Act 1974* excludes certain classes of conduct from the Ombudsman's jurisdiction (see appendix 4). The original Schedule consisted of 15 clauses and over the years it has been subject to a number of changes. Twelve clauses have been added, two have been omitted and several have been amended. Despite these changes, the Schedule has not been comprehensively reviewed. The Committee's current review is the first systematic examination of the Schedule since the establishment of the Office of the Ombudsman 22 years ago.

1.2 Impetus for Review

The Ombudsman first expressed her concerns about the conduct of public authorities excluded from her jurisdiction by Schedule 1 in correspondence to the Committee in September 1996. Her concerns centred on the scope of administrative conduct

¹ NSW Ombudsman, *Annual Report 1994-95*, Sydney, 1995, pages 1-2.

excluded from her Office's jurisdiction and the process by which conduct is included in Schedule 1 of the *Ombudsman Act 1974*. The Ombudsman suggested that it was time for a comprehensive review of the classes of conduct excluded from her jurisdiction by Schedule 1.

In December 1996 the Ombudsman met with the Committee for their Fourth General Meeting during which the Ombudsman reiterated and expanded on her concerns about conduct excluded from her jurisdiction. The Ombudsman considered that not all clauses in Schedule 1 are appropriate exclusions from her jurisdiction. She argued that some amendments are required to bring Schedule 1 up to date, and that a number of clauses in Schedule 1 need to be reviewed or clarified (see appendix 3).

Upon consideration of the material on Schedule 1 submitted by the Ombudsman, the Committee resolved to conduct a review of Schedule 1 of the *Ombudsman Act 1974* and the process through which conduct is excluded from the Ombudsman's jurisdiction.

1.3 Call for Submissions

The Committee on the Office of the Ombudsman and Police Integrity Commission advertised for submissions for the review of Schedule 1 in major metropolitan newspapers in May 1997. The closing date for submissions was 6 June 1997. However, the Committee accepted a number of submissions after this date. The Committee also wrote to those public authorities currently included in Schedule 1, and a number of government departments whose administration may be affected by clauses in the Schedule.

1.4 Submissions received

The Committee received 15 submissions for the review (see appendix 1). With the exception of the submission from the NSW Ombudsman, the submissions can roughly be placed into two categories, those dealing with the process by which conduct is excluded from the Ombudsman's jurisdiction and those dealing with the scope of conduct excluded under Schedule 1 of the *Ombudsman Act 1974*. In the first category the Cabinet Office provided a key submission. The majority of other submissions in the latter category were from public authorities whose conduct is currently exempt from investigation by the Ombudsman under Schedule 1. These submissions generally put forward arguments as to why the exclusions from the Ombudsman's jurisdiction are appropriate and why they should remain in Schedule 1.

1.5 The submission from the Office of the Ombudsman

The submission from the Office of the Ombudsman focuses on four key issues. Firstly, the Ombudsman argues that specific criteria should be developed for including conduct within Schedule 1 of the *Ombudsman Act 1974*. Secondly, the Ombudsman argues that Schedule 1 should be the only mechanism for excluding conduct from her jurisdiction. Thirdly, the Ombudsman argues that Schedule 1 should only be amended by an Act of Parliament, and fourthly, that Schedule 1 should be subject to regular review. The Ombudsman also discusses her views on the clauses currently contained in Schedule

1. (See appendix 2).

1.6 Public Hearings

The Committee held public hearings for the review on the 23rd, 24th and 30th of July, 1997 and heard evidence from the following public officials and authors of key submissions:

Wednesday, 23rd July

Attorney General's
Department

Laurie Glanfield, Director-General

Thursday, 24th July

Community Services
Commission

Roger West, Commissioner
Joanna Quilty, Manager, Policy Unit

Department of Gaming
and Racing

Ken Brown, Director-General
Jill Hennessy, Director, Policy and Development
Dominic Herschel, Manager, Policy and Development

Casino Control Authority

Lindsay Le Compte, Chief Executive

Police Integrity
Commission

Tim Sage, Assistant Commissioner
Andrew Naylor, Commission Solicitor

Wednesday, 30th July

The Cabinet Office

Roger Wilkins, Director-General

Office of the
Ombudsman

Irene Moss, Ombudsman
Chris Wheeler, Deputy Ombudsman
Greg Andrews, Assistant Ombudsman (General)
Stephen Kinmond, Assistant Ombudsman (Police)

CHAPTER 2

WHO IS EXCLUDED FROM THE OMBUDSMAN'S JURISDICTION

The Office of the Ombudsman was established in 1974 after a recommendation from the New South Wales Law Reform Commission. The Ombudsman Bill proposed by the Law Reform Commission in 1973 excluded certain types of conduct of public authorities from the Ombudsman's purview. However, the Commission argued that "a decision to exclude any official action of any public authority from investigation by an Ombudsman can be justified only where compelling policy reasons for exclusion exist".² The legislation passed by the Parliament was in conformity with the Law Reform Commission's view that certain specific conduct of public authorities should be excluded from the Ombudsman's jurisdiction. The *Ombudsman Act 1974* incorporated a number of the exemptions recommended by the Commission as well as some additional clauses. The enacted legislation contained 15 clauses in the Schedule.

2.1 History of Schedule 1

As previously noted the original Schedule to the *Ombudsman Act 1974* consisted of fifteen clauses. Over the years there has been a need to update Schedule 1 in order to omit clauses which were no longer necessary, and to add clauses as the need arose. Schedule 1 can be amended by either proclamation or by statute. The majority of amendments which have occurred to Schedule 1 have been through legislation.

Amendments made by proclamation

A number of amendments have taken place through Governor's proclamation in the Gazette. These proclamations have omitted clauses or added clauses to Schedule 1, or they have redefined the scope of the exclusion in a particular clause (see table 2.1 on the History of clauses in Schedule 1).

Amendments made by statute

As noted the majority of amendments which have occurred to Schedule 1 have been through legislation. These amendments can be placed into four categories. Firstly, a number of amendments to Schedule 1 have come about with the passing of substantive legislation establishing various public authorities. With the passing of these enabling Acts, clauses were subsequently included in Schedule 1 to exclude these public authorities, and or their employees, from the Ombudsman's jurisdiction. These exclusions consist of:

- (i) the Privacy Committee. Clause 16;
- (ii) the conduct of mediators at mediation sessions under the *Community Justice Centres Act 1983*. Clause 18;
- (iii) the State Drug Crime Commission and the State Crime Commission Management Committee. Clause 19;

² NSW Law Reform Commission, *Report on the Right of Appeal from Decisions of Administrative Tribunals and Officers*, Government Printer, New South Wales, 1973.

- (iv) the Independent Commission Against Corruption. Clause 20;
- (v) the Transit Police Service. Clause 21;
- (vi) the Hen Quota Committee. Clause 22;
- (vii) the Casino Control Authority. Clause 24;
- (viii) the conduct of the HomeFund Commissioner when exercising functions under the *HomeFund Commissioner Act 1993*. Clause 25;
- (ix) the conduct of the Legal Services Commissioner when exercising functions under Part 10 of the *Legal Profession Act 1987*. Clause 26;
- (x) the conduct of a conciliator in relation to the conciliation of a complaint under the *Health Care Complaints Act 1993*. Clause 27.

Secondly, amendments have been made to Schedule 1 by statute in order to change or add names. Clause 3(a) of Schedule 1 was amended to refer to the Industrial Relations Commission of New South Wales instead of the Industrial Commission of New South Wales, and clause 7 of Schedule 1 was expanded to exclude the conduct of the Director of Public Prosecutions as well as the conduct of the Attorney General and the Solicitor General.

Thirdly, amendments have been made to Schedule 1 by statute in order to reword clauses to make them more defined. Clause 2 of Schedule 1 was reworded to differentiate between the conduct of a court and of a body with similar functions to a court, and clause 13 was reworded after the Ombudsman experienced a number of difficulties when dealing with complaints about police (see section 5.4 for a full explanation).

Finally, Schedule 1 has also been subject to various amendments through legislation. The original clause 11 was omitted from Schedule 1 by the *Ombudsman (Amendment) Act 1976*, this brought the conduct of the Council of the City of Sydney, Sydney County Council and the officers and employees of those councils within the Ombudsman's jurisdiction. The current clause 11, removing conduct related to Special Commissions of Inquiry, was inserted by the *Ombudsman (Amendment) Act 1983*. Clause 17, relating to conduct violating the privacy of persons was inserted into Schedule 1 by the *Privacy Committee Act 1975*, and the repeal of clause 23 by the *State Bank (Privatisation) Act 1994*, due to the privatisation of the State Bank, also falls into this category of amendments.

Table 2.1 sets out in detail the history of clauses contained in Schedule 1.

Table 2.1 History of clauses contained in Schedule 1

Clause	Clause in Original Schedule	Changes made to Schedule 1 since its enactment
1	Conduct of- (a) the Governor, whether acting with or without the advice of the Executive Council; (b) a Minister of the Crown, including a Minister of the Crown acting as a corporation sole, but not so as to preclude conduct of a public authority relating to a recommendation made to a Minister of the Crown; (c) Parliament; (d) the Houses of Parliament; (e) a committee of either House, or both Houses, of Parliament; (f) either House of Parliament; (g) a member of either House of Parliament, where acting as such; (h) an officer of Parliament or of either House of Parliament where acting as such.	No changes made to clause 1
2	Conduct of a person or body before whom witnesses may be compelled to appear and give evidence, and persons associated with such a person or body.	Ombudsman (Amendment) Act 1983, No. 189 Clause 2. Reworded to; Conduct of - (a) a court or a person associated with a court; or (b) a person or body (not being a court) before whom witnesses may be compelled to appear and give evidence, and persons associated with such a person or body, where the conduct relates to the carrying on and determination of an inquiry or any other proceeding.
3	Conduct of a body of which one or more of the members is appointed by the Governor or a Minister of the Crown where- (a) at least one member of the body may be appointed by virtue of his being a Judge of the Supreme Court of New South Wales, a member of the Industrial Commission of New South Wales or a Judge of the District Court of New South Wales; and (b) such a person, if appointed as such a member, has a right or duty to preside at a meeting of the body at which he is present.	Statute Law (Miscellaneous Provisions) Act (No.2) 1996, No. 121 Omitted "Industrial Commission of New South Wales" from clause 3 (a). Inserted "Industrial Relations Commission of New South Wales" instead.

Clause	Clause in Original Schedule	Changes made to Schedule 1 since its enactment
4	Conduct of a public authority relating to a Bill for an Act or the making of a rule, regulation or by-law.	No changes made to clause 4 of Schedule 1.
5	Conduct of a public authority constituted pursuant to an arrangement between- (a) the State of New South Wales and the Commonwealth; (b) the State of New South Wales and any other State; (c) the State of New South Wales, any other State and the Commonwealth.	A proclamation in the Government Gazette on 26 January 1979 omitted clause 5 from Schedule 1.
6	Conduct of a public authority where acting as a legal adviser to a public authority or as legal representative of a public authority.	No changes made to clause 6 of Schedule 1.
7	Conduct of the Attorney General, or of the Solicitor General, relating to the commencement, carrying on or termination of any proceedings before a court, including a coronial inquiry and committal proceedings before a magistrate.	Miscellaneous Acts (Public Prosecutions) Amendment Act 1986, No. 212. Inserted "or of the Director of Public Prosecutions," after "Solicitor General".
8	Conduct of a public authority relating to the carrying on of any proceedings- (a) before any court, including a coronial inquiry and committal hearings before a magistrate; or (b) before any person or body before whom witnesses may be compelled to appear and give evidence.	No changes made to clause 8 of Schedule 1.
9	Conduct of a public authority relating to an exercise of the prerogative of mercy.	No changes made to clause 9 of Schedule 1.
10	Conduct of a public authority where acting as a commissioner under the Royal Commissions Act, 1923, or, by the authority of an Act, exercising the powers of such a commissioner.	No changes made to clause 10 of Schedule 1.

Clause	Clause in Original Schedule	Changes made to Schedule 1 since its enactment
11	Conduct of the Council of the City of Sydney and of the Sydney County Council and of the officers and employees of those councils.	The original clause 11 was omitted by the <i>Ombudsman (Amendment) Act 1976, No. 39</i> . The Current clause 11 is; Conduct of a public authority where acting as a Commissioner under the <i>Special Commissions of Inquiry Act 1983</i> . This was inserted by the <i>Ombudsman (Amendment) Act 1983, No. 189</i>
12	Conduct of a public authority relating to- (a) the appointment or employment of a person as an officer or employee; and (b) matters affecting a person as an officer or employee.	A proclamation in the Government Gazette on 6 October 1995 inserted a small paragraph at the bottom of clause 12. "unless the conduct arises from the making of a protected disclosure (within the meaning of the <i>Protected Disclosures Act 1994</i>) to the Ombudsman or to another person who has referred the disclosure to the Ombudsman under Part 4 of that Act for investigation or other action."
13	Conduct of a member of the Police Force when acting as a constable.	<i>Police Service (Complaints) Amendment Act 1994, No. 9</i> . Reworded clause 13 to; Conduct of a police officer when exercising the functions of a police officer with respect to crime and the preservation of the peace.
14	Conduct of a public authority relating to the investment of any funds.	No changes made to clause 14 in Schedule 1.
15	Conduct of a public authority relating to the payment of any money as an act of grace.	A proclamation in the Government Gazette on 27 February 1981 omitted Clause 15 from Schedule 1. <i>Ombudsman (Amendment) Act 1983, No. 189</i> . Inserted a new clause 15. 15. Conduct of a public authority where the conduct is a decision made by the public authority in the course of the administration of an estate or a trust, being a decision as to the payment or investment of money or the transfer of property.

Clause	Clause in Original Schedule	Changes made to Schedule 1 since its enactment
16	Not included in original Schedule.	<i>Privacy Committee Act 1975, No. 37</i> added clause 16 to Schedule 1. 16. Conduct of the Privacy Committee constituted under the <i>Privacy Committee Act, 1975</i> .
17	Not included in original Schedule.	<i>Privacy Committee Act 1975, No. 37</i> added clause 17 to Schedule 1. 17. Conduct of a public authority relating to alleged violations of the privacy of persons.
18	Not included in original Schedule.	<i>Ombudsman (Community Justice Centres) Amendment Act 1983, No. 129</i> added clause 18 to Schedule 1. 18. Conduct of a mediator at a mediation session under the <i>Community Justice Centres Act, 1983</i> .
19	Not included in original Schedule.	<i>Miscellaneous Acts (State Drug Crime Commission) Amendment Act 1985, No. 118</i> added clause 19 to Schedule 1. 19. Conduct of a public authority where acting as a member of the State Drug Crime Commission, or the State Drug Crime Commission Management Committee, under the <i>State Drug Crime Commission Act, 1985</i> .
20	Not included in original Schedule.	<i>Independent Commission Against Corruption Act 1988, No. 35</i> added clause 20 to Schedule 1. 20. Conduct of the Independent Commission Against Corruption, the Commissioner or an Assistant Commissioner or an officer of the Commission, where exercising functions under the <i>Independent Commission Against Corruption Act 1988</i> .

Clause	Clause in Original Schedule	Changes made to Schedule 1 since its enactment
21	Not included in original Schedule.	<i>Police Department (Transit Police) Act 1989, No. 58</i> added clause 21 to Schedule 1. 21. Conduct of a public authority when acting as a member of the transit police service.
22	Not included in original Schedule.	<i>Egg Industry (Repeal and Deregulation) Act 1989, No. 99</i> added clause 22 to Schedule 1. 22. Conduct of the Hen Quota Committee where exercising functions under the <i>Egg Industry (Repeal and Deregulation) Act, 1989</i> .
23	Not included in original Schedule.	A proclamation in the Government Gazette on 27 September 1991 added clause 23 to Schedule 1. 23. Conduct of the State Bank of New South Wales Limited in exercising its banking functions. Clause 23 has since been repealed by the <i>State Bank (Privatisation) Act 1994, No. 73</i> .
24	Not included in original Schedule.	<i>Casino Control Act 1992, No. 15</i> added a new clause to Schedule 1, originally numbered clause 23 and subsequently changed to clause 24. 24. Conduct of the Casino Control Authority or any other public authority when exercising functions under the <i>Casino Control Act 1992</i> .
25	Not included in original Schedule.	<i>HomeFund Commissioner Act 1993, No. 9</i> added clause 25 to Schedule 1. 25. Conduct of the HomeFund Commissioner or a member of the staff of the HomeFund Commissioner, when exercising functions under the <i>HomeFund Commissioner Act 1993</i> .

Clause	Clause in Original Schedule	Changes made to Schedule 1 since its enactment
26	Not included in original Schedule	<p><i>Legal Profession Reform Act 1993, No. 87</i> added clause 26 to Schedule 1. 26. Conduct of the Legal Services Commissioner or a member of staff of the Commissioner, when exercising functions under Part 10 of the <i>Legal Profession Act 1987</i>.</p>
27	Not included in original Schedule	<p><i>Health Care Complaints Act 1993, No. 105</i> added clause 27 to Schedule 1. 27. Conduct of a conciliator in relation to the conciliation of a complaint under the <i>Health Care Complaints Act, 1993</i>.</p>

CHAPTER 3

THE PROCESS BY WHICH CONDUCT IS EXCLUDED FROM THE OMBUDSMAN'S JURISDICTION

3.1 How clauses in Schedule 1 currently are amended

As noted in the previous chapter amendments have been made to Schedule 1 through legislation and by proclamation published in the Gazette.

3.1.1 Amendments made by proclamations

Legislative Provisions

Section 14 of the *Ombudsman Act 1974* confers the power to amend Schedule 1 by proclamation:

14 Amendment of Schedule

- (1) *The Governor may, by proclamation published in the Gazette, amend Schedule 1 so as to add to it, or omit from it, any class of conduct of a public authority.*
- (2) *Where Schedule 1 is amended by adding to it any class of conduct of a public authority, and conduct the subject of an investigation or conciliation by the Ombudsman is or includes conduct of the added class, the Ombudsman shall discontinue the investigation or conciliation in so far as it relates to conduct of the added class and shall not make any report concerning conduct of the added class.*
- (3) *A proclamation under subsection (1):*
 - (a) *takes effect from the date of publication of the proclamation or a later date specified in the proclamation, and*
 - (b) *shall be laid before each House of Parliament within fourteen sitting days of that House after the date of proclamation.*
- (4) *If either House of Parliament passes a resolution, of which notice has been given within fifteen sitting days of that House after a proclamation has been laid before it, disallowing the proclamation or any part thereof, the amendment of Schedule 1 made by the proclamation or part thereupon ceases to have effect.*
- (5) *For the purposes of subsections (3) and (4) sitting days shall be counted, whether or not they occur during the same session.*
- (6) *Where, by the operation of subsection (4), an amendment of Schedule 1 ceases to have effect, the Ombudsman may:*
 - (a) *resume any investigation or conciliation that he or she discontinued under subsection (2) by reason of the amendment, and*
 - (b) *make a report concerning the conduct to which the resumed investigation relates.*

The Ombudsman has expressed a number of concerns relating to the process for making amendments by proclamation. She argued during the Fourth General Meeting with the Committee that when Schedule 1 is amended by a proclamation "matters can be excluded from the jurisdiction of the Ombudsman with little difficulty, and without the

need to obtain Parliamentary approval.”³

The submission from the Cabinet Office clearly sets out the administrative process which precedes the making of a proclamation to amend Schedule 1. The Acting Director General advises that:

A draft Proclamation is prepared by the Office of the Parliamentary Counsel pursuant to instructions received from the Department (usually this Office) which initiates the amendment. The Parliamentary Counsel provides an opinion to the Department which initiated the amendment that the Proclamation may legally be made. An Executive Council Minute is then prepared, executed by the Premier and submitted to the Executive Council. The Governor, with the advice of the Executive Council, makes the Proclamation. The Proclamation is then published in the Government Gazette.

Cabinet Consideration

The Cabinet Office advise that the usual Cabinet procedure for preparing legislation applies to any proposed amendment to Schedule 1 by proclamation. The Office's submission outlines the consultative process involved in developing and preparing legislation, as follows:

*When this Office receives a Cabinet proposal involving legislation, it consults with other Ministers whose portfolios may be affected by the proposed amendment. Those other Ministers provide advice to this Office which then may be referred to the Minister who initiated the proposed amendment.*⁴

Parliamentary consideration

At the parliamentary level there is a significant difference in how bills and proclamations are scrutinised. Proclamations do not go through the same parliamentary process which applies to principal legislation. Rather, parliamentary review of amendments made to Schedule 1 by proclamation occurs after the publication of the proclamation which may then be disallowed by resolution of either House of Parliament. This responsibility is conferred upon the Parliament under section 14(4) of the *Ombudsman Act 1974*.

14 (4) If either House passes a resolution, of which notice has been given within fifteen sitting days of that House after a proclamation has been laid before it, disallowing the proclamation or any part thereof, the amendment of Schedule 1 made by the proclamation or part thereupon ceases to have effect.

Whilst proclamations amending Schedule 1 may be disallowed by Parliament such

³ Joint Committee on the Office of the Ombudsman and Police Integrity Commission, *Fourth General Meeting Report*, page 31.

⁴ The Cabinet Office, *Submission for Review*, page 2.

proclamations are not included in the definition of subordinate legislation which may be examined under the *Subordinate Legislation Act 1989*. This means that disallowance of Schedule 1 proclamations occurs on the notice of an individual Member of Parliament, resolved by both Houses, rather than after examination by the Regulation Review Committee in accordance with the *Subordinate Legislation Act 1989*.

3.1.2 Amendments made by statute

The process for amending Schedule 1 through legislation is the same process which applies to any Act of Parliament. A proposed Bill is submitted to Cabinet by the appropriate Minister in the form of a Cabinet Minute. On Cabinet's approval a draft Bill is prepared by the Parliamentary Counsel's Office in accordance with instructions from the Minister who proposed the Bill. On completion of the first draft the Parliamentary Counsel sends the Bill to the relevant Minister for approval and on approval the Bill is ready for introduction into Parliament. In Parliament the Bill goes through a number of stages in which it is debated, open to amendment and voted on by both Houses of Parliament. The Bill is then sent to the Governor for Royal Assent and a notice is published in the Government Gazette to that effect.

Amendments made to Schedule 1 by statute are subject to the process previously outlined and go through far more extensive consultation and scrutiny than amendments made by proclamation. Additionally, legislation is also debated in Parliament where all Members of Parliament have an opportunity to express their views. The Cabinet Office explains that:

It should be noted that all amendments to Schedule 1 by Acts of Parliament have been debated and passed by the Parliament. Accordingly, the consultation which is undertaken with the Opposition and Independent Members of Parliament, as part of the Parliamentary process, would be undertaken in relation to amendments to Schedule 1 in the same way as for all other legislation.⁵

The Attorney General's Department also argues that the parliamentary process for introducing and enacting legislation enables scrutiny of any proposed amendments to the Schedule and that the parliamentary process will give the Ombudsman an opportunity to express her views. The Director General asserts:

Certainly in Parliament itself there is an opportunity for full scrutiny and an opportunity for the Ombudsman to express a view at the time the Bill is tabled, if she has not been given the opportunity to do so beforehand.⁶

The Ombudsman feels that amendments made to Schedule 1 by proclamation do not go through the scrutiny and debate which applies to the passage of principal legislation and that careful parliamentary scrutiny of proposed amendments to Schedule 1 can only be achieved if those amendments are made by an Act of Parliament. The

⁵ Ibid.

⁶ Glanfield, Laurie, *Evidence taken before the Committee, Wednesday 23 July, 1997*, page 22.

Committee is of the opinion that it is appropriate for minor "housekeeping" amendments, that change names or reword clauses, to be made by proclamation but that major amendments, especially additions to the Schedule, should attract the higher level of scrutiny and review available through amendment by statute.

The Ombudsman also argues that it could be advantageous to have all proposed amendments to Schedule 1 considered by the Joint Parliamentary Committee on the Office of the Ombudsman and Police Integrity Commission.⁷ The Committee supports this view and regards comprehensive review of the Schedule as an effective means of ensuring that changes to Schedule 1 are appropriate and consistent. Consideration of proclamations by the Committee should appropriately occur after the proclamations are tabled and prior to the expiry of the disallowance period. Review of proposed legislative amendments to the Schedule should be conducted after the introduction of the relevant bill into Parliament.

Recommendation 1

The Committee recommends that the Committee on the Office of the Ombudsman and Police Integrity Commission should review all proposed amendments to Schedule 1, whether they are made by proclamation or legislative action.

Recommendation 2

The Committee recommends that specific minor amendments should be made to Schedule 1 by proclamation. Such amendments would include changes to names or to reword clauses in order to make them consistent with new legislation and up to date. The Committee further recommends that major amendments involving additions to the Schedule should be made by statute in order that they are subject to full consultation and debate.

3.2 Consultation with the Ombudsman

The Ombudsman has expressed concerns that her Office is often not consulted on proposed amendments to her jurisdiction. There is no statutory requirement for the Ombudsman to be consulted on any proposed changes to her jurisdiction. Submissions received and evidence taken before the Committee presented conflicting views on the issue of consultation.

The Department of Community Services argues that "the Ombudsman should be consulted about any proposed change to Schedule 1, or the introduction of legislation which restricts or expands the Ombudsman's jurisdiction."⁸ However, the Cabinet Office argues that even though it could be advantageous to consult with the Ombudsman it is ultimately for Cabinet to decide whether the Ombudsman should be consulted on matters which impact upon her Office. Further, the Cabinet Office argues that there could be valid reasons as to why the Ombudsman's views are not sought. The Director General presented this view before the Committee:

⁷ NSW Ombudsman, *Submission for Review*, pages 7-8.

⁸ Department of Community Services, *Submission for the Review*, page 3.

Mr Wilkins: *It has not always been the practice to seek the views of the Ombudsman. I make it my practice to seek the views of the Ombudsman, but it is really the prerogative of the Cabinet to make those decisions, and ultimately the Parliament when it comes before Parliament for debate. It would be prudent to seek the views of the Ombudsman, but not essential. My practice recently, and the practice of the current Government, has been to seek the Ombudsman's views on a variety of legislative proposals which impact on the Ombudsman; but there were times when, because of the confidentiality of matters that were going before the Cabinet, governments of the day were not prepared to send matters far and wide for comment prior to making a decision in Cabinet.*⁹

The Director General of the Cabinet Office argues that the current government has sought the Ombudsman's views on legislative proposals which impact upon her Office. The submission from the Cabinet Office states that the Office of the Ombudsman was consulted prior to the most recent amendment made to Schedule 1 by proclamation. It states:

*The most recent amendment made to Schedule 1 by proclamation was in 1995 when clause 12, which excludes employment-related conduct from the Ombudsman's jurisdiction, was replaced so as not to prevent a person from complaining to the Ombudsman in respect of employment-related action taken in reprisal for the making of a protected disclosure. This amendment was made to give effect to the provisions of the Protected Disclosures Act 1994 and was made after consultation with the Deputy Ombudsman, Mr C. Wheeler.*¹⁰

Cabinet Office does not make reference to any other consultation conducted with the Office of the Ombudsman prior to clauses in Schedule 1 being amended.

3.3 Consultation with other bodies

A number of submissions received for the Review of Schedule 1 suggested that all bodies affected by a particular clause in the Schedule should be consulted about any proposal to amend that clause. The Community Services Commission argues "where it is proposed to add or remove...exclusions to or from the Schedule...consultation with affected bodies should be mandatory."¹¹ The Independent Commission Against Corruption has also highlighted a desire to be consulted on any proposed amendment which affects it.¹²

In previous inquiries, the Committee has recommended that the Ombudsman should

⁹ Roger Wilkins, *Evidence taken before the Committee Wednesday 30 July 1997*, page 17

¹⁰ The Cabinet Office, *Submission for the Review*, page 2.

¹¹ Community Services Commission, *Submission for Review*, page 2.

¹² Independent Commission Against Corruption, *Submission for the Review*, page 2.

be consulted on any proposed legislation which may have significant jurisdictional or operational implications for the Office, prior to the introduction of such legislation into Parliament (see Recommendation 3, *Funds and Resources Report*, September 1993 and Recommendation 1, *5th General Meeting Report*, June 1997). Consistent with these previous recommendations, the Committee feels that consultation as a general principle should apply in relation to amendments to Schedule 1 of the *Ombudsman Act 1974*, whether they are being made by proclamation or statute.

Recommendation 3

The Committee recommends that amendments affecting the jurisdiction of the Ombudsman are matters on which the Ombudsman should be consulted. The Committee further recommends that all bodies affected by the proposed amendments to Schedule 1 should be consulted on those amendments.

3.4 Comparison of interstate legislation

As previously noted there is no legislative provision in the New South Wales *Ombudsman Act 1974* which stipulates that amendments made to Schedule 1 need to be achieved through an Act of Parliament. Similarly, no Australian State or Territory's equivalent legislation contains statutory provisions which prescribe that the jurisdiction of their Ombudsman or Parliamentary Commissioner can be amended by statute. In the majority of states and territories in Australia the legislation provides for the jurisdiction of the Ombudsman or Parliamentary Commissioner to be amended by regulations or rules of parliament.

Table 3.4 sets out how conduct is excluded from the Ombudsman's jurisdiction in other states and how this jurisdiction can be amended.

Table 3.4 Comparison of Interstate Legislation.

State	Section of Act determining Ombudsman's jurisdiction (see appendix 5: Jurisdiction of the Ombudsman - Interstate legislation for details)	How amendments are made to that section of the Act
New South Wales	The types of conduct which are excluded from the Ombudsman's jurisdiction are listed in Schedule 1 of the <i>Ombudsman Act 1974</i> , and other principle statutes.	Section 14(1) of the Act specifies how Schedule 1 can be amended: The Governor may, by proclamation published in the Gazette, amend Schedule 1 so as to add to it, or omit from it, any class of conduct of a public authority.
Commonwealth	The types of conduct which are excluded from the Ombudsman's jurisdiction are listed in section 5(2) of the <i>Ombudsman Act 1976</i> .	Section 38 allows for the amendment of section 5(2): The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act.
Victoria	The types of conduct which are excluded from the Ombudsman's jurisdiction are contained in section 13(3) (4), and (5) and also the Schedule of the <i>Ombudsman Act 1973</i> .	Section 31 allows for amendments to be made to the Ombudsman's jurisdiction; <i>31. Rules of Parliament</i> (1) Rules of Parliament may be made for the guidance of the Ombudsman in the exercise of his functions and for any purpose for which Rules of Parliament may be made under this Act. (2) Subject to this Act the functions of the Ombudsman shall be exercised in accordance with the Rules of Parliament made under this Act. (3) The Rules of Parliament referred to in this section are Rules that have been agreed upon by both Houses of Parliament in accordance with the Rules and Orders thereof. (4) Rules of Parliament made under this Act shall be published in the Government Gazette.

State	Section of Act determining Ombudsman's jurisdiction (see appendix 5: Jurisdiction of the Ombudsman - Interstate legislation for details)	How amendments are made to that section of the Act
Queensland	The types of conduct which are excluded from the Commissioner's jurisdiction are contained in sections 12 and 13 of the <i>Parliamentary Commissioner Act 1974</i> .	Section 33 of the Act specifies the regulation making power: The Governor in Council may make regulations under this Act.
South Australia	The types of conduct which are excluded from the Ombudsman's jurisdiction are contained in sections 5 and 13(3)(a) of the <i>Ombudsman Act 1972</i> .	The Act does not contain a section which specifies how to make amendments to limit the Ombudsman's jurisdiction.
Western Australia	The types of conduct which are excluded from the Commissioner's jurisdiction are contained in sections 13(2), 14(3) and (4), and Schedule 1 of the <i>Parliamentary Commissioner Act 1971</i> .	Section 33. Regulations allow for the amendment of Schedule 1 - Entities, and Extent, to which this Act does not apply: 33. The Governor may make regulations for amending Schedule 1.
Tasmania	Section 12(5) and Schedule 2 of the <i>Ombudsman Act 1978</i> sets out the types of conduct excluded from the Ombudsman's jurisdiction. Schedule 1 of the Act lists the Government Departments and other authorities to which this Act applies.	Section 35 of the Act allows for amendments to be made to the Ombudsman's jurisdiction: 35. The Governor may make regulations for the purposes of this Act.
ACT	The types of conduct which are excluded from the Ombudsman's jurisdiction are listed in Section 5(2) of the <i>Ombudsman Act 1989</i> .	Section 38- Regulations, allow for the amendment of section 5(2): 38. The Executive may make regulations, not inconsistent with this Act, prescribing- (a) matters required or permitted by this Act to be prescribed; or (b) matters necessary or convenient to be prescribed for carrying out or giving effect to this Act.

State	Section of Act determining Ombudsman's jurisdiction (see appendix 5: Jurisdiction of the Ombudsman - Interstate legislation for details)	How amendments are made to that section of the Act
Northern Territory	<p>The Northern Territory Ombudsman Act does not list public authorities exempt from the Ombudsman's jurisdiction in a Schedule. The Act applies to all departments and authorities unless the Administrator of the Act determines an exemption.</p> <p>Section 13: Departments and Authorities: Subject to the regulations this Act applies to all departments and authorities.</p>	<p>Section 32 of the Northern Territory Ombudsman Act allows for the exemption of bodies from the Ombudsman's jurisdiction:</p> <p>Section 32: Regulations: The Administrator may make regulations not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular providing for and in relation to (b) the exemption of the whole or any part of a department or authority, or an action or class of action of a department or authority from the application of this Act.</p>

CHAPTER 4

OTHER MECHANISMS TO EXCLUDE CONDUCT FROM THE OMBUDSMAN'S JURISDICTION

4.1 Conduct excluded from the Ombudsman's jurisdiction by means other than Schedule 1

During the Fourth General Meeting with the Committee the Ombudsman made reference to the fact that Schedule 1 is not the only mechanism that has been used to exclude conduct from her Office's jurisdiction. The *Freedom of Information Act 1989*, the *Community Services (Complaints, Appeals and Monitoring) Act 1993*, and the *Police Integrity Commission Act 1996* also preclude the Ombudsman from investigating certain complaints.

Freedom of Information Act 1989

Section 52 of the *Freedom of Information Act 1989* confers the Ombudsman with the power to investigate, under the *Ombudsman Act 1974*, the conduct of any body or person in relation to a determination made by an agency under the *Freedom of Information Act 1989*¹³. However, the Ombudsman is precluded from investigating such complaints while the determination is subject to a right of review by the body or person in question. Similarly, under the *Freedom of Information Act 1989* the Ombudsman is precluded from investigating complaints in relation to a determination by an agency if the determination has been subject to a right of review by the body or person in question and no application for the review of the determination was made while it was subject to that right, or while any relevant proceedings were before the District Court.¹⁴

The Ombudsman also is unable to exercise her powers under the *Ombudsman Act 1974* in respect of a document the subject of a Ministerial certificate.¹⁵ Furthermore, the powers conferred on the Ombudsman by the *Ombudsman Act 1974* do not extend to:

- (i) investigating the conduct of any person or body in relation to the issue of a Ministerial certificate; or
- (ii) in relation to a determination of an application for access to a Minister's document; or
- (iii) for the amendment of a Minister's records, or
- (iv) if the complainant has previously made a complaint about the agency in question under the *Ombudsman Act 1974*; or
- (v) in relation to a determination made by the Ombudsman under the

¹³ Section 52(1) of the *Freedom of Information Act 1989*.

¹⁴ Section 52(2) of the *Freedom of Information Act 1989*.

¹⁵ Section 52(3) of the *Freedom of Information Act 1989*.

Freedom of Information Act 1989.¹⁶ The Ombudsman's jurisdiction under the *Freedom of Information Act 1989* does not extend to those bodies and offices exempt from the application of the Act.¹⁷

Community Services (Complaints, Appeals and Monitoring) Act 1993

The Ombudsman is unable to investigate certain complaints about community services under section 121 of the *Community Services (Complaints, Appeals and Monitoring) Act 1993*. Section 121 states:

Conduct of a public authority that could be, or has been the subject of a complaint to the [Community Services] Commission or of an appeal to the [Community Services] Tribunal may not be the subject of a complaint under the Ombudsman Act 1974.

The Ombudsman has expressed some concern over whether section 121 prohibits her from investigating complaints about the conduct of staff of the Department of Community Services. This issue will be addressed in Chapter 5.

Police Integrity Commission Act 1996

The Ombudsman is precluded from investigating complaints about the conduct of the Inspector of the Police Integrity Commission, and the conduct of the Commissioner of the Police Integrity Commission, or an officer of the Commission, except when a complaint is referred to the Ombudsman from the Inspector, in accordance with section 125 of the *Police Integrity Commission Act 1996*. Section 125 states:

- (1) *Conduct of the PIC Commissioner or an officer of the Commission cannot be made the subject of a complaint, inquiry, investigation or other action under the Ombudsman Act 1974, except in relation to matters referred to the Ombudsman by the Inspector.*
- (2) *Conduct of the Inspector cannot be made the subject of a complaint, inquiry, investigation or other action under the Ombudsman Act 1974.*

4.2 Should Schedule 1 be the only mechanism for excluding conduct from the Ombudsman's jurisdiction?

The Ombudsman recommended during the Fourth General Meeting that Schedule 1 of the *Ombudsman Act 1974* should be the only mechanism for excluding conduct from her jurisdiction under the *Ombudsman Act 1974*.¹⁸ The Office's submission restates that having Schedule 1 as the only mechanism for excluding conduct "would help to ensure

¹⁶ Section 52(5) of the *Freedom of Information Act 1989*.

¹⁷ Schedule 2 of the *Freedom of Information Act 1989*.

¹⁸ Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on Fourth General Meeting with the New South Wales Ombudsman*, page 32.

that the Ombudsman is consulted about any proposed exclusion [and that] it would also assist in clarifying for the public whether or not particular conduct is within the Ombudsman's jurisdiction."¹⁹

The Community Services Commission supports the Ombudsman's suggestion that all conduct excluded from her jurisdiction should be contained in Schedule 1 including conduct excluded under section 121 of the *Community Services (Complaints, Appeals and Monitoring) Act 1993*. Section 121 excludes conduct within the jurisdiction of the Community Services Commission and Community Services Tribunal from investigation by the Office of the Ombudsman. The Commission concludes that it would be "logical for the exclusion to be contained in the Ombudsman Act, rather than in the CAMA legislation as it relates to the Ombudsman's jurisdiction."²⁰

The Community Services Commission also agree with the Ombudsman's proposal that Schedule 1 should be the only mechanism for excluding conduct from the jurisdiction of the Ombudsman. The Commissioner, Roger West, states that the Community Services Commission

*Would also agree that the Schedule should be the sole place for exclusions so that they cannot be buried in other Acts that might be more obscure.*²¹

Similarly, the Police Integrity Commission agrees with the Ombudsman's recommendation that all conduct excluded from her jurisdiction should be included in Schedule 1. The Assistant Commissioner of the Police Integrity Commission states:

Mr Sage: *In making this submission the Commission noted that the Ombudsman had expressed preference for the Schedule to reflect, as a code might, all conduct excluded from her jurisdiction. The Commissions of the view that there is merit in this proposal. For the sake of legislative neatness it agrees that the Schedule should reflect all conduct excluded from the Ombudsman's jurisdiction. It would therefore have no objection to the Schedule being updated to include conduct of the Commissioner, conduct of officers of the Police Integrity Commission and conduct of the Inspector of the Police Integrity Commission.*²²

Although, the Assistant Commissioner of the Police Integrity Commission agrees that all conduct excluded from the Ombudsman's jurisdiction should be contained in Schedule 1, he made no reference to the Ombudsman's suggestion that the Schedule should be the only mechanism for excluding conduct from the Ombudsman's purview.

¹⁹ NSW Ombudsman, *Submission for Review*, page 7.

²⁰ Community Services Commission, *Submission for Review*, page 2.

²¹ West, Roger, *Evidence taken before the Committee, Thursday, 24 July 1997*, page 2.

²² Sage, Tim, *Evidence given before the Committee Thursday, 24 July 1997*, page 25.

While there is some support for the Ombudsman's suggestions there are a number of bodies which feel that such moves would not be advantageous. The Department of Community Services, for example, argue:

the use of specific provisions in other legislation, such as section 121 of the Community Services (Complaints, Appeals and Monitoring) Act 1993, provide evidence of the Parliament's express intention to exclude the jurisdiction of the Ombudsman where it is likely to duplicate the investigation and review of administrative conduct and decision making. It may be difficult to express such an intention in a Schedule.²³

The Department of Health also raised a number of difficulties with the Ombudsman's suggestion:

The Department advises that placing all exemptions in the Schedule and employing the Schedule as the only tool for future exemptions may be problematic. There are clear benefits to members of the public and the bureaucracy in having exemptions dealt with in the context of the substantive legislation. The Freedom of Information Act, for example, sets out a comprehensive scheme on the management of applications, appeals and complaints. Transferring those clauses limiting the Ombudsman's role to Schedule 1 of the Ombudsman Act would considerably reduce the accessibility and usefulness of the FOI Act.²⁴

Conclusion - The Committee recommends that Schedule 1 should not be the only mechanism for excluding conduct from the Ombudsman's jurisdiction as firstly, it may be difficult to express exemptions made in principal legislation in a schedule, and secondly, exemptions made under substantive legislation usually form part of a wider definition of the Ombudsman's functions with respect to the legislation and should remain in the primary statute. In order to provide easier access to the conduct excluded from the Ombudsman's jurisdiction by principal acts, the Committee considers that it would be useful to incorporate a schedule in the *Ombudsman Act 1974* listing relevant statutes and legislative provisions.

Recommendation 4

The Committee recommends that a second schedule be included in the *Ombudsman Act 1974* which specifies or lists the Ombudsman's functions under other statutes and would provide easy access to the conduct within the Ombudsman's jurisdiction.

²³ Department of Community Services, *Submission for the Review*, page 3.

²⁴ NSW Department of Health, *Submission for Review*, page 1.

CHAPTER 5

THE SCOPE OF ADMINISTRATIVE CONDUCT EXCLUDED FROM THE OMBUDSMAN'S JURISDICTION

5.1 Introduction

As previously noted the role of the Office of the Ombudsman is to protect the rights and interests of consumers of government services and to help ensure public officers act fairly and reasonably.²⁵ One of the main objectives of the *Ombudsman Act 1974* was to allow for a more accountable government and public sector. Margaret Allars argues that the Commonwealth Ombudsman, the Administrative Appeals Tribunal and the Administrative Review Council were introduced to open up the government and bureaucracy in order to make them more accountable to the public. She states that these bodies were introduced "based upon the premise that accountability in a modern democracy should be secured by the pursuit of fairness and openness."²⁶

Similarly, freedom of information legislation in Australia was brought about due to a demand for access to government held information and the need for governmental and bureaucratic accountability. Therefore, Ombudsman legislation and freedom of information legislation stem from the same philosophical base. The Australian Law Reform Commission argues that this philosophical base is characterised by the principles of openness, accountability and responsibility of government, and that this base underpins Australia's democratic society. In the Commission's view, freedom of information legislation "is a basic underpinning of Australia's constitutionally guaranteed representative democracy which enables people to participate in the policy and decision making processes of government, opens the government's activities to scrutiny, discussion, review and criticism and enhances the accountability of the Executive".²⁷

However, some argue that there is a need, in certain circumstances, to keep the workings of the government and bureaucracy secret in the interests of the public. Dennis Pearce, in his article *Of Ministers, Referees and Informers - Evidence Inadmissible in the Public Interest*, argues that some government documents should not be disclosed in the public interest such as Cabinet documents, or documentation on policy formulation.²⁸ The Hon. Justice Paul Desmond Finn (Federal Court of Australia), writing in his former capacity as Professor from the Australian National University,

²⁵ NSW Ombudsman, *Information Sheet No. 6 Statement of Intent*, 1993.

²⁶ Allars, Margaret, "Managerialism and Administrative Law" in *Canberra Bulletin of Public Administration*, No. 66, October 1991, pp.50-62.

²⁷ Australian Law Reform Commission, *Open Government: a review of the federal Freedom of Information Act 1982*, 1995, page 31.

²⁸ Pearce, Dennis, "Of Ministers, Referees and Informers - Evidence Inadmissible in the Public Interest" in *The Australian Law Journal*, Vol.54, March 1980, pp. 127-142.

argues in his Interim Report *Official Information: Integrity in Government Project* that there are some areas in the workings of government which due to their nature need to be kept secret in the interests of the public and that those areas are ones "in which the public can legitimately be asked to trust in governments to discharge the constitutional responsibility imposed on them."²⁹

Given that the greater public interest may sometimes necessitate a tilting of the balance towards secrecy, a number of parliaments have exempted certain bodies and conduct from the provisions contained in their FOI and Ombudsman legislation. The Law Reform Commission argued that "exemptions are necessary and in the public interest because in some instances total transparency could be destructive of important aspects of Australia's society and political system."³⁰

In the NSW *Ombudsman Act 1974* and the *Freedom of Information Act 1989* the exemptions are listed in a schedule. The Australian Law Reform Commission noted that it can be argued that placing exemptions in a schedule reinforces the message that exemptions are not the primary focus of the legislation and that this can have a symbolic effect "sending a message to agencies that the purpose of the Act is to provide access and that the exemptions are a subsidiary consideration".³¹

In fact, when the NSW Law Reform Commission proposed an Ombudsman Bill in 1973, they argued that "a decision to exclude any official action of any public authority from investigation by an Ombudsman can be justified only where compelling policy reasons for exclusion exist."³²

While there is a need for the government and public sector agencies to be held accountable for their administrative actions there are certain classes of conduct which Parliament has determined is inappropriate for the Ombudsman to investigate. These exemptions have been placed in Schedule 1 of the *Ombudsman Act 1974* as the need has arisen. However, as previously noted, until now no comprehensive review of the exemptions in Schedule 1 has been conducted. This chapter considers the exemptions currently contained in Schedule 1 and draws conclusions as to whether the excluded conduct has been appropriately removed from the Ombudsman's jurisdiction.

5.2 Parliamentary and legislative exemptions

Schedule 1 of the *Ombudsman Act 1974* contains a number of items which have been exempted from the Ombudsman's jurisdiction due to conduct being of a parliamentary or legislative nature. **Clause 1** removes the following conduct of particular people and

²⁹ Finn, Paul, *Official Information: Integrity in Government Project*, 1991-92, page 167.

³⁰ Australian Law Reform Commission, *Freedom of Information-Discussion Paper 59*, May 1995, page 46.

³¹ Australian Law Reform Commission, *Open Government: a review of the federal Freedom of Information Act 1982*, page 94.

³² NSW Law Reform Commission, *Report on the Right of Appeal from Decisions of Administrative Tribunals and Officers*, 1973.

bodies from the Ombudsman's jurisdiction:

1. Conduct of:

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

The NSW Law Reform Commission argued that the functions of Members of Parliament and the procedures of Parliament in this State are based on the British pattern of Parliamentary Government. In this system accountability is given through the procedures of Parliamentary Questions, Adjournment Debates and Debates on Supply. Furthermore, Members take up their constituents' grievances in the Parliament where Ministers are individually accountable for their actions and the Government is collectively responsible.³³ Ultimately, Parliament and Members are accountable to the electors for their actions and it is appropriate that they should be excluded from the Ombudsman's jurisdiction.

Clause 1 was one of the original exemptions recommended in the Ombudsman Bill proposed by the NSW Law Reform Commission in 1973. The Law Reform Commission argued that conduct of the kind described in clause 1 is an appropriate exclusion from the Ombudsman's jurisdiction, on the grounds that:

*in our political system, the Legislature and Judiciary themselves supervise the conduct of persons within their respective jurisdictions. To the best of our knowledge, no Ombudsman or Parliamentary Commissioner in any common law country has power to investigate such conduct.*³⁴

The Ombudsman agrees that this is an appropriate exclusion, as she states "the parliamentary process provides an appropriate accountability mechanism in relation to complaints about the exercise of legislative powers and functions."³⁵

³³ NSW Law Reform Commission, *Report on the Right of Appeal from Decisions of Administrative Tribunals and Officers*, 1973, page 14.

³⁴ *Ibid*, page 177.

³⁵ NSW Ombudsman, *Submission for the Review*, page 2.

Clause 4 of Schedule 1 removes the conduct of a public authority with regards to the making of principal and subordinate legislation.

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

As with clause 1, this clause was one of the original exemptions recommended by the NSW Law Reform Commission. The Law Reform Commission argued that this is an appropriate exclusion as the Ombudsman should not be able to intervene in law making. According to the Commission:

*An Ombudsman may investigate how a rule, regulation or by-law is applied in practice and he may express opinions on the question whether it is a good or a bad law. But we think that he should not be permitted to intervene in the process of making the law.*³⁶

The views of the NSW Department of Health echo those held by the Law Reform Commission. The Department argues that it would be useful to clarify this clause to ensure that all the policy development which leads up to the introduction of legislation is excluded from the Ombudsman's jurisdiction.³⁷

In contrast, the current NSW Ombudsman does not agree that this is an appropriate exclusion on the grounds that "the process of policy making leading up to the introduction of legislation is as likely as any other conduct to give rise to complaints about maladministration and should be within [the Ombudsman's] jurisdiction."³⁸ The Ombudsman went on to argue that Clauses 1 and 4 "should be consolidated into one all purpose clause which makes it clear that the exercise of legislative powers and functions is excluded."³⁹

The question of whether the Ombudsman has jurisdiction to investigate action taken in relation to policy has been tested in the Victorian Supreme Court with conclusions being drawn that it is inappropriate for the Ombudsman to intervene in the policy process. In *Booth v Dillon* it was held that "a matter to be investigated by the Ombudsman must relate to administrative action not policy; it is limited to a specific decision or act, or the specific failure to decide or act, by a government department or public statutory body."⁴⁰

The Committee considers that it should be clear that the Ombudsman may investigate matters relating to the application of a law or policy but that the Ombudsman should not

³⁶ NSW Law Reform Commission, *Report on the Right of Appeal from Decisions of Administrative Tribunals and Officers*, page 177.

³⁷ NSW Department of Health, *Submission for Review*, page 2.

³⁸ NSW Ombudsman, *Further Submission for the Review*, page 2.

³⁹ NSW Ombudsman, *Submission for the Review*, page 2.

⁴⁰ Supreme Court of Victoria, *Booth v Dillon*, VR 434, 1976, pp. 434.

intervene in the policy or law-making process. The Committee also feels that the Ombudsman's argument that she should be able to investigate maladministration which occurs during the policy making process may be particularly difficult to achieve in practice and has the potential to involve examination of policy. Furthermore, the Ombudsman's proposal to consolidate clauses 1 and 4 is not supported by the Committee as they deal with different conduct. Clause 1 removes the conduct of particular position holders and bodies from the Ombudsman's jurisdiction whereas, clause 4 removes the conduct of a public authority with regards to the exercise of legislative powers and functions. Consequently, it does not seem appropriate to consolidate these clauses.

Recommendation 5

The Committee recommends that clauses 1 and 4 remain unchanged in Schedule 1 as both are appropriate exclusions from the Ombudsman's jurisdiction.

5.3 Judicial and legal exemptions

There are a number of clauses in Schedule 1 excluding conduct which is judicial in nature from the Ombudsman's jurisdiction. The principle behind these exclusions is clearly highlighted in the following comments by Justice Gillard (Victorian Supreme Courts, *Glennister v Dillon*)

An "administrative action" could therefore comprehend, not only any action which will fall strictly into the area of the performance of executive or administrative function but also any other action which might be regarded as reasonably incidental to the performance of such function. But it should be reiterated that any activity in the areas of the exercise of judicial function or the enactment of legislation by Parliament would be beyond the jurisdiction of the Ombudsman.⁴¹

The original **clause 2** in Schedule 1 of the *Ombudsman Act 1974* was:

- 2. Conduct of a person or body before whom witnesses may be compelled to appear and give evidence, and persons associated with such a person or body.**

The original clause 2 was recommended by the NSW Law Reform Commission for reasons similar to those upon which the Governor and Members of Parliament were excluded from the Ombudsman's jurisdiction. The NSW Law Reform Commission argued that it was an appropriate exemption because

in our political system, the Legislature and Judiciary themselves supervise the conduct of persons within their respective jurisdictions. To the best of our knowledge, no Ombudsman or Parliamentary Commissioner in any

⁴¹ Supreme Court of Victoria, *Glennister v Dillon*, VR 550, 1976, page 558.

*common law country has power to investigate such conduct.*⁴²

Clause 2 was amended in 1983 by the *Ombudsman (Amendment) Act 1983*. The then Premier, the Hon. Neville Wran, explained in the second reading speech on the *Ombudsman (Amendment) Bill* that clause 2 was amended in order to:

*make it clear that persons or bodies, such as the Builders Licensing Board, with quasi-judicial powers should not be subject to review when exercising such powers. However, the administrative activities of such persons or bodies should be open to review by the Ombudsman.*⁴³

The bill amended Clause 2 to read:

2. Conduct of-

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

In evidence to the Committee, the Director General of the Attorney General's Department, Laurie Glanfield shows support for the present exclusion:

*The issue of the separation of powers-a longstanding convention in New South Wales-has always led to the courts being treated differently to the Executive and Parliament and seen as a separate arm of government...I think the Ombudsman's functions do not extend to reviewing performance of what are effectively judicial functions.*⁴⁴

However, the Ombudsman argues that this exemption needs clarification to determine whether Courts' administration should be excluded. The Ombudsman claims that the ICAC has jurisdiction to investigate complaints alleging corruption by courts administration staff therefore the Ombudsman should be able to investigate complaints alleging maladministration by courts administration staff.⁴⁵ The Ombudsman further argues that courts administration staff should fall within her jurisdiction in order "to provide an independent mechanism to deal with misconduct and maladministration."⁴⁶ The Department of Community Services presents the same view arguing that persons

⁴² NSW Law Reform Commission, *Report on Right of Appeal from Decisions of Administrative Tribunals and Officers*, 1973, page 177.

⁴³ New South Wales Parliament, *Legislative Assembly Parliamentary Debates*, 1 December 1983, page 4260.

⁴⁴ Glanfield, Laurie, *Evidence taken before the Committee, Wednesday, 23 July 1997*, page 19 - 20.

⁴⁵ Ombudsman, *Further submission for Review*, page 2.

⁴⁶ *Ibid.*

providing administrative support to courts and persons or bodies before whom witnesses may be compelled to give evidence, for reasons of consistency, should be included within the Ombudsman's jurisdiction.⁴⁷

It should be noted that the Attorney General's Department assert the following difference between court registry staff and staff performing 'head office' functions:

*The primary function of court registry staff is ensuring that the work of the court is carried out. In this regard, court registry staff have always been excluded from investigation by the Ombudsman. No change should be made to that exclusion.*⁴⁸

Court registrars are specifically excluded from the Ombudsman's jurisdiction in Western Australia and the Australian Capital Territory by their respective legislation. Court registry staff are an appropriate exclusion given the nature of their work which is an extension of the judicial process.

The Attorney General's Department states that there is a clear distinction between those areas which deal with the courts and the other work of the department which is described as public administration. According to the Department, "it might be argued that staff who provide legal and policy advice to the Attorney General on courts matters do not fall within the category of persons associated with a court."⁴⁹

The Ombudsman has pointed out that there are alternative accountability mechanisms to deal with complaints about the exercise of judicial powers and functions or the conduct of judicial officers. Judicial decisions are open to appeal and review through the legal system and the Judicial Commission can receive complaints about improper conduct of judicial officers.

In view of these arguments, the Committee has concluded that the exercise of judicial powers and functions, and the conduct of judicial officers, are appropriate exclusions from the Ombudsman's jurisdiction. With regard to the courts the Committee accepts that staff performing the administrative work of the courts would be appropriately subject to the Ombudsman's jurisdiction. The extension of the Ombudsman's jurisdiction in this area relies upon a clear identification of court staff responsible for administration.

Clause 3 was one of the original items included in the Schedule of the *Ombudsman Act 1974*. However, it was not one of the exemptions proposed by the NSW Law Reform Commission.

⁴⁷ Department of Community Services, *Submission for Review*, page 2.

⁴⁸ Attorney General's Department, *Submission for Review*, page 2.

⁴⁹ *Ibid.*

3. **Conduct of a body of which one or more of the members is appointed by the Governor or a Minister of the Crown where:**
- (a) **at least one member of the body may be appointed by virtue of his or her being a Judge of the Supreme Court of New South Wales, a member of the Industrial Relations Commission of New South Wales, or a Judge of the District Court of New South Wales, and**
 - (b) **such a person, if appointed as such a member, has a right or duty to preside at a meeting of the body at which the person is present.**

The Ombudsman notes that this is an appropriate exclusion. However, she argues that clauses 2 and 3 "should be consolidated into one all purpose clause which makes it clear that only the exercise of judicial powers and functions or conduct of judicial officers is excluded."⁵⁰ Consolidation of these clauses is appropriate because both relate to the conduct of a court, or bodies similar to a court which exercise some form of judicial power or function, and associated persons.

Recommendation 6

The Committee recommends that clauses 2 and 3 be consolidated into one clause which specifies that it is the exercise of judicial functions and powers, and the conduct of judicial officers, which are excluded from the Ombudsman's jurisdiction. In doing so it is necessary to identify those people associated with a court whose conduct should be excluded by clause 2.

Recommendation 7

The Committee recommends the conduct of staff performing the administrative work of the courts, who are public sector staff, should be within the Ombudsman's jurisdiction.

Clause 6 was one of the original exemptions recommended in the Ombudsman Bill proposed by the NSW Law Reform Commission in 1973.

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

The NSW Law Reform Commission argued that the conduct of the kind described in clause 6 is an appropriate exclusion from the Ombudsman's jurisdiction, and that this

[was] proposed as being a matter within the application of the doctrine of legal professional privilege. The importance of that privilege is such that it should stand between the Ombudsman and the conduct mentioned in the item.⁵¹

However, the Ombudsman does not agree that this is an appropriate exclusion from her jurisdiction. She argues that conduct of the kind described in clause 6 should not be

⁵⁰ Ombudsman, *Submission for the Review*, page 2.

⁵¹ NSW Law Reform Commission, *Report on Right of Appeal from Decisions of Administrative Tribunals and Officers*, 1973, page 178.

completely excluded from her jurisdiction, and that the clause,

Should be amended to bring such conduct within the jurisdiction of the office in circumstances where there is sufficient evidence of improperly motivated or provided legal advice...and where it is not possible or appropriate to refer the matter to the Legal Services Commission.⁵²

The Legal Services Commissioner argues that the Ombudsman's proposed amendment to clause 6 would have adverse consequences for public authorities with regards to legal professional privilege. He informed the Committee:

While I note that the Ombudsman has attempted to limit her jurisdiction under clause 6 to the motivation or provision of legal advice, in most cases the investigation of such a complaint will necessarily involve an examination and assessment of the advice in question. This has the potential to significantly limit the extent to which advice provided by one public authority to another is protected by legal professional privilege, which in turn may have adverse consequences on the operations of public authorities where legal advice or representation is required.⁵³

The Legal Services Commissioner further advises that his jurisdiction "is limited to complaints about individual practitioners" and that his office can refer complaints which raise concerns about the provision of legal advice or other legal services from one public authority to another, and complaints which raise concerns about how a public authority has conducted legal proceedings, to the relevant public authority, Minister or the Ombudsman.⁵⁴

Recommendation 8

The Committee recommends that clause 6 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Clause 7 is similar to one of the original exemptions proposed by the NSW Law Reform Commission. The clause was slightly amended in 1986 by the *Miscellaneous Acts (Public Prosecutions) Amendment Act 1986* to include the conduct of the Director of Public Prosecutions, as well as that of the Attorney General and of the Solicitor General.

⁵² Ombudsman, *Original Submission for Review*, page 3.

⁵³ Legal Service Commissioner, *Further advice for the Review*, page 2.

⁵⁴ *Ibid*, page 3.

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

In 1973 when the NSW Law Reform Commission recommended that the conduct of the Attorney General and Solicitor General be removed from the Ombudsman's jurisdiction they argued that the item was recommended,

*because of the special functions discharged by the senior law officers in relation to legal proceedings commenced by or on behalf of the Crown. The Attorney General's power concerning the commencement and termination of criminal proceedings is an ancient prerogative and its exercise should not, in our view, be subject to investigation by the Ombudsman. The Attorney General may, under the Solicitor General Act 1969 (s.4) delegate the exercise of his powers to the Solicitor General and that officer, under section 3 of the Act, has other special powers and duties.*⁵⁵

Recommendation 9

The Committee recommends that clause 7 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Clause 8 of Schedule 1 also was one of the original exemptions proposed by the NSW Law Reform Commission.

- 8. Conduct of a public authority relating to the carrying on of any proceedings:**
- (a) before any court, including a coronial inquiry and committal proceedings before a magistrate, or**
 - (b) before any other person or body before whom witnesses may be compelled to appear and give evidence.**

The NSW Law Reform Commission argued that this clause is an appropriate exclusion because this item,

"is limited to conduct relating to the "carrying on" of legal proceedings; it does not extend to conduct relating to the "commencing" or "termination" of those proceedings. Conduct of the former kind is properly controllable by the Tribunal before whom the proceedings are taken. Conduct of the latter kind should, except in the case of the Attorney General or the Solicitor General, be within the jurisdiction of the Ombudsman. Discriminatory treatment of persons (for example, a decision to prosecute or not to prosecute for an offence) can occur

⁵⁵ NSW Law Reform Commission, *Report on Right of Appeal from Decisions of Administrative Tribunals and Officers*, 1973, page 178.

*in relation to legal proceedings as in other areas of public administration”.*⁵⁶

The Ombudsman argues, as with clause 6, that the conduct described in clause 8 should not be completely excluded from her jurisdiction. She states that clause 8

*should be amended to bring such conduct within the jurisdiction of the office in circumstances where there is sufficient evidence of... the carrying on of legal proceedings in bad faith, and where it is not possible or appropriate to refer the matter to the Legal Services Commission.*⁵⁷

The Ombudsman argues that a gap exists between the conduct which can be investigated by the Legal Services Commissioner and the conduct which can be investigated by her office. Although the Legal Services Commissioner can investigate complaints about “identified solicitors and barristers”⁵⁸, the Ombudsman is concerned about her capacity to investigate alleged misconduct by public servants instructing legal practitioners or appearing as witnesses in proceedings because of clause 8 of Schedule 1.⁵⁹ According to the Ombudsman these complaints also fall outside the Legal Services Commissioner’s ambit and can fall through a jurisdictional gap.

However, as previously noted, advice received from the Legal Services Commissioner has indicated that complaints which do not fall within his office’s jurisdiction are referred to the relevant public body, Minister or the Ombudsman.

The Legal Services Commissioner is very concerned about the Ombudsman’s proposed amendments to clauses 6 and 8 due to the “vagueness and uncertainty of the terms proposed by the Ombudsman.” The Commissioner argues that such terminology could place the conduct removed from the Ombudsman’s jurisdiction by clauses 6 and 8 of Schedule 1 within the Ombudsman’s ambit:

*It is unclear what is meant by such terms as “sufficient evidence”, “Improperly motivated”, “improperly provided”, and “bad faith”. This uncertainty means public authorities would have little or no guidance as to the practices they are to avoid, and has the potential for the Ombudsman procedure to be abused by those wishing to impede or frustrate an authority in the performance of its functions. In my view, the uncertainty of these terms means that in practice none of the conduct described in the current clauses 6 and 8 would be immune from the Ombudsman’s scrutiny.*⁶⁰

⁵⁶ NSW Law Reform Commission, *Report on Right of Appeal from Decisions of Administrative Tribunals and Officers*, 1973, page 178.

⁵⁷ Ombudsman, *Submission for Review*, page 3.

⁵⁸ Ombudsman, *Further advice*, page 4.

⁵⁹ *Ibid.*

⁶⁰ The Office of the Legal Services Commissioner, *Advice received in letter dated 15 October 1997*, page 2.

It should be noted that the Independent Commission Against Corruption has jurisdiction to investigate corrupt conduct by judges, magistrates or any other judicial officer (section 3(1)(f)) and the definition of corrupt conduct in section 8 of the *Independent Commission Against Corruption Act 1988* includes malfeasance and perverting the course of justice (section 8 (2)(a), and (g) respectively).

The Committee believes that there is some validity in the problem identified by the Ombudsman who has provided confidential case notes of instances where this "gap" has created difficulties for her Office. Nevertheless, on the balance of the evidence presented the Committee is unconvinced that the extent of the problem is of such significance as to warrant adoption of the proposed clause. Given other particular difficulties, such as the terminology used in the proposed clause, the Committee finds that the current clause is appropriate and should not be amended.

Recommendation 10

The Committee recommends that clause 8 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Clause 9 of Schedule 1 was one of the original exemptions recommended by the NSW Law Reform Commission.

9. Conduct of a public authority relating to an exercise of the prerogative of mercy.

The NSW Law Reform Commission argued that this type of conduct should not fall within the Ombudsman's jurisdiction. They argued that "the exercise of Her Majesty's prerogative of mercy has long been regarded as a special power and we think its exercise should not be subject to any external investigation."⁶¹ The Ombudsman agrees that it is appropriate for this conduct to fall outside her jurisdiction and that this clause should remain unchanged.⁶²

Recommendation 11

The Committee recommends that clause 9 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

⁶¹ NSW Law Reform Commission, *Report on Right of Appeal from Decisions of Administrative Tribunals and Officers*, 1973, page 178.

⁶² Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 33, and Ombudsman, *Submission for Review*, page 2.

Clause 10 of Schedule 1 is another of the original exemptions proposed by the NSW Law Reform Commission.

10. Conduct of a public authority where acting as a commissioner under the Royal Commissions Act 1923 or, by the authority of an Act, exercising the powers of such a commissioner.

The Law Reform Commission argued that the conduct described in this clause is an appropriate exclusion from the Ombudsman's jurisdiction because

*a person acting as a commissioner under the Royal Commissions Act 1923 is discharging a function which is predominantly judicial. The convention of judicial independence from executive supervision should, in our view, extend to such a person.*⁶³

The Ombudsman agrees that this exclusion is appropriate given the nature of the work performed by Royal Commissions.⁶⁴

Recommendation 12

The Committee recommends that clause 10 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

Clause 11 was not an original exclusion in Schedule 1 of the *Ombudsman Act 1974* and was inserted by the *Ombudsman (Amendment) Act 1983*.

11. Conduct of a public authority where acting as a Commissioner under the Special Commissions of Inquiry Act 1983.

As with the exclusion of Royal Commissioners, Special Commissioners of Inquiry are an appropriate exclusion from the Ombudsman's jurisdiction, due to the nature of the work they perform. The Ombudsman agrees that this clause is appropriate and should remain in Schedule 1.⁶⁵

Recommendation 13

The Committee recommends that clause 11 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

⁶³ NSW Law Reform Commission, *Report on Right of Appeal from decisions of Administrative Tribunals and Officers*, 1973, page 178.

⁶⁴ Ombudsman, *Submission for Review*, page 5.

⁶⁵ Ombudsman, *Submission for Review*, page 5.

5.4 Law enforcement exemptions

The Schedule contains two items which have excluded law enforcement conduct from the Ombudsman's jurisdiction. **Clause 13** was one of the original exemptions contained in the Schedule to the *Ombudsman Act 1974*, however, it was not proposed by the NSW Law Reform Commission.

The original clause 13 provided:

13. Conduct of a member of the Police Force when acting as a constable.

The original clause 13 was not recommended by the NSW Law Reform Commission. In fact the Law Reform Commission recommended that such conduct should be within the Ombudsman's jurisdiction. Clause 13 was placed into the Schedule by the Government. During the second reading speech for the Ombudsman Bill the former Minister of Justice, The Hon. John Maddison, gave the reasons for the inclusion of this item in the Schedule:

[T]he Law Reform Commission intended that conduct within the Ombudsman's jurisdiction should include conduct of a public authority where acting in relation to crime or the preservation of the peace, the Government has contrary views. There is no objection to the conduct of a member of the police force which amounts to an administrative act being investigated - such as, for example, the decision of an adjudicator not to prosecute. I consider that where the conduct goes to the Police Officer's liability to discipline, the Ombudsman should not be involved but some other form of ex post facto review should be devised...Accordingly, under item 13 of the Schedule to the bill the Ombudsman is to be precluded from investigating the conduct of a member of the police force when exercising his power as an ordinary common-law constable in the preservation of the peace.⁶⁶

Since the passage of the Ombudsman Act in 1974 changes to the police complaints system in New South Wales have resulted in the Ombudsman being given an increased role in the investigation of police misconduct when acting as a constable, as distinct from administrative conduct.

Prior to 1993 the Ombudsman had jurisdiction under the *Ombudsman Act 1974* to investigate complaints concerning police administrative conduct. Other complaints of police misconduct were investigated under the relevant provisions of the *Police Regulation (Allegations of Misconduct) Act (PRAM Act) 1979*. In 1993 the *Police Service (Complaints, Discipline and Appeals) Amendment Act 1993* repealed the PRAM Act and inserted the police complaints provisions into the *Police Service Act 1990*. Section 121 of the *Police Service Act 1990* then provided for the investigation of all complaints concerning any alleged action or inaction of a police officer when acting as

⁶⁶ Parliament of New South Wales (1974), *Legislative Assembly Parliamentary Debates*, 29 August, page 778-779.

a constable. The wording of section 121 of the *Police Service Act 1990* was borrowed from an existing provision in the *Ombudsman Act 1974*, namely clause 13 of Schedule 1. However, this definition caused a number of difficulties for the Ombudsman in dealing with complaints about police, and in 1994 section 121 was amended by the *Police Service (Complaints) Amendment Act 1994*. In the second reading speech the former Minister for Health, The Hon. Ronald Phillips stated:

*use of the term "when acting as a constable" was never intended to oust the jurisdiction of the Ombudsman to investigate matters in which it is alleged that police officers have acted outside the proper execution of their duties; nor was it intended to prevent scrutiny of officers alleged to have acted criminally by, for example, assaulting a member of the public.*⁶⁷

Subsequently, changes were made to the *Ombudsman Act 1974*. Mr Phillips argued that:

*The overall result is to give the Ombudsman power under his own Act to investigate complaints that relate to matters of police administration but to exclude investigation of operational matters relating to crime and peacekeeping activities.*⁶⁸

Clause 13 then read:

13. Conduct of a police officer when exercising the functions of a police officer with respect to crime and the preservation of the peace.

In 1996 the *Police Service Act 1990* was amended again by the *Police Legislation Amendment Act 1996* which brought all police conduct, including administrative conduct, under the *Police Service Act 1990* and defined police conduct under section 121 as follows:

Part 8A Complaints about conduct of police officers

Division 1 Preliminary

121 Meaning of "conduct" of police officer

(1) Definition

*For the purposes of this Act, **conduct** of a police officer means any action or inaction (or alleged action or inaction) of a police officer:*

(a) whether or not it also involves non-police participants, and

⁶⁷ Parliament of New South Wales (1994), *Legislative Assembly Parliamentary Debates*, 14 April, page 1236.

⁶⁸ *Ibid*, page 1237.

- (b) *whether or not it occurs while the police officer is officially on duty, and*
- (c) *whether or not it occurred before the commencement of this subsection, and*
- (d) *whether or not it occurred outside the State or outside Australia.*

(2) Examples

Such conduct can involve (but is not limited to) any of the following:

- (a) *police corruption,*
- (b) *the commission of a criminal offence or disciplinary offence by a police officer,*
- (c) *corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988 involving a police officer,*
- (d) *conduct of a police officer:*
 - (i) *that is otherwise contrary to law, or*
 - (ii) *that is unreasonable, unjust, oppressive or improperly discriminatory, or*
 - (iii) *that is an accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory, or*
 - (iv) *that is based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations, or*
 - (v) *that is based wholly or partly on a mistake of law or fact, or*
 - (vi) *for which reasons should have been given but were not given,*
- (e) *a matter of administration involving a police officer,*
- (f) *a matter that concerns the internal management of the Police Service.*

(3) Former police officers

Conduct may be dealt with, or continue to be dealt with, under this Act even though any police officer involved has ceased to be a police officer. Accordingly, references in this Act to a police officer extend, where appropriate, to include a former police officer.

The Ombudsman believes that the current clause 13 of Schedule 1 should be amended in light of these recent amendments to Part 8A of the *Police Service Act 1990*. The Ombudsman suggests that it may be appropriate to delete all words after “*Conduct of a police officer*”⁶⁹, a proposal supported by the Ministry for Police.⁷⁰

The Ombudsman’s proposed amendments to this clause of the schedule would make the schedule consistent with the provisions of the *Police Service Act 1990* as they apply

⁶⁹ Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 34.

⁷⁰ Ministry for Police, *Submission for Review*, page 2.

to the definition of police conduct. The Ombudsman's jurisdiction in relation to police complaints as outlined in the *Police Service Act 1990* defines police conduct which may be subject to complaint to include matters of maladministration. As complaints concerning all police conduct are now dealt with under the *Police Service Act 1990* Schedule 1 should clearly indicate that police conduct is no longer dealt with under the *Ombudsman Act 1974*.

Clause 21 of Schedule 1 was excluded from the Ombudsman's jurisdiction by the *Police Department (Transit Police) Act 1989*.

21. Conduct of a public authority when acting as a member of the transit police service.

The Ombudsman argued during the Fourth General Meeting with the Committee that clause 21 should be reviewed and possibly repealed due to recent amendments to Part 8A of the *Police Service Act 1990*⁷¹. In her original submission for the review the Ombudsman argues that at minimum this clause should be consolidated with clause 13 (conduct of police officers) into one clause.⁷² The Ombudsman's position subsequently changed and in her second submission she argues that as complaints regarding transit police fall under the *Police Service Act 1990* there is no reason to retain this clause in Schedule 1.

The Ministry for Police do not support the Ombudsman's original proposal to repeal this clause and note that:

*transit police officers are not part of the Police Service as defined by the Police Service Act. However, the complaint provisions of Part 8A of the Police Service Act are applied to transit police officers by section 25 of the Police Department (Transit Police) Act...Deletion of the exclusion provided by Schedule 1 would lead to confusion as to which provisions are to apply to complaints concerning the conduct of a transit officer.*⁷³

The Ministry advises that as part of the reforms flowing from the Royal Commission into the New South Wales Police Service consideration will be given to the issue of the status of transit police officers within the Police Service.

The Committee agrees that consolidating clauses 13 and 21 will make the schedule consistent with the provisions of the *Police Service Act 1990* as they apply to the definition of police conduct. Section 25 of the *Police Department (Transit Police) Act 1989* allows for complaints about the conduct of transit police officers to be dealt with under the complaint provisions of the *Police Service Act 1990*. Consequently the conduct of both transit police and NSW police officers are appropriately excluded from

⁷¹ Joint Parliamentary Committee on the Office of the Ombudsman and Police Integrity Commission, *Fourth General Meeting Report*, page 35.

⁷² Ombudsman, *Submission for Review*, page 5.

⁷³ Ministry for Police, *Submission for Review*, page 2.

the Ombudsman's jurisdiction under the *Ombudsman Act 1974*.

Recommendation 14

The Committee recommends that clause 13 and clause 21 be consolidated into one clause which excludes the conduct of police officers and transit police officers from the Ombudsman's jurisdiction.

5.5 Mediation and conciliation exemptions

There are two clauses in Schedule 1 which remove the conduct of certain mediators and conciliators from the Ombudsman's jurisdiction. **Clause 18** was included in Schedule 1 by the *Ombudsman (Community Justice Centres) Amendment Act 1983*.

18. Conduct of a mediator at a mediation session under the Community Justice Centres Act, 1983.

The Attorney General's Department argues that this clause is an appropriate exclusion from the Ombudsman's jurisdiction because "mediators under the Community Justice Centres Act perform dispute resolution functions rather than administrative functions". The Department also notes that full time staff employed by the community justice centres under the *Public Sector Management Act 1988* are not exempt from the Ombudsman's jurisdiction.⁷⁴

Clause 27 was included in Schedule 1 by the *Health Care Complaints Act 1993*.

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

The Ombudsman argues that clauses 18 and 27 are anomalous. She states:

*These are anomalous provisions as the conduct of other public authorities which engage in similar activities is within the Ombudsman's jurisdiction eg. conciliations under the Anti-Discrimination Act and mediations conducted by the Department of Fair Trading.*⁷⁵

However, the Ombudsman does not argue that clauses 18 and 27 should be within her Office's jurisdiction. Rather she feels that these two clauses are anomalous due to their wording rather than the conduct they describe. She recommends a consolidated clause which would still remove from her jurisdiction the conduct excluded by clauses 18 and 27. This new clause also would be consistent with relevant statutory provisions in the *Community Justice Centres Act 1993* and the *Health Care Complaints Act 1993*. The Ombudsman claims:

Clauses 18 and 27 should be deleted and replaced with a clause

⁷⁴ Attorney General's Department, *Submission for Review*, pages 2-3.

⁷⁵ Ombudsman, *Submission for Review*, page 3.

*covering the conduct of a public authority when acting as a mediator or conciliator under an Act where the Act stipulates that anything said or any admission made or document prepared for the purposes of the mediation or conciliation is not admissible in evidence in any proceedings before any court, tribunal or body.*⁷⁶

The conduct of a mediator at a mediation session under the *Community Justice Centres Act 1993* is excluded by section 28 of that Act, and the conduct of a conciliator in relation to the conciliation of a complaint under the *Health Care Complaints Act 1993* is excluded by section 51 of that Act. The legislative provisions in these two statutes are identical to the proposed clause in that they state that evidence of anything said, or any admission made, or document, prepared for the purposes of the mediation session or conciliation process is not admissible in evidence in any proceedings before any court tribunal or body.

Recommendation 15

The Committee recommends that clauses 18 and 27 be repealed and replaced with a consolidated clause which excludes the conduct of a public authority when acting as a mediator or conciliator under an Act where the Act stipulates that anything said or any admission made or document prepared for the purposes of the mediation or conciliation is not admissible in evidence in any proceedings before any court, tribunal or body.

5.6 Exclusion of independent statutory bodies

A number of clauses in Schedule 1 remove the conduct of independent statutory bodies.

Clause 19 was included in Schedule 1 by the *Miscellaneous Acts (State Drug Crime Commission) Amendment Act 1985*.

19. Conduct of a public authority where acting as a member of the State Drug Crime Commission, or the State Drug Crime Commission Management Committee, under the State Drug Crime Commission Act 1985.

The Ombudsman notes that this clause needs to be amended to refer to the *New South Wales Crime Commission* instead of the *State Drug Crime Commission*.⁷⁷ This is purely a matter of statutory updating.

Seconded Police- The Ombudsman raises another issue relating to the status of police working for the Crime Commission and argues that consideration should be given to whether the exclusion of the Crime Commission should extend to cover NSW police officers seconded to work for or with the Crime Commission. She believes that such police should fall within her jurisdiction. The Ombudsman states:

⁷⁶ Ibid.

⁷⁷ Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 35.

Police officers seconded to the Crime Commission should be subject to the jurisdiction of the Ombudsman in relation to their conduct prior to joining the Commission and in relation to their conduct with the Commission where they exercise the powers of a constable. Otherwise, these police would have no mechanism by which their actions as police would be the subject of scrutiny by an accountability body.⁷⁸

Under the *New South Wales Crime Commission Act 1985* police may work with the Commission under secondment or other arrangements. The Crime Commission has advised that section 27A of the *New South Wales Crime Commission Act 1985* provides for arrangements to be made with the Commissioner of Police for a police task force to assist the Commission to carry out an investigation. Such police officers remain within the New South Wales Police Service Command Structure, that is, these police remain under the control and direction of the NSW Commissioner of Police. If police assisting the Crime Commission remain part of the police service command structure then complaints about such officers can be made through the police complaints system as set out in Part 8A of the *Police Service Act 1990*.

Section 32(5) of the *New South Wales Crime Commission Act 1985* also provides for police officers to be seconded to the Crime Commission. The Commissioner notes:

I cannot rule out the future possibility that police would be employed pursuant to section 32(5) in circumstances where they would not be subject to command and control from the Police Service. In such circumstances the Ombudsman Act perhaps should not apply as such persons would be subject to my supervision.⁷⁹

In order to ensure that such officers are excluded from the Ombudsman's jurisdiction under the *Ombudsman Act 1974* the Commissioner has suggested that clause 19 should remove not only the conduct of the Commissioner or an Assistant Commissioner of the NSW Crime Commission but also any member of staff of the Commission who is acting under the supervision of the Commissioner or an Assistant Commissioner.⁸⁰

The exclusion of such officers from the Ombudsman's jurisdiction is consistent with existing legislation as police officers who are seconded to work for the Independent Commission Against Corruption and are under the supervision of the ICAC Commissioner or an Assistant Commissioner are excluded from the Ombudsman's jurisdiction.⁸¹ With regards to amending this clause the Commissioner of the Crime Commission also noted that:

⁷⁸ Ombudsman, *Further submission for the Review*, page 4.

⁷⁹ New South Wales Crime Commission, *Advice received in a letter 28 October 1997*, page 1.

⁸⁰ Ibid.

⁸¹ See section 101B (3) of the *Independent Commission Against Corruption Act 1988* and Schedule 1 of the *Ombudsman Act 1974*.

due to the nature of its function, and the similarities between the provisions of the NSW Crime Commission Act, the ICAC Act and the Police Integrity Commission Act there is merit in the staff of the NSW Crime Commission being in the same position as the staff of the other agencies with respect to complaints. It is therefore suggested that in amending paragraph 19 consideration be given to expressing the exclusion in terms similar to those that will apply to the ICAC and PIC.⁸²

Recommendation 16

The Committee recommends that clause 19 be amended to refer to the New South Wales Crime Commission instead of the State Drug Crime Commission.

Recommendation 17

The Committee recommends that clause 19 be further amended to exclude the conduct of the Commissioner or an Assistant Commissioner of the New South Wales Crime Commission, the New South Wales Crime Commission Management Committee, or any member of staff of the Commission who is acting under the supervision of the Commissioner or an Assistant Commissioner of the Commission, under the *New South Wales Crime Commission Act 1985*.

Clause 20 was included in Schedule 1 by the *Independent Commission Against Corruption Act 1988*.

20. Conduct of the Independent Commission Against Corruption, the Commissioner or an Assistant Commissioner or an officer of the Commission, where exercising functions under the Independent Commission Against Corruption Act 1988.

The Ombudsman argues that this is an appropriate exclusion given the nature of the work performed by the ICAC. However, the Ombudsman notes that her office has jurisdiction to investigate complaints about the conduct of the ICAC where those complaints are made or referred under the *Protected Disclosures Act 1994*. As such the Ombudsman recommends that clause 20 should be amended to explicitly refer to the Ombudsman's limited jurisdiction over the ICAC.⁸³

The Commissioner of the ICAC agrees with the Ombudsman that an amendment to the Schedule is required to ensure that Schedule 1 is consistent with the provisions of the *Protected Disclosures Act 1994*.⁸⁴ Given this agreement, the Committee supports the Ombudsman's proposed amendment as a reflection of the provisions of the *Protected Disclosures Act 1994*.

⁸² Ministry for Police, *Submission for the Review*, page 2.

⁸³ Joint Parliamentary Committee on the Office of the Ombudsman and Police Integrity Commission, *Fourth General Meeting Report*, page 35, and NSW Ombudsman, *Submission for Review*, page 5.

⁸⁴ Independent Commission Against Corruption, *Submission for Review*, page 1.

Recommendation 18

The Committee recommends that clause 20 be amended to ensure that it is consistent with the provisions of the *Protected Disclosures Act 1994*. This would mean that the conduct of the ICAC is excluded from the Ombudsman's jurisdiction unless the conduct arises from the making of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*) to the Ombudsman or to another person who has referred the disclosure to the Ombudsman under Part 4 of that Act for investigation or other action.

The Police Integrity Commission was established in 1996 and section 125 of the *Police Integrity Commission Act 1996* sets out the Ombudsman's relationship with the Police Integrity Commission regarding matters of conduct. Section 125 states:

125 Relationship with Ombudsman regarding conduct of PIC

- (1) Conduct of the PIC Commissioner or an officer of the Commission cannot be made the subject of a complaint, inquiry, investigation or other action under the Ombudsman Act 1974, except in relation to matters referred to the Ombudsman by the Inspector.**
- (2) Conduct of the Inspector cannot be made the subject of a complaint, inquiry, investigation or other action under the Ombudsman Act 1974.**

The Police Integrity Commission highlight that section 125 does not extend to excluding the conduct of an officer of the Inspector despite the fact that an officer of the Inspector is included among the persons to whom secrecy obligations in s.56 of the *Police Integrity Commission Act 1996* apply.⁸⁵ This is a concern for the PIC as it argues that:

In the event that the Ombudsman holds an inquiry under s.19 of the Ombudsman Act 1974, it seems likely that an officer of the Inspector would, by virtue of s.21(3)(c) of the Ombudsman Act 1974 be prevented from refusing to answer a question by the Ombudsman where the provision of the answer would be in breach of s.56(1)(b) of the Police Integrity Commission Act 1996.⁸⁶

Furthermore, the PIC argues that officers of the Inspector should be included in Schedule 1 as it is more appropriate for the ICAC to have jurisdiction over these officers. According to the PIC:

nothing appears to have been said in the Parliamentary Debates in relation to officers employed by the Inspector. Nevertheless the Inspector does now have a member of staff. Rather than being subject to the scrutiny of the Ombudsman, as may occur under the legislation as currently written, it seems preferable that, consistent with the scheme

⁸⁵ Police Integrity Commission, *Submission for Review*, page 2.

⁸⁶ Ibid.

proposed by Parliament, officers of the Inspector be subject to the same type of scrutiny as the Inspector in the ICAC.⁸⁷

The Assistant Commissioner of the PIC states that the PIC has no objections to “the Schedule being updated to include conduct of the Commissioner, conduct of officers of the Police Integrity Commission and conduct of the Inspector of the Police Integrity Commission.”⁸⁸

Recommendation 19

The Committee recommends that a new clause be included in Schedule 1 which excludes from the Ombudsman’s jurisdiction conduct of:

- (a) The Police Integrity Commission;
- (b) The Inspector of the Police Integrity Commission or an Officer of the Inspector; and
- (c) The Commissioner of the Police Integrity Commission or an officer of the Commission (except in relation to matters referred to the Ombudsman by the Inspector) where exercising functions under the *Police Integrity Commission Act 1996*.

Recommendation 20

The Committee recommends that section 125 of the *Police Integrity Commission Act 1996*, which sets out the Ombudsman’s relationship with the PIC, be amended to include an officer of the Inspector. This will ensure that officers of the Inspector are excluded from the Ombudsman’s jurisdiction as is the case with the PIC Inspector, the Commissioner of the PIC and any officer of the PIC.

5.7 Exclusions from the Ombudsman’s jurisdiction by protocols

There are a number of public sector agencies which share concurrent jurisdiction with the Ombudsman. These include the Police Integrity Commission under the *Police Integrity Commission Act 1996*, and the Police Service under the *Police Service Act 1990*.

Evidence gathered on Schedule 1 of the *Ombudsman Act 1974* suggests that there could be a need for a number of other public authorities to enter into “class or kind” agreements with the Ombudsman to ensure complaints do not fall between jurisdictional gaps.

⁸⁷ Tim Sage, *Evidence before the Committee*, Thursday, 24 July 1997, page 26.

⁸⁸ *Ibid*, page 25.

Clause 17 was included in Schedule 1 by the *Privacy Committee Act 1975*.

17. Conduct of a public authority relating to alleged violations of the privacy of persons.

The Ombudsman gives the following reasons for deleting this clause:

*This clause is anomalous in that the conduct over which the Privacy Committee has jurisdiction has been excluded from the Ombudsman's jurisdiction. In nearly every other case where a specialist watchdog body exists, such as, for example, the ICAC, the Department of Local Government, the Anti-Discrimination Board and the HCCC, the Ombudsman retains concurrent jurisdiction with the specialist watchdog.*⁸⁹

The Ombudsman argues that concurrent jurisdiction "allows for the more effective management and handling of complaints where complaints raise multiple issues", as she can consult with watchdog bodies to determine the most suitable body to investigate the matter. The Ombudsman notes that "this consultation could be formalised with the Privacy Committee by means of a "class or kind" agreement."⁹⁰

However, the Attorney General's Department argues that the Parliament specifically vested the Privacy Committee with jurisdiction to investigate complaints relating to alleged violations of the privacy of persons and that to give the Ombudsman concurrent jurisdiction will create duplication and uncertainty.⁹¹ In fact the Privacy Committee argues that there is no need to remove clause 17 as "the Privacy Committee frequently advises its own clients to refer aspects of complaints which fall outside its jurisdiction to other more appropriate agencies."⁹² The Privacy Committee also claims that any amendment to the current exclusion may cause unnecessary confusion as to which agency is ultimately responsible for dealing with violations of privacy.⁹³

In response to these concerns the Ombudsman notes that any overlapping of jurisdiction with the Privacy Committee would "only come into play where non-privacy issues are ancillary to the main complaint or arise during the investigation of the privacy complaint." The Ombudsman argues that complaints which primarily disclose privacy violations would be dealt with by the Privacy Committee.⁹⁴

Overall, the Committee does not consider that it is necessary to repeal Clause 17.

⁸⁹ NSW Ombudsman, *Submission for Review*, page 6.

⁹⁰ Ibid.

⁹¹ Attorney General's Department, *Submission for Review*, page 2.

⁹² Privacy Committee, *Submission for Review*, page 2.

⁹³ Ibid.

⁹⁴ NSW Ombudsman, *Further submission for the Review*, page 2.

Clearly, the Privacy Committee was intended to have jurisdiction with regard to privacy complaints, and there are mechanisms which could be used to deal with privacy complaints that raise multiple issues including non-privacy matters which would fall within the Ombudsman's jurisdiction. Protocols have been established between the Ombudsman and various agencies such as the ICAC and the Health Care Complaints Commission, to ensure that duplication of investigation is avoided. There appears to be no reason why such a protocol could not be established with the Privacy Committee.

Recommendation 21

The Committee recommends that clause 17 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

The evidence gathered on Schedule 1 also highlights the need for jurisdictional protocols between the Ombudsman and the Community Services Commission. Section 121 of the *Community Services (Complaints, Appeals and Monitoring) Act 1993* (CAMA Act) excludes certain conduct from the Ombudsman's jurisdiction under the *Ombudsman Act 1974*. It states:

121 Certain conduct excluded from Ombudsman Act 1974

Conduct of a public authority that could be, or is or has been, the subject of a complaint to the Commission or of an appeal to the Tribunal may not be the subject of a complaint under the Ombudsman Act 1974.

The Ombudsman argues that like clause 17, section 121 of the CAMA Act also is anomalous "because it removes certain matters from the jurisdiction of the Ombudsman merely because a specialist body is able to investigate such matters. In most other circumstances where there is overlapping jurisdiction, this issue is dealt with through agreements between the Ombudsman and agency in question."⁹⁵ Examples given are the ICAC, Anti-Discrimination Tribunal, Health Care Complaints Commission, Police Service, Police Integrity Commission and the Department of Local Government. The Ombudsman also argues that section 121 of the CAMA Act is confusing because its scope is unclear:

While it clearly removes jurisdiction over the conduct of DOCS in relation to individual complaints alleging unreasonable conduct, it appears that the Ombudsman retains jurisdiction in relation to complaints concerning:

- *the conduct of DOCS staff;*
- *complaints alleging systemic deficiencies; and*
- *all alleged conduct other than unreasonable conduct.*⁹⁶

The Ombudsman recommends that the provision should be removed from the CAMA Act and that a "class or kind" agreement between the Ombudsman and the

⁹⁵ NSW Ombudsman, *Submission for Review*, page 7.

⁹⁶ Ibid.

Commissioner of the Community Services Commission could be entered into to determine the types of matters best dealt with by each body.⁹⁷ However, the Commissioner from the Community Services Commission is not in favour of such an agreement as he argues that "a "class or kind" agreement is an inappropriate substitute for legislation in determining fundamental jurisdictional boundaries."⁹⁸

It must be noted that generally class or kind agreements require enabling legislation that permit such agreements to be made. For example: the provisions of the *Police Service Act 1990* relating to class or kind agreements on categories of conduct. Adopting the Ombudsman's suggestion would require similar enabling provisions.

The Commissioner of the Community Services Commission disagrees with the Ombudsman's comment that there is confusion in relation to section 121. The Commission argues that:

*Our opinion is that s.121 does not create any confusion, either theoretically or in its practical application. It clearly states that conduct of a public authority that could be or as been the subject of a complaint to the Commissioner of an appeal to the Tribunal is excluded from the jurisdiction of the Ombudsman.*⁹⁹

Furthermore, the Commission argues that section 12 of the CAMA Act sets out the categories of conduct that fall within the Commission's jurisdiction. All relate to the conduct of a service provider in relation to a particular consumer or potential consumer. Therefore, any allegation of unreasonable conduct, including the conduct of DOCS staff and complaints alleging systemic deficiencies, which impacts upon a consumer or potential consumer falls within the jurisdiction of the Community Services Commission.¹⁰⁰ The Commissioner further notes that if a complaint does not have an impact on a consumer or a potential consumer the Commission refers the complainant to the Ombudsman or the Independent Commission Against Corruption depending on the nature of the complaint.¹⁰¹

With regards to systemic deficiencies the Commission argues that its jurisdiction in this area is covered by section 83(1)(k) which requires the Commission to "review the causes and patterns of complaints and identify ways in which those causes can be removed or minimised."¹⁰²

⁹⁷ Ibid.

⁹⁸ Community Services Commission, *Further advice*, dated 23 October 1997, page 2.

⁹⁹ Community Services Commission, *Further submission in response to the Ombudsman's submission*, page 2.

¹⁰⁰ Ibid.

¹⁰¹ West, Roger, *Evidence taken before the Committee, Thursday, 24 July 1997*, page 5.

¹⁰² Ibid, page 2.

Whilst the Community Services Commission does not feel there is any jurisdictional confusion over who should investigate complaints about community services the evidence taken from the Office of the Ombudsman suggests otherwise. In particular there seems to be confusion as to when the Office of the Ombudsman has jurisdiction to investigate complaints about the conduct of officers of the Department of Community Services.

The Royal Commission into the New South Wales Police Service recommended in volume IV of the Final Report:

*Empowerment of the Office of the Ombudsman to conduct investigations in respect of allegations of sexual misconduct with or towards a child made against any DOCS. (sic) employee.*¹⁰³

If adopted the Commission's recommendation could alleviate some of the jurisdictional confusion for the Ombudsman. However, the current situation needs clarification.

Presently, the Ombudsman has jurisdiction to investigate complaints which have not been investigated by the Community Services Commission or appealed to the Community Services Tribunal. As such the Office of the Ombudsman is given jurisdiction over community services issues by omission and there is a need to clarify within the Ombudsman Act the types of complaints which can be investigated by the Community Services Commission and the Ombudsman.

Recommendation 22

The Committee recommends that the *Ombudsman Act 1974* be amended to clarify that the Ombudsman's jurisdiction should include all incidences of maladministration in the Department of Community Services in respect of which the Community Services Commission has declined jurisdiction.

5.8 Exclusions which are out of date

As previously noted no comprehensive review of Schedule 1 has ever been conducted until now. As such there are a number of clauses in the Schedule which are now out of date.

Clause 22 was included in Schedule 1 by the *Egg Industry (Repeal and Deregulation) Act 1989*.

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

The Hen Quota Committee was established *to arrange for payments to be made to*

¹⁰³ The Hon. Justice JRT Wood, *Royal Commission into the New South Wales Police Force Final Report Volume IV: The Paedophile Inquiry*, August 1997, page 917.

claimants who satisfy the eligibility criteria for financial assistance in respect of hen quota abolished by the repeal of the *Egg Industry Act 1983*.¹⁰⁴ The Director General of the Cabinet Office argued that this clause was a legitimate exemption from the Ombudsman's jurisdiction because the Hen Quota Committee was a quasi-judicial body, which made decisions on compensation.¹⁰⁵

The Ombudsman argues that this clause should be omitted to bring Schedule 1 up to date.¹⁰⁶ The *Egg Industry (Repeal and Deregulation) Act 1989* was repealed in 1991 as the Act set up schemes relating to the regulation of the Egg Industry and this is no longer carried out by the State.

Recommendation 23

The Committee recommends that clause 22 be repealed in order to bring Schedule 1 up to date.

Similarly **clause 25** needs to be repealed to bring the Schedule up to date. Clause 25 was included in Schedule 1 by the *HomeFund Commissioner Act 1993*.

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

The HomeFund Commissioner was appointed under the *HomeFund Commissioner Act 1993* to investigate and deal with complaints made by HomeFund borrowers.¹⁰⁷ The Ombudsman argues that this clause should be repealed given that the work of the HomeFund Commissioner is almost completed.¹⁰⁸

The *HomeFund Commissioner Act 1993* is still in force. However, the HomeFund Commissioner has stopped receiving complaints and all complaints received have been finalised by the Commissioner. The Department of Fair Trading advise that it currently assume responsibility for the custody of the HomeFund Commissioner's records and of the administrative matters. The Department has also advise that the HomeFund Commissioner has been reappointed to 31 December 1997 to provide for an independent person to exercise the statutory powers under the *HomeFund Commissioner Act 1993* and in order to deal with matters which may fall within his

¹⁰⁴ Section 44(2) of the *Egg Industry (Repeal and Deregulation) Act 1989*.

¹⁰⁵ Wilkins, Roger, *Evidence taken before the Committee, Wednesday, 30 July 1997*, page 21.

¹⁰⁶ Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 35.

¹⁰⁷ Section 4 of the *HomeFund Commissioner Act 1993*.

¹⁰⁸ Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 6.

jurisdiction.¹⁰⁹

Recommendation 24

The Committee recommends that when the HomeFund Commissioner has completed his work and his period of appointment that clause 25 be repealed.

5.9 Investment practices exclusions

Schedule 1 contains a number of clauses which exempt the conduct of public authorities with regard to the investment of funds from the Ombudsman's jurisdiction.

Clause 14 was one of the original exclusions from the *Ombudsman Act 1974*. This clause was not recommended by the NSW Law Reform Commission. However, the Government at the time believed that it would be inappropriate for the Ombudsman to be able to investigate trading and commercial functions and placed clause 14 in Schedule 1.

14. *Conduct of a public authority relating to the investment of any funds.*

Mr Maddison argued during the second reading speech for the Ombudsman Bill that:

*Exclusion 14 in the Schedule relates to conduct of a public authority in connection with the investment of any funds. Clause 13(4)(b)(iii) of the bill will give the Ombudsman the power to refuse an investigation where the complaint relates to the discharge of a function which is substantially a trading or commercial function. Investment might or might not be interpreted as a commercial or trading function, so in view of the discretionary nature of the provision I have mentioned, it has been thought preferable to exclude this function specifically.*¹¹⁰

The Ombudsman has a number of concerns about clause 14 as it currently stands. Firstly, she argues that this clause should be reviewed as it removes conduct from the Office's jurisdiction, which in her view, should fall within the Ombudsman's jurisdiction. She states:

*Where a complaint is concerned with second guessing commercial decisions honestly and reasonably arrived at, the conduct, unless motivated by some improper or unreasonable behaviour, ought to be excluded. However, where a complaint reveals some wrong-doing in relation to the investment of funds, the conduct ought to be within the Ombudsman's jurisdiction.*¹¹¹

¹⁰⁹ Letter from the Minister for Fair Trading, dated 11 November, 1997.

¹¹⁰ Parliament of New South Wales, *Legislative Assembly Parliamentary Debates*, 29 August 1974, page 779

¹¹¹ Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 34.

Secondly, the Ombudsman argues that this clause should be narrowed as it is

*expressed too broadly in that it could potentially and inappropriately exclude complaints about administrative conduct, such as the extent of delays, from the jurisdiction of the Ombudsman. Clause 14 should be narrowed to make it more consistent with clause 15 in order to make it clear that the excluded conduct is the decision made by the public authority as to the investment of funds.*¹¹²

The Auditor General has jurisdiction to scrutinise investment practices of public authorities and the Independent Commission Against Corruption has jurisdiction to investigate complaints alleging corrupt conduct in relation to the investment of funds. Therefore it seems reasonable and justifiable to enable the Ombudsman to investigate complaints alleging maladministration in relation to the investment of funds which are matters distinct from the actual investment decision.¹¹³

Recommendation 25

The Committee recommends that clause 14 be narrowed to make it clear that the excluded conduct is the decision made by the public authority as to the investment of funds as distinct from maladministration which may occur in relation to the investment.

Clause 15 is very similar to clause 14 in that they both relate to investing practices. The original clause 15 was placed into the Schedule of the *Ombudsman Act 1974* by the government at the time. The original clause 15 was:

15. Conduct of a public authority relating to the payment of any money as an act of grace.

During the second reading speech on the Ombudsman Bill, Mr Maddison argued that the conduct in this clause is exempted from the Ombudsman's jurisdiction as "the Government does not believe an Ombudsman should in the first instance, be given authority to investigate why a decision was made to make or not to make an ex gratia payment or to investigate the quantum where the decision is a favourable one".¹¹⁴

The original clause 15 was omitted by a proclamation in the Government Gazette on 27 February 1981. The *Ombudsman (Amendment) Act 1983* inserted a new broader clause 15:

15. Conduct of a public authority where the conduct is a decision made by the public authority in the course of the administration of an estate or a trust, being a decision as to the payment or investment of money or the transfer of property.

¹¹² NSW Ombudsman, *Submission for Review*, page 5.

¹¹³ NSW Ombudsman, *Further submission for Review*, page 3.

¹¹⁴ Parliament of New South Wales, *Legislative Assembly Parliamentary Debates*, 29 August 1974, page 779

The Ombudsman argues that this clause is an appropriate exclusion and that no change is needed at this time.¹¹⁵

Recommendation 26

The Committee recommends that clause 15 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

5.10 Other exclusions

Clause 12 was one of the original exclusions contained in Schedule 1 of the *Ombudsman Act 1974*. In 1974 when the Act was assented to clause 12 read:

12. **Conduct of a public authority relating to-**
- (a) **the appointment or employment of a person as an officer or employee; and**
 - (b) **matters affecting a person as an officer or employee.**

Since this time clause 12 has been amended. A proclamation in the Government Gazette on 6 October, 1995 inserted a small paragraph at the end of clause 12:

unless the conduct arises from the making of a protected disclosure (within the meaning of the Protected Disclosures Act 1994) to the Ombudsman or to another person who has referred the disclosure to the Ombudsman under Part 4 of that Act for investigation or other action.

Clause 12 was not one of the original exclusions proposed by the NSW Law Reform Commission. Rather the Law Reform Commission recommended that matters arising from the employer-employee relationship should be within the Ombudsman's jurisdiction. However, the Government disagreed with this recommendation and this type of conduct was excluded under Schedule 1. Mr Maddison stated during the second reading speech for the Ombudsman Bill that:

The Law Reform Commission recommended that the Ombudsman should...be given jurisdiction in matters arising out of the employer-employee relationship, that is, in relation to such matters as the terms and conditions of employment, including matters relating to appointments, promotions, pay, discipline and other personal matters. When I refer to the employer-employee relationship, I mean a relationship between the Government as the employer - that is, a public authority - and the employees of that authority. I am not referring to employer-employee relationships in the outside community. In this regard it is felt that the Office of the Ombudsman was not created to deal with industrial disputes

¹¹⁵ Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 34.

*such as the payment of an allowance, the granting of special leave, the payment of a specified wage and other allied matters. Accordingly, item 12 of the schedule to the bill will specifically preclude the Ombudsman from inquiring into complaints about things alleged to have been done by or on behalf of an employer of an employee in his capacity as an employer.*¹¹⁶

The Ombudsman argues that this clause has the potential to result in litigation as doubt has previously arisen as to whether the clause excludes only 'industrial matters' or a broader category of conduct. The Ombudsman states:

*In 1987, some doubt arose as to whether clause 12 operated to exclude only 'industrial matters' or whether it excluded a broader category of conduct. This question arose as a consequence of an argument by a public authority that internal departmental investigations into complaints about staff members were matters "affecting a person as an employee" and therefore an investigation by the Ombudsman into the adequacy of such departmental investigations was excluded by clause 12....We have obtained an opinion from Senior Counsel that...clause 12 should not be read as operating in the manner argued by the public authority.*¹¹⁷

The Ombudsman proposes that this clause should be clarified to narrow the exemption to:

*allegations made by an individual about their own appointment or employment as an officer or employee or allegations made by an individual about matters affecting them as an officer or employee provided that there is or was available to the person an alternative and satisfactory means of redress.*¹¹⁸

Clause 12 was originally included in Schedule 1 to preclude the Ombudsman from inquiring into complaints about things alleged to have been done by or on behalf of an employer of an employee in his capacity as an employer. It is clear from the second reading speech for the Ombudsman Bill that the Government wanted to exclude "industrial matters" from the Ombudsman's jurisdiction. It is consistent with this intention to narrow the current exclusion to allegations made by an individual about their own appointment or employment as an officer or employee, or allegations made by an individual about matters affecting them as an officer or employee, provided that person has available to them an alternative and satisfactory means of redress. This would limit the conduct excluded from the Ombudsman's jurisdiction to "industrial matters".

¹¹⁶ Parliament of New South Wales, *Legislative Assembly Parliamentary Debates*, 29 August, 1974, page 778.

¹¹⁷ NSW Ombudsman, *Submission for Review*, page 4.

¹¹⁸ NSW Ombudsman, *Submission for Review*, page 4.

Recommendation 27

The Committee recommends that clause 12 be narrowed to allegations made by an individual about their own appointment or employment as an officer or employee, or allegations made by an individual about matters affecting them as an officer or employee, provided that person has available to them an alternative and satisfactory means of redress. This would appropriately limit the conduct excluded from the Ombudsman's jurisdiction to 'industrial matters'.

Clause 16 was not one of the original items contained in the Schedule to the *Ombudsman Act 1974*. Clause 16 was added to Schedule 1 by the *Privacy Committee Act 1975*.

16. Conduct of the Privacy Committee constituted under the Privacy Committee Act 1975.

In correspondence with the Director General of the Attorney General's Department regarding the Privacy and Personal Information Protection Bill 1996, the Ombudsman noted that the conduct of the Privacy Committee was originally excluded from her jurisdiction because the Ombudsman was one of the two ex-officio members of the Privacy Committee. The Ombudsman argued that when the *Privacy Committee Act 1975* was amended to remove the Ombudsman as an ex-officio member of the Privacy Committee the justification for retaining the exclusion of conduct of that committee from the Ombudsman's jurisdiction was removed.¹¹⁹

The Chairman of the Privacy Committee has no objections to the Committee being brought within the Ombudsman's jurisdiction. He states:

*I have no objection, in principle, to the Committee being brought within the Ombudsman's jurisdiction... The only qualification that I would like to make is that the Committee would expect an undertaking from the Ombudsman that she will not be seeking to exempt her Office from the Committee's (or its successor's) jurisdiction - a jurisdiction that the Committee has exercised for more than 20 years.*¹²⁰

Recommendation 28

The Committee recommends that clause 16 be repealed to bring the conduct of the Privacy Committee within the Ombudsman's jurisdiction.

¹¹⁹ NSW Ombudsman, *Correspondence to the Director-General of the Attorney General's Department*, 24 September 1996.

¹²⁰ Privacy Committee, *Submission for Review*, page 1.

Clause 24 was originally numbered clause 23 when it was added to Schedule 1 by the *Casino Control Act 1992*. It was subsequently changed to clause 24.

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

The Ombudsman has expressed concerns as to whether the exclusion of all conduct of the Casino Control Authority, or any other public authority, when exercising functions under the *Casino Control Act 1992* is warranted.¹²¹

The exclusion of the Casino Control Authority's conduct from the Ombudsman's jurisdiction was recommended by Sir Laurence Street in the report *Inquiry into the Establishment and Operation of Legal Casinos in New South Wales*. Sir Laurence commented that:

*the Casino Control Authority's functions in the discharge of its statutory objects set it apart from other public administrative entities. It is not a service delivery organisation. Rather, it is a regulatory body with considerable powers of enforcement. It is charged with responsibility for ensuring the casino industry remains free from criminal influence and that gaming is conducted honestly, and in the public interest.*¹²²

However, this premise assumed by Sir Laurence, that the Casino Control Authority is not a service delivery organisation and therefore should be outside the Ombudsman's jurisdiction, seems to be misplaced in the use of service delivery rather than administrative function as the determining criteria on this issue.

Sir Laurence also noted that the majority of actions and decisions of the Authority and of the Director of Casino Surveillance in the exercise of their powers would fall within the exclusions in Schedule 1, such as conduct relating to the exercise of quasi-judicial or tribunal functions and conduct relating to employees. He concluded:

*there seems little practical utility in enabling the Ombudsman to investigate such residual matters...The public interest in the integrity of the casino industry and the secrecy constraints imposed in order to ensure a fully informed and uncompromising exercise by the Authority of its public responsibilities outweigh whatever benefits might be thought to accrue from preserving the Ombudsman's limited jurisdiction and powers to review the Authority's activities.*¹²³

In giving evidence to the Committee, the Director General of the Cabinet Office, Roger

¹²¹ Joint Parliamentary Committee on the Office of the Ombudsman and Police Integrity Commission, *Fourth General Meeting Report*, page 35.

¹²² Sir Laurence Street, *Report on Inquiry into the Establishment and Operation of Legal Casinos in New South Wales*, page 125.

¹²³ *Ibid.*, pages 125-126.

Wilkins, adopts the same line of argument. Mr Wilkins argues that the Casino Control Authority is an appropriate exclusion from the Ombudsman's jurisdiction because it may be difficult to draw the line between administrative matters and other functions of the Authority already excluded from the Ombudsman's jurisdiction. He interprets Sir Laurence Street's analysis of the Casino Control Authority legislation to mean:

*there are so many exclusions, there are so many areas where it is legitimate to exclude intrusion by a body such as the Ombudsman, because that would amount, if you like, to compromising some of the secrecy functions and perhaps some of the quasi-judicial functions of the body, it makes no sense to allow the Ombudsman to continue to operate just on this grey penumbra area.*¹²⁴

The Chief Executive of the Casino Control Authority, Lindsay Le Compte, argues that the powers and functions of the Authority warrant its exclusion from the Ombudsman's jurisdiction. Firstly, Mr Le Compte argues that the Authority was excluded from the Ombudsman's jurisdiction because the objects of the Authority set it apart from the usual public authority. He notes Sir Laurence's comment:

*the Authority's field of activities is particularly at risk of penetration and it requires every legislative assistance to enable it to function effectively in the protection of the public interest...in the discharge of its functions the Authority will fill a crime prevention and, in a complementary sense, a criminal investigatory role.*¹²⁵

Secondly, Mr Le Compte emphasises Sir Laurence's argument that:

*the Authority must be assisted to receive free rather than guarded access to criminal information from agencies in Australia and elsewhere, its responsibilities are not comparable with those of other public authorities and it should not be subjected to the same requirements in the matter of access to its records.*¹²⁶

Section 148 of the *Casino Control Act 1992* requires the Authority to ensure that any information that it receives is kept confidential except in limited circumstances. Mr Le Compte comments that three organisations are exempted from section 148, namely the National Crime Authority, the New South Wales Crime Commission and the Independent Commission Against Corruption.¹²⁷ He further argues that the information held by the Authority on people and organisations is highly confidential and if the Authority was to come under the jurisdiction of the Ombudsman it could negatively impact on the Authority's operation with regard to this information. He suggested to the

¹²⁴ Wilkins, Roger, *Evidence taken before the Committee, Wednesday, 30 July 1997*, page 18.

¹²⁵ Casino Control Authority, *Supplementary Statement for Review*, page 1.

¹²⁶ Ibid.

¹²⁷ Le Compte, Lindsay, *Evidence taken before the Committee, Thursday, 24 July 1997*, page 16.

Committee that if those people and organisations who give information to the Authority "were aware that that information could be obtained by other agencies or individuals, and through them potentially made available to other persons, the sources of information available to the Authority to comply with its objects would dry up."¹²⁸ Mr Le Compte is concerned about this issue as the Ombudsman is able to make a report to the complainant and if information was revealed as a result of that report it could have an adverse impact on the Authority and its investigations.

Thirdly, Mr Le Compte states that Sir Laurence originally suggested that the Authority should be excluded from the Ombudsman's jurisdiction on the precedent of the Victorian model. Significantly, the Victorian Ombudsman has indicated that prior to 1994 there were two bodies overseeing the operation of casinos and gaming in Victoria. They were the Gaming Commission and the Casino Control Authority. The Gaming Commission was within the Ombudsman's jurisdiction. However, the Casino Control Authority was excluded from the Ombudsman's jurisdiction because there was a statutory requirement for the Chairperson to be a judge/magistrate and the Ombudsman is prohibited from investigating:

Administrative action taken by a board, tribunal, commission or other body presided over by a judge, magistrate or legal practitioner presiding as such by virtue of a statutory requirement and appointment. (Section 13(3)(aa) of the Victorian Ombudsman Act 1973).

In 1994 the *Gaming and Betting Act 1994* amalgamated the Gaming Commission and the Casino Control Authority to form the Victorian Casino and Gaming Authority. This Act removed the statutory requirement for the Chairperson to be a judge/magistrate and as a result the Authority now automatically falls within the Ombudsman's jurisdiction.

Fourthly, Mr Le Compte argues that the Authority was exempted from a number of other bodies besides the Ombudsman:

The principal findings of Sir Laurence which were taken up by the then Government and the Parliament related to specific provisions such as the Authority's exemption from compliance with the rules of natural justice, its exemption from being effectively subject to the operation of the Freedom of Information Act...and the area where, except in certain circumstances on questions of law, there is no appeal against the Authority's decisions.¹²⁹

As noted the Authority has the power to make decisions and there is no right of appeal against its decisions. Mr Le Compte argues that it is important to recognise that this is an area which is totally different to the operation of most statutory bodies and that the "Authority must act in a way which in some circumstances would be well outside

¹²⁸ Ibid, page 19.

¹²⁹ Le Compte, Lindsay, *Evidence taken before the Committee, Thursday, 24 July 1997*, page 16.

conduct that would normally be acceptable in an administrative sense."¹³⁰

However, the Director General of the Department of Gaming and Racing, states that the Casino Control Authority "in its overall day-to-day administration...is probably no different in its responsibilities of sound administration than any government organisation, be it a department or statutory authority."¹³¹ While the Director-General of the Cabinet Office agrees with Sir Laurence Street that there is not much for the Ombudsman to look at when you consider the matters which are excluded he argues that the Ombudsman could have jurisdiction to look at some matters of administration provided that it was made clear "that all the other general exclusionary grounds applied, in which case there would not be very much left for the Casino Control Authority to be subject to the Ombudsman's scrutiny."¹³²

The Authority is subject to the jurisdiction of the ICAC, the New South Wales Crime Commission and the National Crime Authority with regards to corruption and organised crime matters and the Authority's financial aspects are subject to review by the Auditor General's Office. If the corruption, organised crime and financial aspects of the Authority are reviewed it would seem reasonable for misconduct and maladministration to be investigated by the Ombudsman. Further, the Authority has been exempted from compliance with the rules of natural justice, exempted from being effectively subject to the *Freedom of Information Act 1989* and the Authority's decisions cannot be appealed against except in certain circumstances on questions of law. Also, the extent of these exemptions may be an argument for giving the Ombudsman jurisdiction over administrative activity. Nevertheless, the Authority would have the same responsibilities of sound administration in its overall day to day administration as any government organisation. In practice extending the Ombudsman's jurisdiction in this way may be difficult due to the confidentiality provisions of section 148 of the *Casino Control Act 1992* which require the Authority to ensure that any information it receives is kept confidential except in limited circumstances. The Ombudsman, unlike ICAC, is required by section 29 of the *Ombudsman Act 1974* to report to the complainant. If the Ombudsman is given jurisdiction to look at administrative matters any sensitive information held by the Authority should remain confidential to avoid situations in which the Authority's operations and investigations may be threatened or compromised.

Recommendation 29

The Committee recommends that clause 24 be repealed in order to bring the administrative conduct of the Casino Control Authority within the Ombudsman's jurisdiction.

¹³⁰ Ibid.

¹³¹ Brown, Ken, *Evidence taken before the Committee, Thursday, 24 July 1997*, page 10.

¹³² Wilkins, Roger, *Evidence taken before the Committee, Wednesday, 30 July 1997*, page

Clause 26 was included in Schedule 1 of the *Ombudsman Act 1974* by the *Legal Profession Reform Act 1993*.

26. Conduct of the Legal Services Commissioner or a member of staff of the Commissioner, when exercising functions under Part 10 of the Legal Profession Act 1987.

The Ombudsman has expressed a number of concerns as to whether the Legal Services Commissioner should be excluded from her Office's jurisdiction given that the conduct of most other watchdog/accountability bodies are within her jurisdiction.¹³³ However, this clause only excludes the conduct of the Legal Services Commissioner or a member of his staff when exercising functions under Part 10 of the *Legal Profession Act 1987*.

Part 10 of the *Legal Profession Act 1987* sets out the powers and functions of the Legal Services Commissioner for dealing with complaints about legal practitioners and reprimanding legal practitioners who are found guilty of professional misconduct. Part 10 also sets out the powers and functions of the Legal Services Tribunal and the relationship the Commissioner has with the Tribunal. The Committee is of the view that it would not be appropriate for the Ombudsman to look into matters related to investigations or disciplinary action taken by the Commissioner.

Further, the Ombudsman has previously argued that the conduct of mediators and conciliators when acting under an Act *where the Act stipulates that anything said or any admission made or document prepared for the purposes of the mediation or conciliation is not admissible in evidence in any proceedings before any court, tribunal or body* are appropriate exclusions from her jurisdiction.¹³⁴ The Legal Services Commissioner argues that neither himself nor his staff are compellable witnesses in any legal proceedings and that files of his office cannot be subpoenaed in any legal proceedings (except by the ICAC or under Part 3 of the *Royal Commissions Act 1923*).¹³⁵ To be consistent with the Ombudsman's line of argument the conduct of the Legal Services Commissioner with regard to investigations of complaints should not fall within the Ombudsman's jurisdiction.

Recommendation 30

The Committee recommends that clause 26 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.

¹³³ Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 35.

¹³⁴ NSW Ombudsman, *Submission for Review*, page 3.

¹³⁵ Office of the Legal Services Commissioner, *Submission for Review*, page 2.

CHAPTER 6

FURTHER ISSUES ARISING FROM THE REVIEW

6.1 Is there a need for guiding criteria for excluding conduct from the Ombudsman's jurisdiction?

Amendments to Schedule 1 of the *Ombudsman Act 1974* have been made by proclamation published in the Gazette and by legislation. Proclamations have been used sparingly with the majority of amendments being made through legislation. Items in the Schedule have been added, repealed and reworded by both proclamations and legislation, and as such there appears to be no systematic choice for the form the amendment takes. In practice this has meant that items have been added to the Schedule in an ad hoc fashion as the need has arisen.

The Ombudsman further argues that the Schedule is ad hoc because there is no guiding criteria for determining what type of conduct should be excluded from the Ombudsman's jurisdiction, and that this is not in the public interest. Her views were evident when she gave evidence before the Committee:

Chairman: *Where is the public interest not served by the present exclusion of matters from the Ombudsman's jurisdiction?*

Ms Moss: *Accountability. Where there are agencies that are not accountable the public interest is not served. That is an important point. The Schedule at the moment is a bit ad hoc. There does not appear to be some observable criteria or even a rational basis for why some things are in or out. I think we should bring back to this process reason and criteria. My belief is that accountability is a good thing, that it is an important aspect of this democratic process. Therefore, there should be good reasons that an agency should be out; we should assume that agencies should be within an accountable system unless there are good reasons for them being out.*¹³⁶

A number of the submissions received for the Review agree with the Ombudsman that criteria for determining what should be included in Schedule 1 would be beneficial. The Legal Services Commissioner argues that "providing firm criteria for the inclusion of matters in Schedule 1 of the Ombudsman Act would be beneficial both for the Ombudsman's Office and for the bodies concerned."¹³⁷ The Department of Community Services and the Department of Health also agree with the Ombudsman's suggestion that specific criteria should be developed for determining what matters should be excluded from the Ombudsman's jurisdiction. The Health Department state that "as the Ombudsman Act is directed at administrative conduct, it is suggested that this principle

¹³⁶ Irene Moss, *Evidence taken before the Committee Wednesday 30 July 1997*, page 44.

¹³⁷ Legal Services Commissioner, *Submission for Review*, page 1.

could be used as a starting point.”¹³⁸

The Community Services Commission also agrees that criteria should be developed for inclusion in Schedule 1. The Commissioner, Roger West, stated:

*We would agree with and support the proposals that there should be criteria established that are transparent and known to people as to what items should be included in a schedule that would indicate exclusion from the provisions of the Ombudsman Act.*¹³⁹

The Community Services Commission argues that any criteria developed “should include a notion such as: “to avoid duplication where the same or a similar level of scrutiny is afforded through some other body.”¹⁴⁰

However, the Cabinet Office do not agree with the Ombudsman that a set of criteria would be useful for determining what items should be included in Schedule 1. The current practice is that “an assessment as to the appropriateness of including any class of conduct in Schedule 1 is made on a case by case basis.”¹⁴¹ The Cabinet Office see no reason why this practice should be changed in favour of developing specific criteria. The Director General presented this view before the Committee:

Chairman: *You have mentioned the policy areas and the processes by which things are decided within Cabinet. In terms of the addition or deletion of matters from the Schedule, do you think it would be useful for a set of criteria to be developed under which that would be approached?*

Mr Wilkins: *My answer to that is that I think not. I think it is useful to have a discussion of the sort that we have perhaps had about the sorts of reasons why you may or may not put things in. I think the idea that you would actually come up with a set of criteria would be unfortunate. You could characterise the sorts of bodies that are there and the sorts of reasons why they might be there, but I think that if you tried to come up with some sort of tight and exclusive set of criteria, that would not work. I think the better point of view would be to take the point I was making earlier: that there should be a clear onus to give a reason and to give a justification for putting things into Schedule 1, both through the Cabinet process and through the parliamentary process, and that there should be a recognition that if you exclude a body from this form of accountability there needs to be good public interest reasons as to why you would do that. I do not know that it is fruitful to try to set out exhaustively a set of criteria that you would always have to basically refer to; I do not think that*

¹³⁸ NSW Health Department, *Submission for Review*, page 1.

¹³⁹ West, Roger, *Evidence taken before the Committee Thursday, 24 July, 1997*, page 2.

¹⁴⁰ Community Services Commission, *Submission for Review*, page 2.

¹⁴¹ The Cabinet Office, *Submission for Review*, page 2.

would actually be useful. Something which is an exception would come up, and then you have got a problem.¹⁴²

The Director General went on to state:

Mr Wilkins: *I think perhaps putting the onus on the person proposing the Minister who brings the matter to Cabinet and the Government who enunciates it in Parliament as to what the reason is for this matter being excluded in Schedule 1 is the best that can be done, and there might be quite novel and different reasons as to why something should be excluded that we or you had not really thought of. There seems to me to be no reason why you should not actually characterise some of the sorts of reasons that one might have for putting things into Schedule 1, without pretending that that is an exclusive list.*¹⁴³

The evidence suggests that it would be useful to explicitly state certain characteristics and principles that would point to conduct which should appropriately fall outside the Ombudsman's jurisdiction. However, such characteristics and principles should not be binding as exceptions are likely to arise. It would seem preferable to identify a series of guiding principles which could be consulted when exemptions are proposed. Proposed exemptions should be examined on a case by case basis, and exclusions under Schedule 1 need to be clearly justified on public interest grounds in Cabinet and Parliament.

The Ombudsman proposes that "a provision should be included in the Act which puts beyond doubt that the limitations on the Ombudsman's jurisdiction set out in Schedule 1 are to be read and interpreted narrowly". The Ombudsman claims that such a provision would be consistent with, and give legislative effect to, judicial decisions which state that the powers of the Ombudsman are to be construed widely whereas exclusions of jurisdiction are to be read narrowly. A similar principle was upheld in the New South Wales Supreme Court in relation to the interpretation to be placed upon the Ombudsman's powers. In the appeal of *Botany Council v the Ombudsman* Justice P Kirby concluded that the powers of the Ombudsman are wide and should be construed as such. He stated that the powers of the Ombudsman under the *Ombudsman Act 1974* are extremely wide as "they are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability."¹⁴⁴ The Committee fully supports this view and accordingly has made the following recommendations:

¹⁴² Roger Wilkins, *Evidence taken before the Committee Wednesday 30 July 1997*, pages 23-24.

¹⁴³ *Ibid.*

¹⁴⁴ New South Wales Supreme Court, *Botany Council v the Ombudsman*, 37 NSWLR 357, 1995, pp. 367-368.

Recommendation 31

The Committee recommends that:

- (a) guiding characteristics and principles be developed about what conduct should fall outside the Ombudsman's jurisdiction;
- (b) such characteristics and principles should not be binding as exceptions are likely to arise; and
- (c) proposed exemptions continue to be examined on a case by case basis.

Recommendation 32

The Committee recommends that a provision be included in the *Ombudsman Act 1974* which puts beyond doubt that the limitations on the Ombudsman's jurisdiction set out in Schedule 1 are to be read and interpreted narrowly.

6.2 Should Schedule 1 be subject to regular review?

As previously noted, until now there has been no comprehensive review of the items contained in Schedule 1. The Director General of the Cabinet Office, Roger Wilkins, notes that Schedule 1 is reviewed on an ad hoc basis.¹⁴⁵ The submission from the Cabinet Office states that:

*There is no systematic review of the Schedule undertaken at set intervals. However, as issues arise regarding the appropriateness of conduct excluded from the Ombudsman's jurisdiction, or as amendments are made to other legislation which may have an impact on Schedule 1 to the Ombudsman Act, the provisions of Schedule 1 are reviewed.*¹⁴⁶

Given that items are added to the Schedule in an ad hoc fashion the Committee considers that there is a need for a regular review of Schedule 1 of the *Ombudsman Act 1974*. Regular review of Schedule 1 would counter the ad hoc process by which items are added to Schedule 1 and would permit a fuller assessment of the appropriateness of items included in the Schedule. However, the Committee is not proposing that amendments to the Schedule should cease to be made on a case by case basis. This would be impractical. It is proposed that the Schedule should continue to be amended as required but that regular review should occur, for example, every five years. This would enable the Committee to examine the appropriateness and relevancy of the clauses, whether they are consistent with new legislation, and their workability.

The Ombudsman supports a regular review of Schedule 1 and stated in her submission that:

In my view, it is appropriate for the Schedule to be subject to review by the Parliamentary Committee on the Office of the Ombudsman and the

¹⁴⁵ Roger Wilkins, *Evidence taken before the Committee Wednesday 30 July 1997*, page 22.

¹⁴⁶ The Cabinet Office, *Submission for Review of Schedule 1*, page 3.

*Police Integrity Commission at least once every five years.*¹⁴⁷

The Director General of the Cabinet Office also felt that a regular review of Schedule 1 was a sensible suggestion:

*As with any other legislation, I do not think there is any reason why it should not be reviewed on a three-yearly basis. Characteristically, Parliament now puts clauses into bills which suggest that they should be reviewed every five years. That is a possibility as well; perhaps something along those lines.*¹⁴⁸

Recommendation 33

The Committee recommends that the *Ombudsman Act 1974* be amended to provide for a review of Schedule 1 by the Committee on the Office of the Ombudsman and the Police Integrity Commission at five-yearly periods.

¹⁴⁷ Office of the Ombudsman, *Submission for Review of Schedule 1*, page 8.

¹⁴⁸ Roger Wilkins, *Evidence taken before the Committee Wednesday 30 July 1997*, page 22.

APPENDIX 1

List of Submissions

LIST OF SUBMISSIONS

REVIEW OF SCHEDULE 1 OF THE OMBUDSMAN ACT 1974

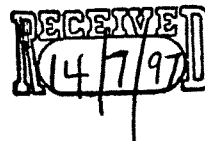
Number

1. Noel Selway, Faulconbridge Residents Association Incorporated
2. Department of Gaming and Racing
3. Legal Services Commissioner
4. Mervyn Finlay, Inspector, Police Integrity Commission
5. Independent Commission Against Corruption
6. Privacy Committee
7. NSW Ombudsman
8. NSW Department of Health
9. Police Integrity Commission
10. Attorney General's Department
11. NSW Department of Community Services
12. Community Services Commission
13. Ministry for Police
14. The Cabinet Office
15. Casino Control Authority

APPENDIX 2

***Submission from the
Office of the Ombudsman***

Our reference: Grant Poulton
Telephone: 9286 1014



15 JUL 1997

Mr Bryce Gaudry MP
Chairman
Committee on the Office of the Ombudsman
and the Police Integrity Commission
Room 813
Parliament House
Macquarie Street
Sydney NSW 2000

Attention: Stephanie Hesford

Dear Mr Gaudry

**OMBUDSMAN'S SUBMISSION ON REVIEW OF SCHEDULE 1 OF THE
*OMBUDSMAN ACT 1974***

I enclose a copy of my submission in relation to the Committee's review of Schedule 1. I confirm my earlier advice that I will be attending this hearing on 24 July together with Chris Wheeler, the Deputy Ombudsman.

Yours sincerely



**IRENE MOSS AO
NSW OMBUDSMAN**

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**Parliamentary Committee on the Office of the Ombudsman
and the Police Integrity Commission**

Review of Schedule 1 of the *Ombudsman Act 1974*

Ombudsman's Submission

Introduction

In my answers to questions on notice for the fourth general meeting I recommended that:

1. the *Ombudsman Act* ("the Act") should be amended to provide specific criteria or principles to be used for including conduct in Schedule 1;
2. Schedule 1 should be the only mechanism for excluding conduct from the Ombudsman's jurisdiction;
3. Schedule 1 should only be amended by Act of Parliament; and
4. Schedule 1 should be subject to regular review.

I also discussed the particular matters/types of conduct listed in Schedule 1 and made some recommendations in relation to them.

I now want to use the opportunity presented by the Committee's review of Schedule 1 to expand on some of my earlier comments and recommendations.

1. Criteria for inclusion of conduct in Schedule 1

Presumption:

The Ombudsman was established to provide an effective mechanism by which public authorities exercising administrative powers and functions are held to account. From this flow two presumptions. First, the conduct of public authorities exercising administrative powers or functions should be presumed to be within the jurisdiction of the Ombudsman. Second, the conduct of those exercising judicial or legislative powers and functions should be presumed to be outside the jurisdiction of the Ombudsman.

Therefore, the first two categories of conduct which should appear in Schedule 1 as conduct excluded from the jurisdiction of the Ombudsman are the exercise of judicial and legislative powers and functions.

Judicial powers and functions:

The conduct of public authorities to the extent that they exercise judicial powers and functions should be excluded from the Ombudsman's jurisdiction. Currently, clauses 2 and 3 of Schedule 1 may be relevant to this presumption.

In my view, these clauses should be consolidated into one all purpose clause which makes it clear that only the exercise of judicial powers and functions or conduct of judicial officers is excluded.

Apart from the fact that such matters fall outside the accepted meaning of "matters of administration", it is important to note that there are alternative accountability mechanisms to deal with complaints about these matters. Judicial decisions can be appealed and reviewed through the legal system, and complaints about the improper conduct of judicial officers are dealt with by the Judicial Commission.

Legislative powers and functions:

The conduct of public authorities to the extent that they exercise legislative powers and functions should be excluded from the jurisdiction of the Ombudsman. Currently, much of clause 1 and clause 4 of Schedule 1 appear to give effect to this presumption.

In my view, these clauses should be consolidated into one all purpose clause which makes it clear that the exercise of legislative powers and functions is excluded.

The Parliamentary process provides an appropriate accountability mechanism in relation to complaints about the exercise of legislative powers and functions.

Administrative powers and functions:

Having excluded conduct involving the exercise of legislative and judicial powers and functions from the jurisdiction of the Ombudsman, consideration needs to be given to whether there any administrative powers and functions that should be excluded, and if so, on what basis:

1. Exclusion of the conduct of the Governor and Ministers of the Crown:

In my view, it is not appropriate for the conduct of the Governor (clause 1(a)) or that of Ministers of the Crown (Clause 1(b)) to be within the jurisdiction of the Ombudsman.

It is also appropriate that functions associated with the exercise of the Crown prerogative, as specified in clauses 7 and 9, should be excluded from the jurisdiction of the Ombudsman.

2. **Exclusion of the conduct of officers of the Parliament:**

There are a number of public authorities whom the Parliament has decided can only be dismissed by the Governor on an address of both Houses of the Parliament. Apart from myself and my three statutory officers, these include: the ICAC Commissioner*; the PIC Commissioner; any PIC Assistant Commissioner; the Inspector of the PIC; the Electoral Commissioner; the Director of Public Prosecutions; and the Auditor-General. Given the existence of Parliamentary accountability, it is appropriate that the conduct of such officials be excluded from the jurisdiction of the Ombudsman.

* It should be noted that this office has jurisdiction in relation to complaints about the conduct of the ICAC where those complaints are made or referred under the *Protected Disclosures Act 1994*. The ICAC has a broader jurisdiction over this office which includes complaints made or referred under the *Protected Disclosures Act* as well as complaints alleging corrupt conduct.

3. **Exclusion of the conduct of public authorities where acting as legal advisers or in relation to the carrying on of legal proceedings:**

The provision of legal advice (clause 6) and decisions relating to the carrying on of legal proceedings (clause 8) are excluded from the jurisdiction of the Ombudsman. In my view they should not be completely excluded. The clauses should be amended to bring such conduct within the jurisdiction of the office in circumstances where there is sufficient evidence of improperly motivated or provided legal advice, or the carrying on of legal proceedings in bad faith, and where it is not possible or appropriate to refer the matter to the Legal Services Commission.

4. **Exclusion of conduct where such exclusion is necessary for the effective performance of a function:**

Clauses 18 and 27 exclude the conduct of certain mediators and conciliators from the jurisdiction of the Ombudsman. These are anomalous provisions as the conduct of other public authorities which engage in similar activities is within the Ombudsman's jurisdiction eg. conciliations under the Anti-Discrimination Act and mediations conducted by the Department of Fair Trading.

Clauses 18 and 27 should be deleted and replaced with a clause covering the conduct of a public authority when acting as a mediator or conciliator under an Act where the Act stipulates that anything said or any admission made or document prepared for the purposes of the mediation or conciliation is not admissible in evidence in any proceedings before any court, tribunal or body.

5. Exclusion of conduct where the public authority is acting as employer or making decisions about employment:

Clause 12 of Schedule 1 excludes the conduct of public authorities relating to the appointment or employment of a person as an officer or employee or matters affecting a person as an officer or employee. There is a recently introduced exception to this exclusion which relates to the consequences to a public servant's employment in relation to a protected disclosure which has been made or referred to the Ombudsman.

An examination of the second reading speech of the Minister of Justice of the time makes it clear that clause 12, in its original form, was intended to remove 'industrial matters' from the jurisdiction of the Ombudsman. The exclusion, so interpreted, would have been appropriate given the existence of this alternative and satisfactory means of redress by way of the industrial relations system. However, in 1987, some doubt arose as to whether clause 12 operated to exclude only 'industrial matters' or whether it excluded a broader category of conduct. This question arose as a consequence of an argument by a public authority that internal departmental investigations into complaints about staff members were matters "affecting a person as an employee" and therefore an investigation by the Ombudsman into the adequacy of such departmental investigations was excluded by clause 12. The authority obtained an opinion from the Crown Solicitor which tended to confirm their argument. This matter was then made the subject of an Ombudsman's Special Report to Parliament, a copy of which is attached. In that report, the Ombudsman recommended that clause 12 be amended so as to make it clear that the exclusion applied only to industrial matters and not to the type of conduct which the Ombudsman had been investigating. The recommendation was not acted upon.

We have obtained an opinion from Senior Counsel that, based on two recent cases (one involving this office and the other involving the Commonwealth Ombudsman), clause 12 should not be read as operating in the manner argued by the public authority. A copy of that advice is attached for the Committee of the Committee but is not for publication.

Given the potential for this issue to result in litigation questioning the jurisdiction of this office, it would seem appropriate that clause 12 be clarified to narrow the exclusion to allegations made by an individual about their own appointment or employment as an officer or employee or allegations made by an individual about matters affecting them as an officer or employee provided that there is or was available to the person an alternative and satisfactory means of redress.

6. **Conduct of the ICAC, the State Crime Commission, the PIC, Royal Commissions and Special Commissions of Inquiry:**

Currently, the conduct of Royal Commissioners (clause 10), Special Commissioners of Inquiry (clause 11), officers of the ICAC* (clause 20) and members of the "State Drug Crime Commission", now the NSW Crime Commission (clause 19) is excluded. The provisions excluding the PIC from the jurisdiction of the Ombudsman are currently located in section 125 of the *Police Integrity Commission Act 1996*.

These exclusions are entirely appropriate given the nature of the work which is performed by these bodies, particularly where these bodies are exercising powers and functions under Division 2 of Part 2 of the *Royal Commissions Act 1923*.

However, some thought should be given to whether the State Crime Commission exclusion should extend to cover NSW police officers seconded to work for or with that Commission. In my view, complaints about the conduct of such officers should not be outside the jurisdiction of the Ombudsman as these officers are still serving police officers with the powers of sworn police officers.

* It should be noted that this office has jurisdiction in relation to complaints about the conduct of the ICAC where those complaints are made or referred under the *Protected Disclosures Act 1994*. The ICAC has a broader jurisdiction over this office which includes complaints made or referred under the *Protected Disclosures Act* as well as complaints alleging corrupt conduct.

7. **Conduct of police officers and transit police:**

The conduct of police officers and transit police (clauses 13 and 21 respectively) is excluded from the Ombudsman's jurisdiction under the *Ombudsman Act 1974* but is within the Ombudsman's jurisdiction under the *Police Service Act 1990* (as amended by the *Police Legislation Amendment Act 1996*). Therefore, in order to be consistent with the existence of these alternative provisions giving the Ombudsman jurisdiction over police and transit police, clauses 13 and 21 should remain in schedule 1. However, in my view they should be consolidated into one clause.

8. **Miscellaneous:**

Clauses 14 and 15 deal with similar subject matter - conduct relating to decisions about the investment of funds. In my view, clause 14 is expressed too broadly in that it could potentially and inappropriately exclude complaints about administrative conduct, such as the extent of delays, from the jurisdiction of the Ombudsman. Clause 14 should be narrowed to make it more consistent with clause 15 in order to make it clear that the excluded

conduct is the decision made by the public authority as to the investment of funds.

Clause 16, the conduct of the Privacy Committee, should be deleted. The Director-General of the Attorney-General's Department and the Ombudsman are in agreement about this matter. A copy of the Ombudsman's letter to the Director-General, which sets out the reasons for their agreement is attached.

Clause 17, concerning the conduct of public authorities relating to alleged violations of privacy, should also be deleted. This clause is anomalous in that the conduct over which the Privacy Committee has jurisdiction has been excluded from the Ombudsman's jurisdiction. In nearly every other case where a specialist watchdog body exists, such as, for example, the ICAC (largely), the Department of Local Government, the Anti-Discrimination Board and the HCCC, the Ombudsman retains concurrent jurisdiction with the specialist watchdog. The principal benefit of this concurrent jurisdiction is that it allows the more effective management and handling of complaints where complaints raise multiple issues. For example, where a complaint raises several issues, one of which may be a minor and subsidiary privacy-related issue, it may be more efficient and effective for my office to investigate all issues raised in the complaint rather than separating the specialist issue from the general issues. Currently, complaints which raise multiple issues can be assessed by this office in consultation with other specialist watchdog bodies and joint decisions made as to the most suitable body to investigate the matter. This consultation could be formalised with the Privacy Committee by means of a "class or kind" agreement which facilitates this consultation. By entering into such an agreement, we would be able to avoid duplication but ensure that complaints do not fall between jurisdictional cracks.

Clauses 22 (conduct of the Hen Quota Committee) and 25 (conduct of the HomeFund Commissioner and his staff) should be deleted to bring the Schedule up to date.

Clause 24 excludes the conduct of the Casino Control Authority, or the conduct of any public authority exercising functions under the *Casino Control Act 1992*. I am unsure of the basis for this exclusion and question its continued relevance.

2. Inclusion in Schedule 1 as the only method of exclusion

One matter which I raised in my answers to questions on notice for the fourth general meeting was the fact that other legislative instruments have been adopted to exclude conduct from the jurisdiction of the Ombudsman. I referred by way of example to

section 52(2)-(5) of the *Freedom of Information Act 1989*, section 121 of the *Community Services (Complaints, Appeals and Monitoring) Act 1993* (the “CAMA Act”), and section 125 of the *Police Integrity Commission Act 1996*.

In relation to section 121 of the CAMA Act, this is an anomalous and confusing provision.

It is anomalous because it removes certain matters from the jurisdiction of the Ombudsman merely because a specialist body is able to investigate such matters. In most other circumstances where there is overlapping jurisdiction, this issue is dealt with through agreements between the Ombudsman and the agency in question (eg. the ICAC, the ADT, the HCCC, Police Service, PIC, Department of Local Government and so on).

The position is also confusing because its scope is unclear. While it clearly removes jurisdiction over the conduct of DOCS in relation to individual complaints alleging unreasonable conduct, it appears that the Ombudsman retains jurisdiction in relation to complaints concerning:

- the conduct of DOCS staff;
- complaints alleging systemic deficiencies; and
- all alleged conduct other than unreasonable conduct.

It would be far simpler to remove the provision from the CAMA Act and to rely on:

- the provisions of section 13(4)(v) of the *Ombudsman Act 1974* which refers to alternative and satisfactory means of redress; and
- an agreement reached between the Ombudsman and the Commissioner of the Community Services Commission as to the classes and kinds of matters best dealt with by each body.

I repeat my earlier submission that the only mechanism by which the Ombudsman’s jurisdiction should be excluded is through the *Ombudsman Act 1974*. This would help to ensure that the Ombudsman is consulted about any proposed exclusion. It would also assist in clarifying for the public whether or not particular conduct is within the Ombudsman’s jurisdiction.

3. Amendments to Schedule 1

As I stated earlier, restrictions on the jurisdiction of the Ombudsman should be achieved through enactment of amending legislation, rather than by way of proclamation by the Governor. To this could be added a requirement for prior consideration of any proposal by the Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission. The requirement for amending

legislation would allow careful parliamentary scrutiny of proposals to curtail the Ombudsman's jurisdiction.

A provision should be included in the Act which puts beyond doubt that the limitations on the Ombudsman's jurisdiction set out in Schedule 1 are to be read and interpreted narrowly. Such a provision would be consistent and give effect to certain judicial decisions involving the NSW and Commonwealth Ombudsman. These decisions have held that, as is clear from the nature and purpose of the statutes establishing the Ombudsman, the powers of the Ombudsman are to be construed widely whereas exclusions of jurisdiction are to be read narrowly. These decisions lie at the heart of the reasoning of Senior Counsel in the opinion we obtained in relation to the meaning of clause 12.

4. Regular reviews of Schedule 1

In my view, it is appropriate for the Schedule to be subject to review by the Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission at least once every five years.

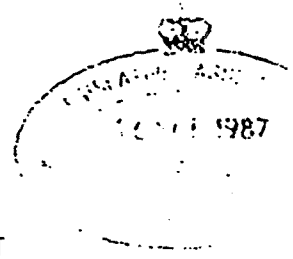


Parliament of New South Wales

1986-87

REPORT
TO PARLIAMENT UNDER SECTION 31
OF THE OMBUDSMAN ACT 1974
CONCERNING THE PROPOSED
AMENDMENT TO THE OMBUDSMAN
ACT TO LIMIT APPLICATION OF ITEM
12 (b) OF SCHEDULE 1

Ordered to be printed 17 September, 1987



REPORT TO PARLIAMENT

UNDER SECTION 31 OF THE OMBUDSMAN ACT

Proposed amendment to the Ombudsman Act
to limit application of Item 12(b) of Schedule 1.

Report to THE HONOURABLE BARRIE UNSWORTH, MP
Premier of the State of New South Wales

PREPARED BY: G.G. MASTERMAN, Q.C.
OMBUDSMAN

DATE : 937

REPORT TO PARLIAMENT UNDER SECTION 31 OF THE OMBUDSMAN ACT

1. PURPOSE

- 1.1 This report requests Parliament to forthwith amend the Ombudsman Act to close a "loop hole" recently discovered in the Act. The "loop hole" relates to the construction of the words "matters affecting a person as an officer or employee" which, in relation to the conduct of a public authority, is excluded conduct under Section 12(1)(a) of the Ombudsman Act.
- 1.2 Until recently, this exclusion was interpreted as relating to a reasonably narrow class of complaints, which could be categorised as "industrial" issues. Legal advice now indicates that the exclusion covers a much wider class of complaints. It appears that the construction of this exclusion has had an unintended consequence which will now seriously constrain the Ombudsman in dealing with many important complaints.

2. BACKGROUND

- 2.1 Section 12 of the Act provides that the Ombudsman cannot investigate the conduct of a public authority set out in Schedule 1 of the Act. Among the exclusions is the conduct of a public authority relating to matters affecting a person as an officer or employee (Schedule 1, item 12(b)).
- 2.2 During the second reading debate upon the Ombudsman Bill, the then Minister for Justice said:

.... it is felt that the office of the ombudsman was not created to deal with industrial disputes such as the payment of an allowance, the granting of special leave, the payment of a specified wage and other allied matters. Accordingly, Item 12 of the Schedule to the bill will specifically preclude the ombudsman from inquiring into complaints about things alleged to have been done by or on behalf of an employer of an employee in his capacity as an employer.

personal matters) unless the Ombudsman considers that the matter merits investigation in order to avoid injustice.

3. CHALLENGE TO JURISDICTION

3.1 The Ombudsman does not usually act on citizen's complaints until they have first been directed to the relevant public authority. This practice, in addition to seeking effective use of resources, recognises that public authorities should be self-correcting institutions, able to cope with criticism, review their practices, and to correct mistakes. The Office of the Ombudsman is usually an avenue of last resort, and has encouraged the setting up of internal complaints mechanisms such as the Department of Health's Complaints Unit, the Official Visitor Scheme in New South Wales Prisons, and the recent Client Liaison Unit initiative in the Department of Youth and Community Services.

3.2 A significant number of complaints allege that public authorities have failed to investigate misconduct by their servants.

3.3 Examples include:

- . A complaint that the Department of Education failed to properly act on allegations put to it by parents that a teacher was sexually molesting their children.
- . A complaint from a prisoner that the Department of Corrective Services failed to take action on his allegation of being assaulted by a prison officer.
- . A complaint that the Department of Health failed to adequately investigate a complaint made by a woman that she was sexually harassed by a health worker at a hospital.

3.4 In this example, the woman's complaint, by statutory declaration, was investigated by the most senior regional officer of the Department. Dissatisfied with this action, she then complained to the Department's Complaints Unit, which reviewed the matter and informed the woman that the regional investigation had been appropriate and

satisfactory. She then complained to the Ombudsman. Following preliminary inquiries which established a prima facie case, an investigation was commenced by the Ombudsman; this provided provisional conclusions that there had been wrong conduct on the part of both the regional officer and the Complaints Unit.

3.5 The Department of Health sought advice from the Crown Solicitor on whether certain action detailed in the provisional report constituted wrong conduct as argued by the Ombudsman's investigation officer. A copy of the full advising of the Crown Solicitor is annexed to this report. While reporting that, in his opinion, the Ombudsman was able to form such conclusions about the substantive matters on the available evidence, he was of the view that the conduct investigated was itself not within the Ombudsman's jurisdiction.

3.6 The Crown Solicitor's argument, in brief, is that the officers of the Department of Health were trying to establish the accuracy of an allegation that the health worker had misconducted himself. In so doing, the Crown Solicitor says the regional officer was following public service requirements so far as disciplinary action was concerned, and the Complaints Unit was purporting to review his action. The Crown Solicitor admits that it is difficult to define "matters affecting a person in his capacity as an officer or employee"; but believes that alleged misconduct by someone acting as an officer or employee is such a matter. That conduct is therefore excluded conduct in the opinion of the Crown Solicitor.

4. IMPLICATIONS OF RESTRICTED JURISDICTION

4.1 The Ombudsman has sought advice from independent Counsel who has supported the view taken by the Crown Solicitor on the construction of this provision of the Act. The immediate effect is that the Ombudsman must cease investigating the Department of Health complaint and all similar complaints. The Ombudsman must also decline to investigate future

complaints about public authorities' handling of allegations against their employees. Counsel has said that the conduct of a public authority can relate to matters affecting a person as an officer or employee if there is any connection, regardless of the nature of that connection. The words "relating to" have a broad meaning which, in Counsel's view, can refer to any connection between two entities.

- 4.2 Many complaints made to the Ombudsman fall within this category of apparently excluded conduct. It is clear that Parliament never intended complaints of this kind to be caught within the provision of Item 12(b) of Schedule 1 of the Ombudsman Act; the construction of the provision has brought about an unintended and absurd consequence.

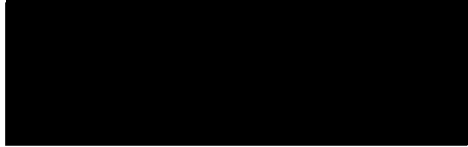
5. VIEWS OF THE OMBUDSMAN

- 5.1 The Ombudsman believes that complaints by an employee about "industrial relations" matters ought to be outside the Ombudsman's jurisdiction. He advised the Premier of his view on this matter relatively soon after his appointment in June 1981.
- 5.2 Complaints by members of the public about the failure of public authorities to take proper action on allegations about misconduct by individual public servants in their dealings with the public are entirely different. The Ombudsman believes that such complaints clearly should be within the scope of the Ombudsman's jurisdiction.

6. RECOMMENDATION

- 6.1 It is recommended that Parliament forthwith amend Item 12(b) of Schedule 1 of the Ombudsman Act to restrict the conduct excluded from the Ombudsman's jurisdiction to complaints by an employee about matters directly affecting that person's appointment to and employment by a public authority.

6.2 Pursuant to Section 31(2) of the Ombudsman Act, I further recommend that this report be made public forthwith.



G.G. Masterman,
Ombudsman



VI.

State Crown Solicitor's Office

Mr. Walton,
 Manager, Complaints Unit,
 Department of Health,
 McKell Building,
 Rawson Place,
 SYDNEY.

Goodsell Building
 8-12 Chifley Square
 Sydney, N.S.W.
 D.X. 19 Sydney
 Box 25, G.P.O. Sydney 2001

86/5420 AC.IVK
 (Mr Knight)

Our reference:

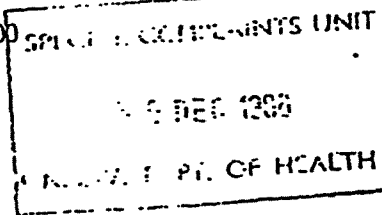
Your reference:

CU85/0423 GF:AK

228 7777

Telephone: 298-6566-

Extension: 7375



19th December, 1986.

Re: Complaint by Ms. B

1. Advice sought.

1.1 You have referred to me a document forwarded to you by the Ombudsman by letter dated 24th November, 1986 entitled "Provisional Findings and Recommendations", which was prepared by him in the course of an investigation of a complaint by Ms. B. The Ombudsman states that he would like to have any comments you see fit to make within 28 days of the date of his letter. Your comments will, presumably, be taken into account so far as the course of the investigation and its results are concerned.

1.2 You seek my urgent advice in respect of all the matters contained in the Ombudsman's report, particularly in regard to:-

- "(i) whether the failure to inspect clinical files or other documents held by the Community Health Centre, in light of denials of the complainants allegation, constitutes wrong conduct; and
- (ii) whether the course of inquiry adopted by the Complaints Unit constitutes wrong conduct."

2. The Complaint.

2.1 It appears from the Ombudsman's report that the conduct notified as being the subject of investigation by the Ombudsman was:

- "The alleged failure of the Department of Health to carry out an adequate investigation into the complaint made by Ms B

IVK.f.14

against Mr. X of the Community Health Centre."

and that the Public Authority the subject of the complaint was:

1. The Department of Health.

2. Mr. D

Health Region, Department of Health.

I have not sighted the actual complaint.

2.2 Ms. B had initially complained by Statutory Declaration to the Chief Executive Officer of District Hospital about alleged sexual harassment of herself by Mr. X, a at the Community Health Centre, who was providing counselling for Ms. B's 9 year old son W with respect to behavioural problems at school. The complaint was referred to the Regional Director as Mr. X was a Departmental employee. Mr. D as , investigated the complaint but informed Ms. B that Mr. X had denied improper conduct and that as it was one person's word against another there were no further measures he could take.

2.3 Ms. B was dissatisfied with the investigations by Mr. D and complained by letter dated 11th June, 1985 to the Complaints Unit. Ms. B was subsequently advised by you for the Secretary by letter dated 26th August, 1985 that he was satisfied that the allegations had been appropriately investigated by Mr. D Ms. B then complained to the Ombudsman.

2.4 By letter dated 17th April, 1986 the Ombudsman sought the Secretary's comments on the complaint in order to assist him to decide whether the complaint should be the subject of an investigation under the Ombudsman Act, 1974 ("the Act"). The Secretary responded by letter dated 30th June, 1986. In that letter, after setting out the history of the matter as he knew it, the Secretary said:

"Ms. B then lodged a complaint with the Complaints Unit by letter dated 11 June, 1985. As a result of that complaint the Complaints Unit called for, and received, copies of the Region's files concerning these allegations. These documents were then reviewed by officers of the Complaints Unit. I advise that the Complaints Unit did not arrange for a committee to further

interview Mr. X . . . The reply to Ms.B from the Complaints Unit, dated 11 August, 1985, was based purely upon a review of the Region's file. As stated in that reply, 'I am satisfied that the allegations raised by the concerning Mr.X have been appropriately investigated . . .'. I do not resile from that decision.

I advise further that the Department has not adopted any specific guidelines for dealing with complaints alleging sexual harassment by Departmental staff. All complaints against officers within this Department are dealt with in accordance with Public Service Board directives dealing with disciplinary interviews. These guidelines are applicable in respect to all allegations of misconduct by N.S.W. public servants, regardless of the nature of the allegation in any particular case. I am of the opinion that these guidelines were adhered to by my officers in the conduct of the investigation into the allegations made by Ms.B "

2.5 On 13th August, 1986 notice was given of the Ombudsman's decision to commence an investigation pursuant to s.13 of the Act.

3. The Act.

3.1 Section 26(1) of the Act provides:

"26. (1) Where, in an investigation under this Act, the Ombudsman finds that the conduct the subject of the investigation, or any part of the conduct, is wrong, the Ombudsman shall make a report accordingly, giving his reasons."

"Conduct" which the Ombudsman may investigate is defined in s.5(1) as follows:

" 'conduct' means -

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

3.2 Only certain conduct may, however, be the subject of a complaint to the Ombudsman. Section 12 provides:

"12. (1) Subject to this section, any person (including a public authority) may complain to the Ombudsman about the conduct of a public authority unless -

- (a) the conduct is of a class described in Schedule 1;
- (b) the conduct took place more than twelve months before the date of assent to this Act;
- (c) the conduct took place during the period of twelve months that last preceded the date of assent to this Act and the complaint was made more than twelve months after the appointed day; or
- (d) the conduct, being conduct of a local government authority, took place before the day appointed and notified under section 2(2) of the Ombudsman (Amendment) Act, 1976."

Clearly, only conduct of a "public authority" may be the subject of a complaint. "Public authority" is defined in s.5(1). While I accept that Mr. D is a public authority it is not entirely clear that "The Department of Health" is a public authority, as is asserted on p.1 of the Ombudsman's report. If it is a public authority it must be because of the definition of "person" in s.5(1) which "includes an unincorporated body of persons".

Conduct of a class described in Schedule 1 cannot be the subject of a complaint. Item 12 of Schedule 1 describes the following conduct:

- "12. Conduct of a public authority relating to -
 - (a) the appointment or employment of a person as an officer or employee; and
 - (b) matters affecting a person as an officer or employee."

The word "employment" in paragraph (a) is, in my opinion, coloured by the word "appointment" and is intended to mean "the act of taking a person into one's service" and not "the state of being employed".

The construction of para. (b) is not, however, an easy matter. For conduct to be excluded there must be a matter which is a matter "affecting a person as an officer or employee" and the conduct must relate to that matter.

In the second reading speech for the Ombudsman Bill, 1974 the then Minister for Justice said, at p.778 of the N.S.W. Parliamentary Debates (29 Aug. 1974):

"The Law Reform Commission recommended that the Ombudsman should, as the New Zealand counterpart is, be given jurisdiction in matters arising out of the employer-employee relationship that is, in relation to such matters as the terms and conditions of employment, including matters relating to appointments, promotions, pay, discipline and other personnel matters. When I refer to the employer-employee relationship, I mean a relationship between the Government as the employer - that is, a public authority - and the employees of that authority. I am not referring to employer-employee relationships in the outside community. In this regard it is felt that the office of the ombudsman was not created to deal with industrial disputes such as the payment of an allowance, the granting of special leave, the payment of a specified wage and other allied matters. Accordingly, Item 12 of the schedule to the bill will specifically preclude the Ombudsman from inquiring into complaints about things alleged to have been done by or on behalf of an employer of an employee in his capacity as an employer." (my underlining).

It appears from this speech that the Government intended to exclude matters arising out of the employer-employee relationship and that such matters included matters "relating to ... discipline and other personnel matters." The shorthand description was "things ... done by ... an employer ... in his capacity as an employer" (although the actual examples given by the Minister in the second last sentence are somewhat narrower). It is difficult on this basis to see why what Mr. D and the Complaints Unit were doing is not excluded conduct. Clearly, they were endeavouring to ascertain whether an allegation that Mr. X had misconducted himself while acting as an officer of the Department was correct. Mr. D was certainly following, and consciously following, Public Service requirements so far as disciplinary action was concerned and the Complaints Unit was purporting to review his action. I cannot see that it matters that the allegations of misconduct came from a member of the public rather than from within the organization.

The Opposition of the day, considered the conduct excluded by item 12 to be too wide. As p.1351 of the Parliamentary Debates discloses, the Opposition sought to replace item 12 with the following:

"12. The Ombudsman shall not investigate any matter with respect to persons who are or were in service under a public authority so far as the matter relates to terms and conditions of employment (including matters relating to appointments promotions removals pay discipline and superannuation, and other personal matters) unless the Ombudsman considers that the matter merits investigation in order to avoid injustice."

and Mr. Mulock said:

"Honourable members on this side of the Chamber see that as a considerable improvement on paragraph 12 of the schedule as it appears in the bill, which reads:

12. Conduct of a public authority relating to -
 - (a) the appointment or employment of a person as an officer or employee; and
 - (b) matters affecting a person as an officer or employee.

Those matters are excluded from the operations that can be investigated by the Ombudsman. The provision is too wide. If the Ombudsman is not to play the role of an advocate when there appears to be an injustice in this area of employment, he should have the right to intervene and investigate these matters."

The Law Reform Commission in its Report on Appeals in Administration 1973 had prepared an Ombudsman's Bill which contained no equivalent to item 12 of Schedule 1 and said, at p.179:

"43. Conduct not mentioned in the Schedule, and therefore conduct within the Ombudsman's jurisdiction, includes, for example, conduct of a public authority -

.....

- (e) where acting in relation to the employment by the public authority of any person, or pursuant to the terms and conditions of employment of any person employed by the public authority."

The Commission had also proposed the establishment of a Public Administration Tribunal which could review official action but not official action affecting the employer-employee relationship. At p.166 of its report it said:

"67. Most official actions affecting the employer-employee relationship are within the jurisdiction of special tribunals such as the Industrial Commission and the Crown Employees Appeal Board of this State. In Item 14 we seek to avoid unnecessary duplication of remedies. Conduct touching the relationship mentioned is not, however, excluded from investigation by the Ombudsman which may lead to recommendation by him."

The grammatical and ordinary sense of words used in an Act is to be adhered to unless that produces some absurdity or inconsistency. I must say I have some difficulty in ascertaining the precise meaning of the words "matters

affecting a person in his capacity as an officer or employee". I would have thought that an allegation that a person has misconducted himself while acting as an officer or employee was such a matter with the result that conduct relating to that matter is excluded conduct. It is true that "affect" can be used in different senses. It may mean to "influence", "alter" or "shape" (per Winn L.J., in Re Bluston, Bluston v. Dawes (1966) 3 All. E.R. 220 at pp.225-226) or "touch", "relate to" or "concern" (per McTiernan J. in Shanks v. Shanks (1942) 65 C.L.R. 334 at p.337). The former seems somewhat inappropriate in the context of a person being affected by the matter and I incline to the view that the latter wider construction was intended. I also appreciate that it might be argued that "matters" is confined to "employment" matters as between the employer and the employee, i.e. the terms and conditions of the employment and, although it does not necessarily follow, that such matters would not include allegations of misconduct brought by a stranger to the employment relationship but which are relevant to the terms and conditions of the employment. The difficulty with this is that it would have been an easy matter to refer in para. (b) to such limited employment matters, a course adopted in other Acts; if that had been intended, ^{and} comparison with para. (a) does not dictate such a conclusion.

3.3 On the view I prefer, Ms. B had no right to complain pursuant to s.12(1) of the Act to the Ombudsman about the conduct of Mr. D and the Department of Health in relation to her complaints to them about Mr. X's behaviour, as such conduct was conduct of a class described in item 12(b) of Schedule 1. As a consequence, the Ombudsman could not investigate the complaint pursuant to s.13 and cannot make a report under s.26. The doubt which surrounds the meaning of item 12(b) of Schedule 1 is sufficient to justify Mr. D and the Department not conceding that their conduct is within the Ombudsman's jurisdiction.

It needs to be borne in mind that Ms. B was always able to complain directly to the Ombudsman about Mr. X's behaviour.

3.4 If my preferred view is incorrect, the Ombudsman's obligation to report pursuant to s.26 arises if the Ombudsman finds the conduct or any part of it is "wrong". In this regard s.5(2) provides:

"(2) For the purpose of this Act, conduct of a public authority is wrong if it is -

- (a) contrary to law;
- (b) unreasonable, unjust, oppressive or improperly discriminatory;
- (b1) in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory;
- (c) based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations;
- (d) based wholly or partly on a mistake of law or fact;
- (e) conduct for which reasons should be given but are not given; or
- (f) otherwise wrong."

No procedure is provided in the Act which enables a challenge to the Ombudsman's finding.

4. The Ombudsman's provisional findings and recommendations.

4.1 At p.18 of the draft report the Ombudsman states:

"I find that the Department of Health failed to carry out an adequate investigation into the complaint made by Ms.B against Mr. X of the Community Health Centre in that Mr.D, in investigating the original complaint, failed to take adequate steps to obtain and consider all the available evidence prior to conducting a disciplinary interview with Mr. X; and in reviewing the investigation, officers of the Complaints Unit failed to identify this deficiency and other discrepancies in the papers provided to it, and failed to take corrective action, and failed to take adequate steps to themselves properly investigate Ms. B's complaint. I consider that such conduct is wrong in terms of section 5 of the Ombudsman Act in that it was unreasonable."

4.2 The finding in respect of Mr. D is that prior to conducting a disciplinary interview with Mr. X he failed to take adequate steps to obtain and consider all the available evidence. Those steps included the obtaining of W clinical file and other documents (to check whether the home visit in question was recorded) and all files and appointment books (including Mr. X's diary); carrying out effective enquiries to ascertain whether there existed any other independent evidence and interviewing Ms.B Without taking these steps Mr. D was said not to be in a

position to test the allegations and the credit of the parties. The failure to take such steps was found by the Ombudsman to be wrong in that it was "unreasonable" within the meaning of para. (b) of s.5(2). Having examined paras. 4.3.7 and 4.3.8 of the Staff and Personnel Handbook (not the Public Service (General) Regulations 1984 as referred to by the Ombudsman) I conclude that it was open to the Ombudsman to find that Mr. D's specified conduct was "unreasonable" in the sense that it was less than might have been expected of him in going about the task he had undertaken as the Department's representative which, in essence, was, to use the language of para. 4.3.7 "to investigate all matters pertaining to the alleged breach" in order to be satisfied whether "the officer has a case to answer" (the Ombudsman's description of the task appears at the top of p.8).

4.3 The finding in the case of officers of the Complaints Unit was that they failed to identify the deficiency in Mr. D's investigation and other discrepancies in the papers provided to the Unit and failed to take corrective action and failed to take adequate steps to themselves properly investigate Ms. B's complaint and that such failures were unreasonable. At p.17 of the draft report the Ombudsman says:

"To summarise, I consider that the Complaints Unit staff failed to establish the fact that not all of the relevant papers held by the Regional Office were provided to it; that its review of Mr. D's investigation was not critical of the fact that he had not examined the clinical file on W and other documents kept by the Community Health Centre that may have been of possible forensic assistance in testing the allegations made by Ms. B; that they failed to call for such documents themselves; and that they failed to take further action on the prima facie evidence presented to them that the procedure specified in Public Service Regulation 4.3.9(iv) had not been observed by Mr. D."

I consider that the material referred to by the Ombudsman at pp.14-17 of his draft report permitted him to be satisfied that all of the Unit's failures, except the failure to itself take adequate steps to properly investigate Ms. B complaint, were unreasonable. You have not provided me with details of the Unit's functions but I take it from your letter that it is not considered to be part of the Unit's function to carry out investigations itself. If that is in fact the case then, other matters aside, it could not be said to be unreasonable for the Unit not to investigate the complaint itself. (It also seems to me that the Unit cannot be found to have been unreasonable in failing "to take corrective

action" in the sense of correcting errors in Mr. D's investigation - if that is what these words mean - and in also failing to undertake its own investigation. Further, if the Unit was satisfied with Mr. D's investigation, albeit mistakenly, it cannot be said to be unreasonable for it to then decide not to investigate the complaint itself). However, the Ombudsman emphasises that the Complaints Unit advised Ms. B that they were making "enquiries" as a result of her letter (p.14) and this may be the basis for his finding that the Unit's failure to undertake its own investigation was unreasonable. I do not think that letter can be taken as an undertaking that the Unit would itself carry out an investigation into the original complaint. It seems to me that the Department is entitled to canvass this aspect (and the other matters raised in this paragraph) with the Ombudsman and to ask him on what basis he proposes to make the finding.

4.4 If my view is incorrect and the Ombudsman may report on the subject conduct pursuant to s.26, the recommendations which he may make in such a report are set out in s.26(2) which provides:

"(2) In a report under this section, the Ombudsman may recommend -

- (a) that the conduct be considered or reconsidered by the public authority whose conduct it is, or by any person in a position to supervise or direct the public authority in relation to the conduct, or to review, rectify, mitigate or change the conduct or its consequences;
- (b) that action be taken to rectify, mitigate or change the conduct or its consequences;
- (c) that reasons be given for the conduct;
- (d) that any law or practice relating to the conduct be changed; or
- (e) that any other step be taken."

In para. 8.1 of his draft report the Ombudsman states:

"I recommend that the Department develop guidelines for the investigation of complaints of sexual harassment, in consultation with the Director of Equal Opportunity in Public Employment and the Anti-Discrimination Board."


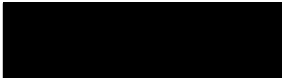
The Ombudsman appears to be recommending that the Department develop guidelines additional to those laid down by the Public Service Board dealing specifically with the investigation of "complaints of sexual harassment". He appears to be equating a complaint by a member of the public that a Departmental employee has misconducted himself in a sexual way and possibly committed criminal offences with the concept of sexual harassment by employees of fellow employees in public employment. That may not be appropriate. The Department is entitled to regard such a complaint as a disciplinary matter the investigation of which is governed by the Regulations and the Handbook. Sexual misconduct is but one of a number of forms of misconduct which may be the subject of disciplinary action. If additional guidelines for such a complaint by a member of the public are necessary, and the Ombudsman has not said why this is so, the Department is entitled to take the view ^{that} this is a matter for the Public Service Board rather than for those entities mentioned in para. 8.1 of the draft report.

In para. 8.5 the Ombudsman says:

"I recommend that the Department provide a copy of this report to Mr. Y the Executive Director of Hospital and Mr. X, the Hospital."

Whether the Ombudsman may make such a recommendation is a matter of doubt. Clearly, the persons to whom he may give a report are limited and are specified in s.26. Such a recommendation inhibits to some extent the freedom of action of the public authority receiving the report and that may not have been intended. On the other hand, the Ombudsman's power of recommendation in s.26(1)(e) is widely expressed.

I do not propose to comment on the other recommendations as that seems to be unnecessary.


Crown Solicitor.


Further submission of the Ombudsman

Review of schedule 1 of the *Ombudsman Act 1974*

This is a further submission of the Ombudsman in reply to the submissions which the Committee has made available to my Office.

Legal Services Commissioner

- The Health Care Complaints Commission is within the jurisdiction of the Ombudsman. The HCCC, much like the LSC, handles complaints about government and non-government bodies. The role of the LSC is analogous to the HCCC. The function of the LSC is not so dissimilar to warrant exemption.
- Confidentiality and secrecy provisions of the type referred to by the Commissioner also apply to the Ombudsman and officers of the Ombudsman. The penalty for breach of these provisions is the same as the penalty referred to by the Commissioner.
- The LSC is already subject to the jurisdiction of the ICAC. There is no principled reason why complaints about maladministration should be exempted.
- With respect to the Attorney-General and his department, the review provided by the Attorney and his department is not independent in the same way as is the Ombudsman.
- The privileges referred to by the Commissioner also apply to the Ombudsman.
- Oversight of the LSC by the Ombudsman would not diminish the independence of the LSC. The reverse would be true.

Department of Gaming and Racing

The Director-General attaches a report authored by the Hon Sir Laurence Street. I comment on the report as follows.

- Paragraph 8.4.3: the description of the Casino Control Authority as a regulatory body with enforcement powers as opposed to a service delivery agency is not a relevant principle for exemption. In any event, the Ombudsman has jurisdiction over licensing agencies such as the Road and Traffic Authority, the licensing authority for Sydney Water, the Ministry of Energy which licenses electricity suppliers, the Land Titles Office and numerous other agencies.
- Paragraph 8.4.4: not all of the CCA's actions and decisions are quasi-judicial or tribunal-like. Some actions will be purely administrative. Therefore, this is not a relevant principle for blanket exemption.
- Paragraph 8.4.5: the ICAC has jurisdiction and access to information. Further, the Ombudsman has jurisdiction over the police where similar considerations of confidentiality and law enforcement apply.

Privacy Committee

- In my oral submission I have already referred to the arguments which support my view that clause 17 should be deleted.

- The Office currently has overlapping jurisdiction with the ICAC, the HCCC, the Department of Local Government, the police and the PIC and we have Memoranda of Understanding or informal agreements with all of these agencies.
- This approach is extremely useful in ensuring the effective handling of complaints and preventing them from falling between jurisdictional cracks.
- An overlapping jurisdiction with the Privacy Committee would, in any event, only come into play where non-privacy issues are ancillary to the main complaint or arise during the investigation of the privacy complaint.
- The specialist Privacy Committee would have jurisdiction to deal with complaints which primarily disclose privacy violations.

NSW Health Department

- Transferring the limitations on the Ombudsman's jurisdiction presently contained in the *FOI Act* into the *Ombudsman Act* would not necessarily reduce the accessibility and usefulness of the *FOI Act*. In my view, it is logical that limitations on the jurisdiction of the Ombudsman should be found in the *Ombudsman Act*.
- The *FOI Act*, for example, is amended by Act of Parliament and it does not appear that the time constraints of the Parliament cause any difficulties in this regard.
- The Ombudsman has not seen, nor been consulted, in relation to the proposed exclusion of jurisdiction apparently contained in the new health legislation referred to by the Acting Director-General.
- The process of policy making leading up to the introduction of legislation is as likely as any other conduct to give rise to complaints about maladministration and should be within jurisdiction.
- The Ombudsman, under its FOI jurisdiction examines documents and matters relating to interaction between government and non-government agencies. There is no principled basis for excluding the Ombudsman on the basis suggested by the Acting Director-General in relation to clause 14.
- Clinical decisions and professional judgements are within the jurisdiction of the HCCC. The HCCC is within the Ombudsman's jurisdiction. This does not present difficulties at present and I see no reason, in principle, why it should in the future.
- The Ombudsman is often confronted with professional judgements in other areas. For example, planning and engineering decisions that arise in local government complaints. This does not present problems as the focus is always on the process followed rather than the merits of the judgement per se. It is unclear why clinical decisions and judgements have any special professional status.

The Attorney-General's Department

- Complaints alleging corruption by courts administration staff are within the jurisdiction of the ICAC.
- Complaints alleging maladministration by courts administration staff should also be within the jurisdiction of the Ombudsman.
- In any event, as a former Magistrate, I disagree with the Director-General's oral submission that Magistrates and Judges are functionally responsible for courts administration staff.

- Although judicial officers exercise a defacto control over their court rooms and the staff which service them, such staff are public servants and not subject to the direct control and discipline of judicial officers.
- Courts administration staff should be within the jurisdiction of the Ombudsman so as to provide an independent mechanism to deal with misconduct and maladministration.
- In my written submission I make the point that clause 18 is anomalous and affirm my comments in my earlier written submission.
- The Director-General is mistaken when he says that the Legal Services Commissioner is not compellable by the ICAC. The Commissioner is compellable and the Commissioner acknowledges this.
- In my oral submission I have already referred to the arguments in favour of the Legal Services Commissioner and the Privacy Committee being within the jurisdiction of the Ombudsman.
- As far as the Privacy Committee is concerned, the Committee and the Director-General agree.
- The Director-General does not, however, agree with respect to the Commissioner. This approach is inconsistent.
- I have also referred to the issue of shared jurisdiction with respect to the Committee and Commissioner in my oral submission.

Department of Community Services

- I note that the Acting Director-General agrees that staff involved in courts administration should be within the jurisdiction of the Ombudsman.
- There should be no difficulties with the JITs as a consequence of my suggestion with regard to clause 13 as the conduct of police are within the jurisdiction of the Ombudsman under the *Police Service Act*.
- I note the Acting Director-General's broad support for my submission with regard to section 121 of the *Community Services (Complaints, Appeals and Monitoring) Act* where he says "*It would be difficult for the Ombudsman to carry out efficacious investigation were her jurisdiction only to extent to certain aspects of such operations (eg those carried out by the Department of Community Services officers) and not others.*"
- The ICAC has jurisdiction with regard to allegations of corrupt conduct in relation to investment of funds. This is not a mechanism for review as suggested by the Acting Director-General. In any event, complaints about maladministration in relation to the investment of funds ought, in principle, be within the jurisdiction of the Ombudsman.
- The Acting Director-General does not say how changes to clause 17 will impact on the operations of the Department. There would seem no reason in principle why this should be so.
- The Acting Director-General suggests that there may be some difficulties in transferring section 121 of the *Community Services (Complaints, Appeals and Monitoring) Act* to Schedule 1 of the *Ombudsman Act*. It is unclear what he believes these difficulties are, and I do not believe that my proposal is unworkable.

Ministry for Police

- Police officers seconded to the Crime Commission should be subject to the jurisdiction of the Ombudsman in relation to their conduct prior to joining the Commission and in relation to their conduct with the Commission where they exercise the powers of a constable. Otherwise, these police would have no mechanism by which their actions as police would be the subject of scrutiny by an accountability body.
- The Ombudsman has jurisdiction over complaints about transit police under the *Police Service Act*. Therefore, there is no reason for this clause to remain in Schedule 1.

Casino Control Authority

- The CCA is within the jurisdiction of the ICAC and Mr Le Compte refers to this fact as well as the fact that the National Crime Authority and the State Crime Commission also have jurisdiction over the Authority. Mr Le Compte does not, however, refer to the fact that the Authority is also subject to the Auditor-General.
- In my view, complaints alleging maladministration by the Authority or its staff should be within the jurisdiction of the Ombudsman. I am reinforced in this view by the following extract from Mr Le Compte's evidence:

"... the Authority must act in a way which in some circumstances would be well outside conduct that would normally be acceptable in an administrative sense."

- As for issues requiring sensitive handling, my Office currently deals with witness protection matters which are highly sensitive matters. Further, in judging unreasonable conduct, the Ombudsman obviously has regard to the particular nature of the authority and the context of the administrative action.
- Mr Le Compte's evidence about its sources of information "drying up" is inconsistent with the fact that at least four other agencies have access to such information.
- I am concerned that the Authority does not have to explain its decision to deny access to documents which is referred to by Mr Le Compte. In this regard I refer to an extract from my annual report of 1995-96 which discusses my concerns.

The Cabinet Office

- I note the Acting Director-General's comments regarding the usual procedure with respect to Schedule 1. The Committee is, however, being asked to consider a different procedure.
- This Office has not, notwithstanding the procedure outlined by the Acting Director-General, always been consulted on proposed changes to its jurisdiction.
- The Acting Director-General says:

"The creation of any new "watchdog" body always raises the question as to whether or not the new body should be the subject to the jurisdiction of existing "watchdog" bodies."

In my view, there should be a presumption that all such bodies should be within jurisdiction of the existing watchdogs and that this presumption should only be rebutted where there are compelling and principled reasons for this to occur.

APPENDIX 3

***Extract from the Fourth General
Meeting between the
Committee & the Ombudsman***



**Report of the
Committee on the Office of the Ombudsman
and the Police Integrity Commission**

**Fourth General Meeting with
the New South Wales Ombudsman
8 November 1996**

December 1996
ISBN: 0 7310 9739 4

EXCLUDED CONDUCT OF PUBLIC OFFICIALS

27. In recent correspondence to the Committee you raised concerns about conduct excluded from the Ombudsman's jurisdiction under Schedule 1 of the Act. Would you expand on these concerns for the benefit of the Committee?

Answer

In my letter to the Committee of 16 September 1996 I summarised my concerns about Schedule 1 of the *Ombudsman Act* in the following terms:

1. the scope of the administrative conduct that is now excluded from the jurisdiction of the Ombudsman is extensive and ever increasing;
2. matters can be excluded from the jurisdiction of the Ombudsman with little difficulty, and without the need to obtain Parliamentary approval, merely by a proclamation published in the Government Gazette (see section 14 of the *Ombudsman Act*);
3. this Office is often not consulted prior to items being added to Schedule 1;
4. certain items are retained in the Schedule when any logical justification for doing so has long ceased (for example item 22 "*Conduct of the Hen Quota Committee when exercising functions under the Egg Industry Repeal and Deregulation Act 1989*"); and
5. there do not appear to be any logical and consistent criteria used as the basis for determining what should or should not be included in Schedule 1.

I noted in my letter my view that it is well past time for a comprehensive review of the items included in Schedule 1 to the *Ombudsman Act*.

When the *Ombudsman Act* first commenced in 1975, Schedule 1 consisted of 15 items (a copy of the original Schedule 1 is annexed). Since that time a further 12 items have been added, two have been omitted and several amended. The Schedule currently consists of 25 items and is likely to be expanded in the near future to include the conduct of the Police Integrity Commission and the Inspector of the Police Integrity Commission. Lest my concerns be misinterpreted, let me clearly state that I have no objection to the inclusion of items in the Schedule relating to the conduct of the PIC and the PIC Inspector.

The question of the scope of the conduct excluded from the jurisdiction of the Ombudsman should be considered in the light of the provisions in other Acts which either exclude or limit the jurisdiction of the Ombudsman.

Schedule 1 is not the only mechanism that has been used to exclude conduct from the jurisdiction of the Ombudsman (or include conduct within that jurisdiction). For example, the jurisdiction of the Ombudsman is **excluded** by specific provisions in the *Freedom of Information Act 1989* (section 52(2)-(5)), the *Community Services (Complaints, Appeals and Monitoring) Act 1993* (section 121), and section 13(5) of the *Ombudsman Act* itself. On the other hand, jurisdiction is **expanded** by the *Freedom of Information Act* (section 52(1) and (6)), and the *Protected Disclosures Act 1994* (section 13(4)).

To date there has been a very ad hoc approach to items being included in or omitted from Schedule 1 to the *Ombudsman Act*. This also applies to the inclusion of provisions into other legislation which limit or restrict the jurisdiction of the Ombudsman.

As stated above, there do not appear to be any logical and consistent criteria used as the basis for determining what matters should or should not be included in Schedule 1.

Recommendations:

In my opinion the Act should be amended to provide:

- *specific criteria or principles to be used as a guide for assessing whether items should be included in Schedule 1 excluding conduct from the jurisdiction of the Ombudsman;*
- *that inclusion into Schedule 1 of the Ombudsman Act is the only mechanism for excluding conduct from the jurisdiction of the Ombudsman under the Ombudsman Act;*
- *that Schedule 1 may only be amended by Act of Parliament; and*
- *that Schedule 1 is to be subject to review by the Parliamentary Joint Committee on a regular basis (say every 2 years).*

28. Do you believe that Schedule 1 requires review and, if so, in what regard?

Answer

As indicated in my answer to question 27, I do believe that Schedule 1 requires review. I have set out in the table below, in a very shorthand form, my preliminary views in relation to each item in Schedule 1.

ITEMS (summarised) AND PRELIMINARY VIEWS

(1) *Conduct of the Governor, a Minister, Parliament, an MP or an officer of Parliament.*

No change necessary - this is an appropriate exclusion.

(2) *Conduct of a court, or a person or body before whom witnesses maybe compelled to appear or give evidence, and persons associated.*

This exclusion should be clarified. Was it intended that the exclusion apply to Courts' administration?

(3) *Conduct of a body where at least one member is appointed by virtue of being a Judge, and has a right or duty to preside at meetings.*

No change necessary - this is an appropriate exclusion.

(4) *Conduct relating to a Bill for a Act or the making of a rule or regulation.*

No change necessary - this is an appropriate exclusion.

(5) * * * *

Already omitted

(6) *Conduct of a public authority acting as a legal adviser or a legal representative of a public authority.*

No change necessary - this is an appropriate exclusion.

(7) *Conduct of the Attorney-General, Solicitor General or DPP relating to the commencement, carrying on or termination of proceedings before a court.*

No change necessary - this is an appropriate exclusion.

(8) *Conduct of a public authority relating to the carrying on of any proceedings before any court or any other person or body before whom witnesses may be compelled to appear and give evidence.*

No change necessary at this time.

(9) *Conduct relating to the exercise of the prerogative of mercy.*

No change necessary - this is an appropriate exclusion.

ITEMS (summarised) AND PRELIMINARY VIEWS

(10) *Conduct of a Royal Commissioner or a person exercising the powers of a Royal Commissioner.*

No change necessary - this is an appropriate exclusion.

(11) *Conduct of a Commissioner under the Special Commissions of Inquiry Act.*

No change necessary - this is an appropriate exclusion.

(12) *Conduct relating to the appointment or employment of a person and matters effecting a person as an officer or employee.*

No change necessary at this time.

(13) *Conduct of a police officer when exercising the functions of a police officer with respect to crime and the preservation of the peace.*

Should be amended in the light of the recent amendments to Part 8A of the *Police Service Act* - for example it may be appropriate to delete to all words after "Conduct of a police officer".

(14) *Conduct relating to the investment of funds.*

This exclusion should be reviewed. Where a complaint is concerned with second-guessing commercial decisions honestly and reasonably arrived at, the conduct, unless motivated by some improper or unreasonable behaviour, ought to be excluded. However, where a complaint reveals some wrong-doing in relation to the investment of funds, the conduct ought to be within the Ombudsman's jurisdiction.

(15) *Conduct which is certain decisions made in the course of the administration of an estate or trust.*

No change necessary at this time.

(16) *Conduct of the Privacy Committee.*

I am advised that it is intended to omit this item so as to bring the conduct of the proposed Privacy Commissioner within the jurisdiction of the Ombudsman.

(17) *Conduct relating to alleged violations of the privacy of persons.*

This exclusion should be clarified. There is a potential overlap between this exclusion and a complaint to this Office which initially discloses no privacy issue but does so as a matter arising. This might need to be reconsidered to ensure that the Ombudsman is not excluded from investigating complaints about the conduct of the proposed Privacy Commissioner. The Ombudsman should not be prevented from pursuing such complaints.

ITEMS (summarised) AND PRELIMINARY VIEWS

(18) *Conduct of a mediator at a mediation session under the Community Justice Centres Act.*

No change is necessary at this time.

(19) *Conduct of members of the NSW Crime Commission.*

Needs to be amended to refer to the *New South Wales Crime Commission*, etc, instead of the *State Drug Crime Commission*.

(20) *Conduct of the ICAC.*

Should be amended in the light of section 13(4) of the *Protected Disclosures Act*.

(21) *Conduct of a member of the transit police service.*

Should be reviewed in the light of the recent amendments to Part 8A of the *Police Service Act*, and possibly omitted.

(22) *Conduct of the Hen Quota Committee.*

Should be omitted as any logical justification for its inclusion has long since ceased.

(23) * * * *

Already omitted

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

Some concerns as to whether the exclusion of all conduct of the Casino Control Authority, or any other public authority when exercising functions under the Casino Control Act, is warranted.

(25) *Conduct of the HomeFund Commissioner.*

Should be omitted, particularly given that the work of the HomeFund Commissioner is almost completed.

(26) *Conduct of the Legal Services Commissioner*

Concerns as to whether the Legal Services Commissioner should be excluded, particularly as the conduct of most other watchdog/accountability bodies is within the jurisdiction of the Ombudsman.

ITEMS (summarised) AND PRELIMINARY VIEWS

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

No change necessary at this time.

In summary, our preliminary views can be categorised under four headings:

- (i) **Exclusions which are appropriate and need no change:**
Items 1, 3, 4, 6, 7, 9, 10 and 11.
- (ii) **Exclusions about which no change is necessary at this time:**
Items 8, 12, 15, 18 and 27.
- (iii) **Exclusions which need amendment but are in the nature of 'housekeeping' amendments to bring the schedule up to date etc.**
Items 13, 16, 19, 20, 21, 22 and 25.
- (iv) **Exclusions which need to be reviewed and or clarified**
Items 2, 14, 17, 24 and 26

Items in category (iii) are relatively straightforward and would bring the schedule up to date. Items in category (iv) require greater consideration. Our views on the manner in which they should be clarified or reviewed are briefly stated above.

COMMENT

Upon consideration of the material submitted by the Ombudsman on Schedule 1, the Committee resolved that it would conduct a review of this schedule and the process through which conduct is included in, or omitted from, the Ombudsman's jurisdiction.

APPENDIX 4

***Schedule 1 of the
Ombudsman Act 1974***

Schedule 1 Excluded conduct of public authorities

(Section 12)

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

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

- 3 Conduct of a body of which one or more of the members is appointed by the Governor or a Minister of the Crown where:
 - (a) at least one member of the body may be appointed by virtue of his or her being a Judge of the Supreme Court of New South Wales, a member of the Industrial Relations Commission of New South Wales or a Judge of the District Court of New South Wales, and

-
- (b) such a person, if appointed as such a member, has a right or duty to preside at a meeting of the body at which the person is present.
- 4 Conduct of a public authority relating to a Bill for an Act or the making of a rule, regulation or by-law.
- 5 (Repealed)
- 6 Conduct of a public authority where acting as a legal adviser to a public authority or as legal representative of a public authority.
- 7 Conduct of the Attorney General, or of the Solicitor General, or of the Director of Public Prosecutions, relating to the commencement, carrying on or termination of any proceedings before a court, including a coronial inquiry and committal proceedings before a magistrate.
- 8 Conduct of a public authority relating to the carrying on of any proceedings:
(a) before any court, including a coronial inquiry and committal proceedings before a magistrate, or
(b) before any other person or body before whom witnesses may be compelled to appear and give evidence.
- 9 Conduct of a public authority relating to an exercise of the prerogative of mercy.
- 10 Conduct of a public authority where acting as a commissioner under the *Royal Commissions Act 1923* or, by the authority of an Act, exercising the powers of such a commissioner.
- 11 Conduct of a public authority where acting as a Commissioner under the *Special Commissions of Inquiry Act 1983*.
- 12 Conduct of a public authority relating to:
(a) the appointment or employment of a person as an officer or employee, and
-

- (b) matters affecting a person as an officer or employee, unless the conduct arises from the making of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*) to the Ombudsman or to another person who has referred the disclosure to the Ombudsman under Part 4 of that Act for investigation or other action.
- 13 Conduct of a police officer when exercising the functions of a police officer with respect to crime and the preservation of the peace.
- 14 Conduct of a public authority relating to the investment of any funds.
- 15 Conduct of a public authority where the conduct is a decision made by the public authority in the course of the administration of an estate or a trust, being a decision as to the payment or investment of money or the transfer of property.
- 16 Conduct of the Privacy Committee constituted under the *Privacy Committee Act 1975*.
- 17 Conduct of a public authority relating to alleged violations of the privacy of persons.
- 18 Conduct of a mediator at a mediation session under the *Community Justice Centres Act 1983*.
- 19 Conduct of a public authority where acting as a member of the State Drug Crime Commission, or the State Drug Crime Commission Management Committee, under the *State Drug Crime Commission Act 1985*.
- 20 Conduct of the Independent Commission Against Corruption, the Commissioner or an Assistant Commissioner or an officer of the Commission, where exercising functions under the *Independent Commission Against Corruption Act 1988*.
-

- 21 Conduct of a public authority when acting as a member of the transit police service.
- 22 Conduct of the Hen Quota Committee where exercising functions under the *Egg Industry (Repeal and Deregulation) Act 1989*.
- 23 (Repealed)
- 24 Conduct of the Casino Control Authority or any other public authority when exercising functions under the *Casino Control Act 1992*.
- 25 Conduct of the HomeFund Commissioner or a member of the staff of the HomeFund Commissioner, when exercising functions under the *HomeFund Commissioner Act 1993*.
- 26 Conduct of the Legal Services Commissioner or a member of staff of the Commissioner, when exercising functions under Part 10 of the *Legal Profession Act 1987*.
- 27 Conduct of a conciliator in relation to the conciliation of a complaint under the *Health Care Complaints Act 1993*.

APPENDIX 5

Jurisdiction of the Ombudsman Interstate Legislation

Commonwealth - Ombudsman Act 1976

Section 5

Functions of Ombudsman

- (1) *Subject to this Act, the Ombudsman:*
- (a) *shall investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department, or by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman; and*
 - (b) *may, of his or her own motion, investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department or by a prescribed authority; and*
 - (c) *with the consent of the Minister, may enter into an arrangement under which the Ombudsman will perform functions of an Ombudsman under an ombudsman scheme established in accordance with the conditions of licences or authorities granted under an enactment.*
- (2) *The Ombudsman is not authorized to investigate:*
- (a) *action taken by a Minister; or*
 - (aa) *action that constitutes proceedings in Parliament for the purposes of section 16 of the Parliamentary Privileges Act 1987; or*
 - (b) *action taken by a Justice or Judge of a court created by the Parliament; or*
 - (ba) *action by the chief executive officer of a court or by a person who, for the purposes of this Act, is to be taken to be a member of the staff of the chief executive officer of a court:*
 - (i) *when exercising a power of the court; or*
 - (ii) *when performing a function, or exercising a power, of a judicial nature; or*
 - (c) *action taken by:*
 - (i) *a magistrate or coroner for the Australian Capital Territory, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands; or*
 - (ii) *a person who holds office as a magistrate in a State or the Northern Territory in the performance of the functions of a magistrate conferred*

on him or her by or under an Act; or

- (d) action taken by any body or person with respect to persons employed in the Australian Public Service or the service of a prescribed authority, being action taken in relation to that employment, including action taken with respect to the promotion, termination of appointment or discipline of a person so employed or the payment of remuneration to such a person; or*
 - (g) action taken by a Department or by a prescribed authority with respect to the appointment of a person to an office established by or under an enactment, not being an office in the Australian Public Service or an office in the service of a prescribed authority; or*
 - (h) action taken by an eligible case manager that is not connected with:
 - (i) the provision of case management services (within the meaning of the Employment Services Act 1994) to persons referred to the eligible case manager under Part 4.3 of that Act; or*
 - (ii) the performance of functions conferred on the eligible case manager under that Act.**
- (3) The reference in paragraph (2)(a) to action taken by a Minister does not include reference to action taken by a delegate of a Minister, and, for the purposes of this subsection, action shall be deemed to have been taken by such a delegate notwithstanding that the action is taken in pursuance of a power that is deemed by a provision of an enactment, when exercised by the delegate, to have been exercised by the Minister.*
- (3A) For the purposes of the application of this Act to or in relation to the Ombudsman, action taken by a Department or by a prescribed authority shall not be regarded as having been taken by a Minister by reason only that the action was taken by the Department or authority in relation to action that has been, is proposed to be, or may be, taken by a Minister personally.*
- (4) Paragraph (2)(d) does not prevent the Ombudsman from investigating action taken by a member or special member of the Australian Federal Police, or by any other person, with respect to a complaint made to such a member or special member concerning action taken by another such member or special member.*
- (5) The Ombudsman is not authorised to investigate action taken under:*
- (a) a law of Western Australia in its application in the Territory of Christmas Island by virtue of the Christmas Island Act 1958; or*
 - (b) a law of Western Australia in its application in the Territory of Cocos (Keeling) Islands by virtue of the Cocos (Keeling) Islands Act 1955;*

by a person employed by Western Australia.

- (6) *The reference in subsection (5) to a person employed by Western Australia includes a reference to:*
- (a) *a person occupying, or acting in, an office or position under a law of Western Australia; or*
 - (b) *a person employed by a body established by or under a law of Western Australia.*
- (7) *An arrangement referred to in paragraph (1)(c) may include provision for payment by the other party to the arrangement for the performance of functions by the Ombudsman in accordance with the arrangement.*

Victoria - Ombudsman Act 1973

Section 13. Functions and jurisdiction

- (1) *The principal function of the Ombudsman shall be to enquire into or 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.*
- (2) *Subject to this section this Act applies to all Government Departments and Public Statutory bodies except those or the branches of those mentioned in the Schedule and to members of staff of all municipal councils.*
- (3) *Nothing in this Act shall authorize the Ombudsman to enquire into or investigate any administrative action taken-*
 - (a) *by a court of law or by a Judge or a magistrate;*
 - (aa) *by a board tribunal commission or other body presided over by a Judge magistrate or legal practitioner presiding as such by virtue of a statutory requirement and appointment;*
 - (b) *by a person acting as legal adviser to the Crown in any proceedings;*
 - (ba) *by the Director of Public Prosecutions;*
 - (c) *by a person in his capacity as trustee under the Trustee Act 1958;*
 - (ca) *by the Electoral Commissioner;*
 - (d) *by the Auditor-General; or*
 - (e) *by a municipal council or a councillor of a municipal council acting as such.*
- (3A) *Nothing in this Act authorises any enquiry into or investigation of any administrative action taken by a member of the police force of Victoria otherwise than-*
 - (a) *in accordance with Part IVA of the Police Regulation Act 1958;*
 - (b) *on a complaint made by a member of the police force in respect of his or her terms and conditions of employment (including matters relating to appointments, promotions, removals, pay, discipline and superannuation, and other personnel matters).*
- (4) *The Ombudsman shall not conduct an investigation in respect of any matter where it appears to him that-*

- (a) *the aggrieved person has or had a right of appeal reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative; or*
- (b) *the aggrieved person has or had a remedy by way of proceedings in a court of law-*

unless the Ombudsman considers that in the particular circumstances-

- (c) *it would not be reasonable to expect or to have expected the aggrieved person to resort to that right or remedy; or*
 - (d) *the matter merits investigation in order to avoid injustice.*
- (5) *The Ombudsman shall not investigate any matter with respect to persons who are or were in service under an authority so far as the matter relates to terms and conditions of employment (including matters relating to appointments promotions removal pay discipline and superannuation, and other personnel matters) unless the Ombudsman considers that the matter merits investigation in order to avoid injustice.*
- (6) *The powers of the Ombudsman in relation to any administrative action taken by an authority to which this Act applies may be exercised notwithstanding that the action was taken on behalf of, or in the exercise of any function conferred on, an authority or a body to which this Act does not apply, but nothing in this Act shall authorize or require the Ombudsman to question the merits of any decision made by the authority or body to which this Act does not apply.*
- (7) *Where any administrative action is taken by an authority or body to which this Act does not apply under any powers or functions conferred on or instructions given to it by an authority to which this Act applies, the administrative action so taken shall, for the purposes of this Act, be deemed to be the administrative action of the authority to which this Act applies, and the powers of the Ombudsman in respect of that action may be exercised accordingly.*
- (8) *The Ombudsman may conduct an enquiry or investigation in respect of an administrative action taken by an authority to which this Act applies before the coming into operation of this Act, if in all the circumstances the Ombudsman considers it proper so to do.*

SCHEDULE

AUTHORITIES AND BRANCHES OF AUTHORITIES TO WHICH THIS ACT DOES NOT APPLY

Offices of the establishment of the Governor

The office of lay observer under section 14Q or 32F of the Legal Profession Practice Act 1958.

Queensland - *Parliamentary Commissioner Act 1974.*

PART 3 - JURISDICTION AND FUNCTIONS OF THE COMMISSIONER

Division 1 -Extent of jurisdiction

Agencies subject to investigations

12. (1) *This Act applies to all agencies and their officers.*
- (2) *This Act does not apply to a person who is a police officer in the person's capacity as a police officer.*
- (3) *Administrative action by, in or on behalf of an officer of an agency is taken to be administrative action of the agency.*
-

Matters subject to investigation

13. (1) *Subject to this Act, the principal function of the Commissioner shall be to investigate any administrative action taken by, in or on behalf of an agency.*
- (2) *The power under this Act to investigate any recommendation made to a Minister includes a power to investigate any action taken as a consequence of that recommendation, but nothing in this Act authorises or requires the commissioner to question the merits of a decision made by a Minister or by Cabinet.*
- (3) *Subject to subsection (4), the commissioner shall not conduct an investigation under this Act in respect of any of the following matters-*
- (a) *any administrative action in respect of which the person aggrieved has or had a right of appeal, reference, or review to or before a tribunal constituted under any enactment or by virtue of the royal prerogative;*
- (b) *any administrative action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law.*
- (4) *Notwithstanding anything in subsection (3), the commissioner may conduct any investigation notwithstanding that the person aggrieved has or had such a right or remedy as is referred to in that subsection if the commissioner considers that, in the particular circumstances-*
- (a) *it would not be reasonable to expect or to have expected the person aggrieved to resort to that right or remedy; or*
- (b) *the matter merits investigation in order to avoid injustice.*
- (5) *Nothing in this Act shall authorise the commissioner to investigate any*

administrative action taken -

- (a) *by a court of law or by a judge, magistrate, or member of any such court; or*
 - (b) *by a tribunal, or any member thereof, in the exercise of judicial powers; or*
 - (c) *by a person acting as legal adviser to the Crown or as counsel for the Crown in any legal proceedings; or*
 - (d) *by a person in the capacity as trustee under the Trusts Act 1973; or*
 - (e) *by a master in equity, and a registrar within the meaning of the Rules of the Supreme Court and a registrar of a District Court or of a Magistrates Court; or*
 - (f) *by the auditor-general; or*
 - (g) *by a mediator at a mediation session under the Dispute Resolution Centres Act 1990; or*
 - (h) *by a person in a capacity as a conciliator under the Health Rights Commission Act 1991.*
- (6) *Nothing in this Act authorises or requires the commissioner to question the merits of a decision that the Commissioner is satisfied has been taken in order to implement a determination made by the Cabinet.*
- (7) *The powers of the commissioner under this Act may be exercised in relation to administrative action of an agency even though the action was taken on behalf of, or in the exercise of functions conferred on, an authority or body that is not an agency.*
- (8) *However, the commissioner is not authorised or required to question the merits of a decision taken by an authority or body that is not an agency.*
- (9) *If administrative action of an authority or body that is not an agency is taken under functions conferred on, or instructions given by, an agency, the action is taken, for the purposes of this Act, to be the action of the agency.*
- (10) *The commissioner may investigate administrative action despite a provision in an enactment to the effect that action of that kind is final or must not be appealed against, challenged, reviewed, quashed or called in question.*
- (11) *The Commissioner may investigate administrative action taken before the commencement of this Act.*

South Australia - Ombudsman Act 1972.

Section 5 -

Non-application of Act

5. (1) *This Act does not apply to or in relation to any Commission or tribunal for the time being declared by proclamation to be a Commission or tribunal to which this Act does not apply.*
- (2) *This Act does not apply to or in relation to-*
- (a) *any complaint to which the Police (Complaints and Disciplinary Proceedings) Act 1985 applies; or*
 - (b) *any matter to which that Act would apply if the matter were the subject of a complaint under that Act.*
-

PART 3 INVESTIGATIONS

Matters subject to investigation

13. (1) *Subject to this Act, the Ombudsman may investigate any administrative act.*
- (2) *The Ombudsman may make such an investigation either on receipt of a complaint or on the Ombudsman's own initiative and, where a complaint is made, the Ombudsman may investigate an administrative act notwithstanding that, on the face of it, the complaint may not appear to relate to that administrative act.*
- (3) *The Ombudsman must not investigate any administrative act where -*
- (a) *the complainant is provided in relation to that administrative act with a right of appeal, reference or review to a court, tribunal, person or body under any enactment or by virtue of Her Majesty's prerogative; or*
 - (b) *the complainant had a remedy by way of legal proceedings, unless the Ombudsman is of the opinion that it is not reasonable, in the circumstances of the case, to expect that the complainant should resort or should have resorted to that appeal, reference, review or remedy.*
- (4) *The Ombudsman may investigate any administrative act, notwithstanding any enactment that provides that that administrative act is final or not to be appealed against, challenged, reviewed, quashed or called into question.*

Western Australia - Parliamentary Commissioner Act 1971.

Departments and authorities subject to investigation

13. (1) *Subject to subsection (2), this Act applies to all departments and authorities.*
- (2) *This Act does not apply to-*
- (a) *either House of Parliament, any committee or member of either of those Houses or a joint committee of both Houses of Parliament;*
 - (b) *any member of a department of the staff of Parliament referred to in, or an electorate officer within the meaning of, the Parliamentary and Electorate Staff (Employment) Act 1992;*
 - (c) *the Clerk or the Deputy Clerk of either House of Parliament;*
 - (d) *the Supreme Court, a Judge or any person acting in the office, or performing the functions of, a Master, the Principal Registrar or a Registrar of the Supreme Court;*
 - (e) *the District Court, a District Court Judge or any person acting in the office, or performing the functions of, a Registrar within the meaning of the District Court of Western Australia Act 1969;*
 - (f) *the Family Court, a Judge or an acting Judge of that Court or any person acting in the office, or performing the functions of, the Registrar or a Deputy Registrar of that Court;*
 - (g) *the Children's Court or a Judge, magistrate or member within the meaning of the Children's Court of Western Australia Act 1988;*
 - (h) *the Liquor Licensing Court, the Judge or an Acting Judge of that Court or any person acting in the office, or performing the functions of, the Registrar of that Court;*
 - (i) *any other court of law;*
 - (j) *a commissioner of any court;*
 - (k) *a stipendiary magistrate;*
 - (l) *a coroner;*
 - (m) *the Governor, a member of the Governor's Establishment within the meaning of the Governor's Establishment Act 1992 or a person to whom section 6(1)(a) of that Act applies; or*

- (n) *any department or authority specified in Schedule 1 but if the extent to which this Act does not apply in respect of a department or authority has been set out in the item in Schedule 1 relating to that department or authority then this Act does not apply to that extent.*
- (3) *For the purposes of this Act, but subject to subsection (5)-*
- (a) *references to a department or authority shall be construed as including references to each of the members, officers, and employees thereof;*
 - (b) *references to an officer of an authority shall be construed as including references to an officer appointed by, or a person employed or engaged to work in, that authority under any enactment; and*
 - (c) *references to a member of an authority shall be construed as including references to the holder of any office created by an enactment who by virtue of his holding that office is a member of that authority.*
- (4) *For the purposes of this Act, but subject to subsection (5), the following persons shall be deemed to constitute the officers and employees of a department, namely-*
- (a) *the chief executive officer of the department;*
 - (b) *public service officers employed in the department;*
 - (c) *officers appointed by the Governor under the provisions of any Act administered in that department; and*
 - (d) *officers appointed, and persons employed or engaged, by the Minister of the Crown administering the department or the chief executive officer of the department, being either -*
 - (i) *officers or persons who are so appointed, employed or engaged under any enactment; or*
 - (ii) *officers or persons whose remuneration as such is defrayed in whole or in part out of moneys provided by Parliament.*
- (5) *A person who is a ministerial officer for the purposes of section 74(3) of the Public Sector Management Act 1994 shall not, as such, be regarded for the purposes of this Act as a member or an officer or employee of a department or authority.*
-

14. Matters subject to investigation

- (1) *Subject to this Act, the Commissioner shall investigate any decision or recommendation made, or any act done or omitted, that relates to a matter of administration and affects*

any person or body of persons in his or its personal capacity in or by any department or authority to which this Act applies in the exercise of any power or function.

- (1a) *Subject to this Act and notwithstanding subsection (1), the Commissioner shall investigate any action taken by a member of the Police Force or Police Department, whether or not that action relates to a matter of administration, where that action was, or purported to be, done in the exercise of, or in connection with or incidental to the exercise of, that member's powers, duties or functions as a member of the Police Force or Police Department:*

Provided that the Parliamentary Commissioner shall not investigate such action until the Commissioner of Police shall be deemed to have had a reasonable opportunity to conduct his own investigation into such action.

- (1b) *For the purposes of the proviso to subsection (1a), the Commissioner of Police shall be deemed to have had a reasonable opportunity to conduct his own investigation into any action referred to in that subsection if -*

- (a) *a period of 42 days; or*
- (b) *such longer period as is agreed to by the Commissioner of Police and the Parliamentary Commissioner,*

has expired since the complaint relating to that action was received at the office of the Commissioner of Police.

- (1c) *The application of subsection (1a) does not extend to action taken by a member of the Police Force or Police Department before that subsection came into operation.*

- (2) *References in this Act to the taking of any action shall be construed as including references to -*

- (a) *a failure or refusal to perform any act;*
- (b) *the formulation of any proposal or intention; and*
- (c) *the making of any recommendation (including a recommendation to a Minister of the Crown).*

- (3) *This section does not authorize or require the Commissioner to investigate under this Act any decision made by Cabinet or by a Minister of the Crown or question the merits of any such decision.*

- (4) *Subject to subsection (5), the Commissioner shall not conduct an investigation under this Act in respect of any of the following matters, that is to say -*

- (a) *any action in respect of which the person aggrieved has or had a right of appeal, reference, or review to or before a tribunal constituted under any enactment or by virtue of the Crown's prerogative; and*

- (b) *any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law.*
- (5) *Notwithstanding anything in subsection (4), the Commissioner may conduct any investigation notwithstanding that the person aggrieved has or had such a right or remedy as is referred to in that subsection if he is satisfied that, in the particular circumstances, it is not reasonable to expect him to resort, or to have resorted, to it.*
- (6) *The Commissioner shall not conduct an investigation into any action taken by a person acting as legal adviser or as counsel.*
-

SCHEDULE 1 - ENTITIES, AND EXTENT, TO WHICH THIS ACT DOES NOT APPLY

The Anti-Corruption Commission established under the Anti-Corruption Commission Act 1988.

The Director of Public Prosecutions and the Deputy Director of Public Prosecutions under the Director of Public Prosecutions Act 1991.

The Electoral Commissioner within the meaning of the Electoral Act 1907 to the extent of the Electoral Commissioner's functions other than that of chief executive officer of the department of the Public Service known as the Western Australian Electoral Commission.

The Deputy Electoral Commissioner within the meaning of the Electoral Act 1907.

The Commissioner for Equal Opportunity appointed under the Equal Opportunity Act 1984.

The Auditor General appointed under the Financial Administration and Audit Act 1985 to the extent of the Auditor General's functions other than that of chief executive officer of the department of the Public Service known as the Office of the Auditor General.

The Information Commissioner under the Freedom of Information Act 1992.

The Commissioner for Public Sector Standards under the Public Sector Management Act 1994 to the extent of the Commissioner's functions other than that of chief executive officer of the department of the Public Service principally assisting the Commissioner in the performance of the Commissioner's functions under that Act.

The Parliamentary Commissioner for Administrative Investigations and the Deputy Commissioner for Administrative Investigations under the Parliamentary Commissioner Act 1971.

Any Royal Commission constituted under the Royal Commissions Act 1968 and any member of a Royal Commission.

The Solicitor General appointed under the Solicitor-General Act 1969.

Tasmania - Ombudsman Act 1978.

PART III

JURISDICTION AND FUNCTIONS OF THE OMBUDSMAN

Division 1 -Extent of jurisdiction

12. (1) *Subject to this Act, the Ombudsman may investigate any administrative action taken by or on behalf of a public authority.*
- (2) *A reference in this Act to taking action includes a reference to -*
- (a) *a failure or refusal to perform, or a delay in performing an act;*
 - (b) *the formulation of a proposal or an intention; and*
 - (c) *the making of a recommendation (including a recommendation to a Minister),*

and in this Act, administrative action means action taken in a matter of administration whether there was legal authority for that action or not.

- (3) *The Ombudsman shall not investigate any action of a kind specified in Schedule 2.*
- (4) *The power of the Ombudsman to investigate an administrative action includes power to investigate all the circumstances surrounding that action.*
- (5) *The Ombudsman is not, in the exercise of his powers under this Act, entitled to question the merits of -*
- (a) *any decision made by a Minister;*
 - (b) *any decision made by a court or by a person as a member of a court; or*
 - (c) *any decision made by an authority where the decision does not involve administrative action of a kind that the Ombudsman is authorised to investigate under this Act.*
- (6) *Subsection (5) does not prevent the investigation of action pursuant to, or in consequence of, a decision referred to in that subsection.*
-

SCHEDULE 2

EXCLUDED ADMINISTRATIVE ACTION

1. *Action taken for the purposes of the promotion of a Bill or its passage through Parliament, or the preparation or promulgation of a regulation, rule or by-law.*
2. *Action taken by a person as legal adviser to, or counsel for, the Crown or an authority to which this Act applies.*
3. *Action taken by or on behalf of a government department or other authority with respect to proceedings before a court or a person authorized by law, or by consent of parties, to hear, receive, and examine evidence.*
4. *Action taken by the Tasmanian Industrial Commission under the Industrial Relations Act 1984 in relation to State employees within the meaning of that Act.*

Australian Capital Territory - Ombudsman Act 1989

Section 5

Functions

5. (1) *Subject to this Act, the Ombudsman -*
- (a) *shall investigate action that relates to a matter of administration, being action -*
 - (i) *taken after the commencement of this Act by an agency and in respect of which a complaint has been made to the Ombudsman;*
 - (ii) *in respect of which a complaint is transferred to the Ombudsman under section 28 of the A.C.T. Self-Government (Consequential Provisions) Act 1988 of the Commonwealth; or*
 - (iii) *taken before the commencement of this Act and in respect of which a complaint is made to the Ombudsman after that commencement in a case where, if that complaint had been made to the Commonwealth Ombudsman before that commencement, that complaint would have been transferred to the Ombudsman under section 28 of the A.C.T. Self-Government (Consequential Provisions) Act 1988 of the Commonwealth; and*
 - (b) *may, of his or her own motion, investigate action of that kind.*
- (2) *The Ombudsman is not authorised to investigate-*
- (a) *action taken by a Minister;*
 - (b) *action taken by-*
 - (i) *a Judge or the Master of the Supreme Court; or*
 - (ii) *the Registrar or a Deputy Registrar of the Supreme Court or of the Magistrates Court when performing a function of a judicial nature;*
 - (c) *action taken by a magistrate or coroner for the Territory;*
 - (ca) *action taken by a Royal Commission under the Royal Commissions Act 1991;*
 - (cb) *action taken by a Board of Inquiry under the Inquiries Act 1991;*
 - (cc) *action taken by the Commissioner for the Environment;*
 - (cd) *action taken by the Territory or a Territory authority for the management of the environment;*

- (ce) *action taken by-*
 - (i) *the Commissioner for Health Complaints;*
 - (ii) *a delegate of the Commissioner for Health Complaints;*
 - (iii) *a member of the Health Complaints Unit, being the office established by section 6 of the Health Complaints Act 1993;*
 - (iv) *a conciliator appointed under section 32 of that Act; or*
 - (v) *a mentor appointed under section 38 of that Act;*
- (cf) *action taken by a Judicial Commission under the Judicial Commissions Act 1994;*
- (d) *action taken by any body or person with respect to persons employed in the Government Service or in the service of a prescribed authority, being action taken in relation to the employment of those persons, including action taken with respect to the promotion, termination of appointment or discipline of, or the payment of remuneration to, those persons;*
- (e) *action taken by an agency with respect to the appointment of a person to an office established by or under an enactment, not being an office in the Government Service or an office in the service of a prescribed authority; or*
- (f) *action taken by an agency-*
 - (i) *for the purpose or in the course of providing, or purporting to provide, a health service; or*
 - (ii) *in refusing to provide a health service.*
- (3) *The reference in paragraph (2)(a) to action taken by a Minister does not include reference to action taken by a delegate of a Minister.*
- (4) *For the purposes of subsection (3), action shall be deemed to have been taken by a delegate of a Minister notwithstanding that the action is taken under a power that is deemed by a provision of an enactment, when exercised by the delegate, to have been exercised by the Minister.*
- (5) *For the purposes of the application of this Act in relation to the Ombudsman, action taken by an agency shall not be regarded as having been taken by a Minister only because the action was taken by the agency in relation to action taken or to be taken by a Minister personally.*
- (6) *In this section -*

“health service” means a service provided or to be provided in the Territory for, or

purportedly for, the benefit of the health of a person and includes a service specified in Part I of the Schedule to the Health Complaints Act 1993, but not a service specified in Part II of that Schedule.

APPENDIX 6

Minutes

**Minutes of the Meeting of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Friday 11 April 1997
Coffs Harbour Council Chambers at 9.30am

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr J Kinross MP
Mr A Fraser MP
Ms R Meagher MP

Legislative Council

The Hon. E Nile MLC

Apologies

Ms C Moore MP, Mr P Lynch MP, Mr A Stewart MP, The Hon. M Gallacher MLC and the Hon. P Staunton MLC.

In Attendance

Ms Helen Minnican (Project Officer), Mr Leslie Gonye (Acting Clerk) and Ms Louise Pallier (Assistant Committee Officer).

Review of Schedule 1 of the *Ombudsman Act 1974* - The Committee discussed the proposed terms of reference for a review of Schedule 1 of the *Ombudsman Act 1974* as previously circulated. Resolved on the motion of Mr Fraser, seconded by Mr Kinross, to adopt the following terms of reference:

Review of Schedule 1 of the *Ombudsman Act 1974* - The Committee on the Office of the Ombudsman and the Police Integrity Commission has resolved to review and report to Parliament on Schedule 1 of the *Ombudsman Act 1974*, with particular reference to:

- a) the scope of the administrative conduct excluded from the Ombudsman's jurisdiction;
- b) how determinations are made about the exclusion of conduct under Schedule 1;
- c) the process by which conduct is excluded from the Ombudsman's jurisdiction and amendments are made to Schedule 1;
- d) any other matter that the Committee considers relevant to the review.

Mr Kinross indicated that he considered it particularly important for the Committee's inquiry into Schedule 1 to include an examination of clause 2(a) of the schedule.

The Committee agreed that future deliberative meetings should take place when required on Thursday mornings from 9.00am until 10.30am.

The Committee adjourned at 9.45am.

**Minutes of the meeting of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Thursday, 15 May 1997
Library Conference Room, Parliament House at 3.55pm

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)

Mr J Anderson MP

Mr A Fraser MP

Mr J Kinross MP

Mr P Lynch MP

Ms R Meagher MP

Mr A Stewart MP

Legislative Council

The Hon. P Staunton MLC

The Hon. M Gallacher MLC

Also in attendance: Ronda Miller (Clerk to the Committee); Helen Minnican (Director); Stephanie Hesford (Research Officer).

Apologies were received from Ms C Moore MP and the Hon. E Nile MLC.

Chairman opened the meeting.

1 Confirmation of the Minutes

Minutes of the meeting held on 23 April 1997 confirmed on the motion of the Hon. P Staunton, seconded Mr Anderson.

Minutes of the meeting held on 11 April 1997 confirmed on the motion of Mr Anderson, seconded Mr Fraser.

Minutes of the meeting held on 10 April 1997 confirmed on the motion of Mr Anderson, seconded Ms Meagher.

Minutes of the meeting held on 4 March 1997, as amended, confirmed on the motion of Mr Anderson, seconded Ms Meagher.

Minutes of the meeting held on 28 November 1996 confirmed on the motion of Mr Fraser, seconded Mr Gallacher.

Minutes of the meeting held on 2 May 1996 confirmed on the motion of Mr Stewart, seconded Mr Anderson.

2 Correspondence arising from the Minutes

The Committee noted the following items of correspondence previously circulated and despatched in accordance with resolutions made at previous meetings.

3 Correspondence Received

4 Review of Schedule 1 of the *Ombudsman Act 1974*

Copies of the advertisement and terms of reference for the review, and related background information were circulated and noted. The Committee discussed the

conduct of the review and directed the Director to make a list of potential witnesses and people from whom submissions should be invited, including the Director General of the Premier's Department, the Director General of the Cabinet Office, the Ombudsman and certain witnesses who appeared at the public hearings for the Protected Disclosures Act Review, for example, Whistleblowers Australia. The Committee agreed to discuss and finalise the selection of witnesses and those individuals/organisations who would be invited to give submissions. The Committee instructed the Director to canvass members for a suitable date to organise the scheduling of hearing days.

**Minutes of the Meeting of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Thursday, 29 May, 1997
Room 814-815, Parliament House, 3.30pm

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr A Fraser MP
Mr J Kinross MP
Mr P Lynch MP
Ms R Meagher MP

Legislative Council

The Hon. P Staunton MLC
The Hon. E Nile MLC

Apologies

Ms C Moore MP, Mr T Stewart MP and the Hon. M Gallacher MLC.

In Attendance

Ms Ronda Miller (Clerk) and Ms Helen Minnican (Director).

1. Confirmation of Minutes

Minutes of the meeting held on 15 May, 1997 were confirmed on the motion of Mr Fraser, seconded Mr Anderson.

Minutes of the meeting held on 21 May 1997 were confirmed on the motion of Mr Fraser, seconded Mrs Nile.

2. Correspondence arising from the Minutes

3. Correspondence received

4. Business arising from the Minutes

Review of Schedule 1 of the *Ombudsman Act 1974* - The Committee discussed a program for public hearings for the review prepared in accordance with the resolutions made at last Committee meeting.

The Director gave an update on the submissions received for the Review.

The Committee resolved on the motion of Ms Staunton, seconded by Mr Kinross, to invite submissions from the following groups and individuals, including interested witnesses who gave evidence during the Protected Disclosures Review:

Director-General
Attorney-General's Department

Director-General
Department of Gaming and Racing

Legal Services Commissioner

President
Whistleblowers' Australia Inc.

Director-General
The Cabinet Office

NSW Ombudsman

Hearing dates - Dates for the public hearings to be confirmed by the Secretariat after canvassing the Committee Members, preferably early in July.

**Minutes of the meeting of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Friday 27 June 1997
Room 1136, Parliament House at 4.50pm

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr J Kinross MP
Mr P Lynch MP

Legislative Council

The Hon. E Nile MLC
The Hon. P Staunton MLC

Apologies

Mr A Fraser MP, The Hon. M Gallacher MLC, Ms R Meagher MP, Ms C Moore MP, and Mr A Stewart MP.

In Attendance

Helen Minnican (Director), Stephanie Hesford (Research Officer) and Natasha O'Connor (Assistant Committee Officer).

Schedule 1 Review - The Committee agreed to write to Cabinet Office seeking a written response to the invitation to make a submission.

**Minutes of the meeting of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Wednesday, 23 July 1997
at 10:00am in the Waratah Room, Parliament House

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr A Fraser MP
Mr P Lynch MP
Mr T Stewart MP

Legislative Council

The Hon. M Gallacher MLC
The Hon. E Nile MLC

Apologies

The Hon. P Staunton MLC, Ms C Moore MP, Mr J Kinross MP, Ms R Meagher MP

In Attendance

Ms Helen Minnican (Director), and Ms Natasha O'Connor (Assistant Committee Officer).

Public Hearing - Schedule 1 Review

The Chairman opened the public hearing and welcomed Mr Laurie Glanfield, Director General of the Attorney General's Department.

Laurie Glanfield took the oath and acknowledged receipt of summons. Mr Glanfield tabled his submission and addressed the Committee. The Committee proceeded to question the witness. Questioning concluded, the Chairman thanked Mr Glanfield for attending and the witness withdrew.

The Committee received into evidence submissions from Department of Community Services; Police Integrity Commission; NSW Department of Health; Privacy Committee; ICAC; PIC Inspector; Legal Services Commissioner; and Department of Gaming and Racing.

The Committee adjourned at 5.50pm, sine die.

**Proceedings of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Thursday, 24 July, 1997
at 9.30am in the Jubilee Room, Parliament House

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr A Fraser MP
Mr P Lynch MP

Legislative Council

The Hon M Gallacher MLC
The Hon E Nile MLC

Apologies

The Hon P Staunton MLC, Ms C Moore MP, Mr J Kinross MP, Ms R Meagher MP, and Mr T Stewart MP.

In Attendance

Ms Helen Minnican (Director), and Ms Natasha O'Connor (Assistant Committee Officer).

Schedule 1 - Public Hearing

The Chairman opened the public hearing and welcomed Roger West, Community Services Commissioner, and Joanna Quilty, Manager Police Unit, Community Services Commission.

Roger West and Joanna Quilty affirmed and acknowledged receipt of summons.

The Commissioner tabled his submission and addressed the Committee.

The Chairman opened questioning, followed by other Members of the Committee.

Questioning concluded, the witnesses withdrew.

The Committee went into deliberative session.

The public hearing resumed at 10.50am.

Ken Brown, Director-General, Department of Gaming and Racing, took the oath and acknowledged receipt of summons.

Jill Hennessy, Director, Policy and Development, Department of Gaming and Racing, affirmed and acknowledged receipt of summons.

Dominic Herschel, Manager, Policy, Department of Gaming and Racing affirmed and acknowledged receipt of summons.

Mr Brown made an opening statement and tabled the submission from the Department of Gaming and Racing.

The Chairman commenced questioning of the witnesses, followed by other Members.

Questioning concluded, the witnesses withdrew.

The Committee adjourned briefly and resumed at 11.40am.

The Chairman welcomed Mr Lindsay Le Compte, Chief Executive of the NSW Casino Control Authority.

Mr Le Compte took the oath and acknowledged receipt of summons. The witness made an opening address.

The Chairman commenced questioning of the witness followed by other Members of the Committee.

Questioning concluded, the Chairman thanked Mr Le Compte and the witness withdrew.

The Chairman welcomed Tim Sage, Assistant Commissioner, Police Integrity Commission, and Andrew Naylor, Commission Solicitor.

Mr Sage and Mr Naylor both took the oath and acknowledged receipt of summons.

Mr Sage tabled the submission of the PIC and addressed the Committee.

The Chairman thanked the witnesses for attending and the witnesses withdrew.

The Committee went into deliberative session.

...
The Committee discussed the evidence heard during the hearing. Resolved on the motion of Mr Lynch, seconded Mr Fraser, to release to the Ombudsman copies of the transcript from Mr Le Compte and the submissions received, in order that she could prepare her final evidence to the Committee.

The Committee instructed the Director to request the Community Services Commissioner to respond to the section of the Ombudsman's submission relating to the Commission before the Ombudsman appeared to give evidence on 30 July 1997.

The Committee adjourned at 12.55pm, sine die.

**Proceedings of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Wednesday, 30 July, 1997
at 2.00pm in the Jubilee Room, Parliament House

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr J Kinross MP
Mr P Lynch MP
Mr A Stewart MP

Legislative Council

The Hon M Gallacher MLC
The Hon E Nile MLC

Apologies

The Hon P Staunton MLC, Mr A Fraser MP, Ms C Moore MP, and Ms R Meagher MP.

In Attendance

Ms Helen Minnican (Director), and Ms Natasha O'Connor (Assistant Committee Officer).

Deliberative Session

The Committee commenced in deliberative session. Confirmation of the minutes of previous meetings was deferred.

Correspondence Received

Schedule 1

The Committee discussed the conduct of the public hearing and late submissions received from the Community Services Commissioner, Cabinet Office, Police Ministry and Department of Gaming and Racing.

...

Public Hearing - Schedule 1 Review & Key Issues raised in 4th GM Report

The Chairman opened the public hearing at 2.00pm.

The Committee formally tabled the following submissions: Noel Selway of the Faulconbridge Residents Association Incorporated; the Legal Services Commissioner; Mr Mervyn Finlay, the Police Integrity Commission Inspector; the Independent Commission Against Corruption; the Privacy Committee; the NSW Department of Health; the NSW Department of Community Services; the Community Services

Commissioner, the second submission - which was a response to the Ombudsman's submission; the Police Ministry; and the Casino Control Authority.

Mr Garry Payne, Director-General, Department of Local Government, took the oath and acknowledged receipt of summons.

Mr Timothy Rogers, Deputy Director-General, Department of Local Government, affirmed and acknowledged receipt of summons.

Mr Payne addressed the Committee. The Chairman proceeded to question the witnesses, followed by other Members of the Committee.

Questioning concluded, the Chairman thanked the witnesses and they withdrew.

Mr Roger Wilkins, Director-General, Cabinet Office, affirmed and acknowledged receipt of summons. Mr Wilkins tabled the submission from the Cabinet Office.

The Chairman questioned the witness, followed by other Members of the Committee.

Questioning concluded, the witness withdrew.

The Ombudsman, Irene Moss, affirmed and acknowledged receipt of summons.

Deputy Ombudsman, Chris Wheeler, affirmed and acknowledged receipt of summons.

Assistant Ombudsman, Greg Andrews, affirmed and acknowledged receipt of summons.

Assistant Ombudsman, Steven Kinmond, took the oath and acknowledged receipt of summons.

The Committee questioned the witnesses on key issues arising from the Committee's Fourth General Meeting Report.

A short adjournment followed until 3.40pm.

The public hearing resumed and the Committee continued to question the witnesses on the key issues. Questioning concluded on this subject, the Committee proceeded to question the witnesses in relation to Schedule 1.

The Ombudsman addressed the Committee and tabled a second submission for the review of Schedule 1.

Questioning concluded, the Chairman thanked the witnesses and they withdrew.

The Committee adjourned at 5.25pm, sine die.

**Minutes of the Meeting of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Thursday, 25 September 1997
in Room 1043

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr J Kinross MP
Mr P Lynch MP

Legislative Council

The Hon. M Gallacher MLC
The Hon. T Kelly MLC
The Hon. E Nile MLC

Apologies

Mr A Fraser MP, Ms C Moore MP, Ms R Meagher MP and Mr T Stewart MP.

The Chairman welcomed Mr Kelly, replacing Ms Staunton.

- 1. Correspondence Arising from the Minutes**
- 2. Correspondence Received**
- 3. Chairman's letter to Committee Members of 22 September 1997**
- 4. Confirmation of Minutes**
Confirmation of the minutes of meetings held on 29 May, 27 June, 23, 24 and 30 July 1997. **Resolved** on the motion of Mr Anderson, seconded Mr Lynch.
- 5. Draft Reports**
- 6. General Business**
A draft report on the Review of Schedule 1 was distributed for consideration of Members prior to discussion at the next deliberative meeting.

The meeting concluded, the Committee adjourned at 10.25am.

**Minutes of the Meeting of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Thursday, 16 October 1997
at 10:00am in the Library Meeting Room

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)

Mr J Anderson MP

Mr A Fraser MP

Mr J Kinross MP

Mr P Lynch MP

Legislative Council

The Hon. T Kelly MLC

The Hon. E Nile MLC

Apologies

Ms C Moore MP, Ms R Meagher MP, Mr T Stewart MP and the Hon. M Gallacher MLC.

1. Confirmation of Minutes

Confirmation of the Minutes of meetings held on 25 September 1997. Resolved on the motion of Mr Anderson, seconded Mr Lynch.

2. Draft Report

The Committee deliberated on several issues related to the review on Schedule 1, and agreed to support a number of proposed recommendations to be confirmed at the next deliberative meeting.

3. Correspondence

4. ASPG Conference

5. 1999 International Conference of the International Association for Civilian Oversight of Law Enforcement (IACOLE)

The Committee adjourned at 11.00am, until 10.00am on 23 October 1997.

**Minutes of the Meeting of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Thursday, 23 October 1997 at 3.40pm - 3.50pm in the
Legislative Assembly Clerk's Meeting Room

Members Present

Legislative Assembly

Mr B Gaudry MP (Chairman)

Mr J Anderson MP

Mr P Lynch MP

Mr T Stewart MP

Legislative Council

The Hon. M Gallacher MLC

The Hon. T Kelly MLC

Apologies

Mr A Fraser MP, Mr J Kinross MP, and the Hon. E Nile MLC.

1. Minutes

Minutes of the meeting held on 16 October 1997, were confirmed as amended on the motion of Mr Lynch, seconded by Mr Kelly.

2. Review of Schedule 1

The Committee discussed the recommendations relating to the Review of Schedule 1 of the *Ombudsman Act 1974* and agreed to the proposed recommendations as amended on the motion of Mr Lynch, seconded by Mr Kelly. The Committee deferred the adoption of the final report until the next meeting.

3. Correspondence Received

4. Business arising from the Minutes

5. General Business

The Committee adjourned at 3.50pm, *sine die*.

**Minutes of the Meeting of the
Committee on the Office of the Ombudsman & the Police Integrity
Commission**

**Wednesday, 12 November, 1997
Room 1043, Parliament House, 6:30pm**

Members Present

Legislative Assembly
Mr B Gaudry (Chairman)
Mr J Anderson
Mr J Kinross
Mr P Lynch

Legislative Council
The Hon P Kelly
The Hon E Nile

Apologies

Mr A Fraser, Mr T Stewart, The Hon M Gallacher MLC.

1. Confirmation of Minutes

Minutes of the meeting held on 16 October, 1997 were confirmed on the motion of Mr Anderson, seconded Mr Kelly.

Minutes of the meeting held on 23 October, 1997 were confirmed on the motion of Mr Kelly, seconded Mr Lynch.

2. Schedule 1 draft report - The Committee considered the draft report on the Review of Schedule 1 of the Ombudsman Act as previously circulated and discussed several amendments to the recommendations contained in the draft report.

Executive Summary, as amended, adopted.

Recommendation 1, as amended, adopted.

Recommendations 2-5, adopted.

Recommendation 6, as amended, adopted.

Recommendation 7, as amended, adopted.

Recommendations 8-19 adopted.

Recommendation 20, as amended, adopted.

Recommendations 21-33 adopted.

Chapters 5 & 6, as amended, adopted. Remainder of report adopted as stands.

The Committee resolved on the motion of Mrs Nile, seconded Mr Lynch, that the draft Report, as amended, be adopted as the Report of the Committee, that it be signed by the Chairman and presented to the House, together with the minutes of evidence, and that the Chairman, Project Officer and Committee Clerk be permitted to correct stylistic, typographical and grammatical errors.

3. Correspondence arising from the Minutes

4. Business arising from the Minutes

The meeting concluded at 7.30pm.