

# OMBUDSMAN (AMENDMENT) BILL 1989

NEW SOUTH WALES



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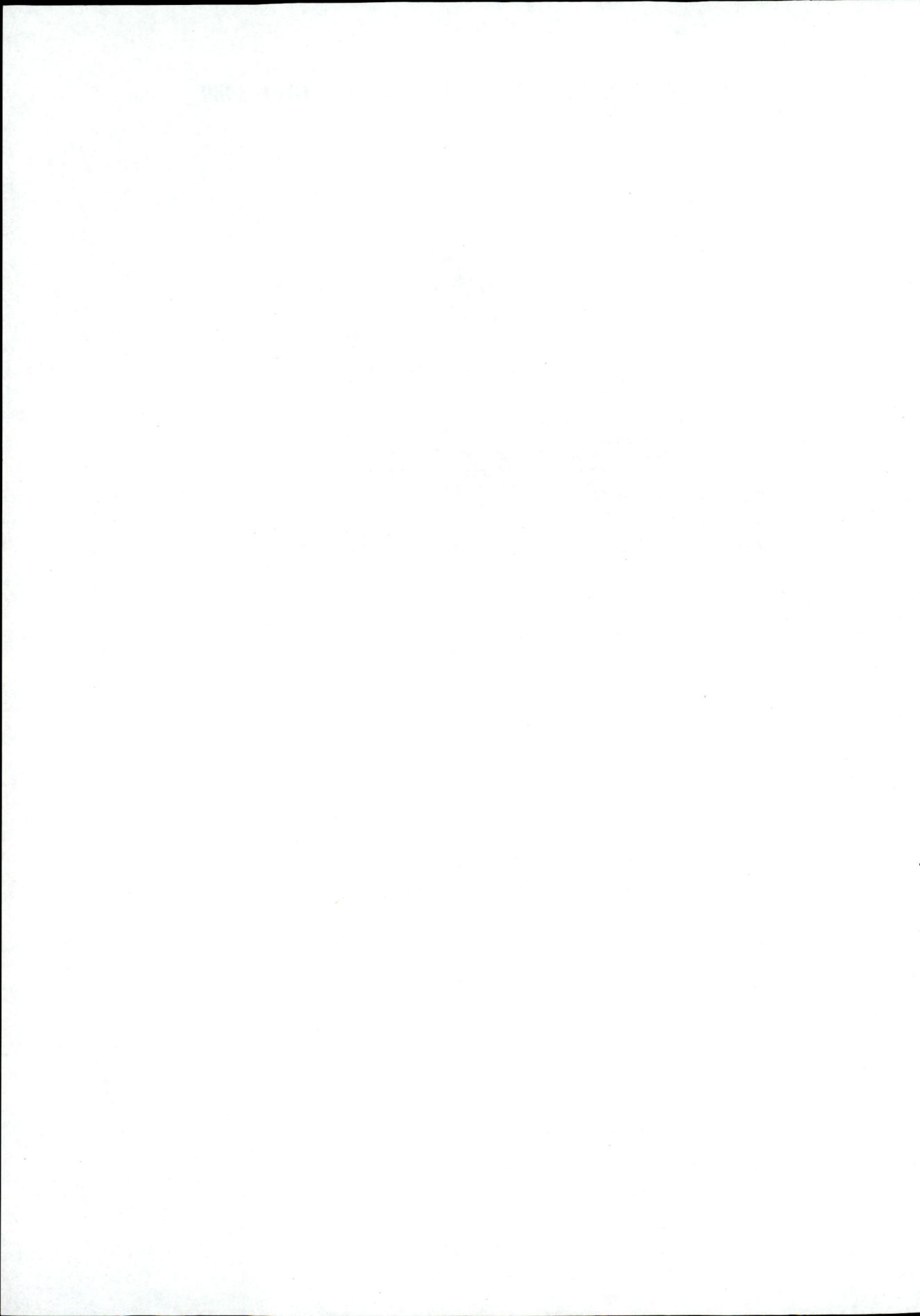
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*This PUBLIC BILL originated in the LEGISLATIVE ASSEMBLY and, having this day passed, is now ready for presentation to the LEGISLATIVE COUNCIL for its concurrence.*

*Clerk of the Legislative Assembly.*

*Legislative Assembly Chamber,  
Sydney, , 1989*

NEW SOUTH WALES



**Act No. , 1989**

An Act to amend the Ombudsman Act 1974 to enable the Ombudsman to disclose information in the public interest, and to constitute a corporation managed by the Ombudsman; to amend the Public Sector Management Act 1988 consequentially; and for other purposes.

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See also Police Regulation (Allegations of Misconduct) (Ombudsman) Amendment Bill 1989.

*Ombudsman (Amendment) 1989*

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**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Ombudsman (Amendment) Act 1989.

**Commencement**

2. This Act commences on a day or days to be appointed by proclamation.

**Amendment of Ombudsman Act 1974 No. 68**

3. The Ombudsman Act 1974 is amended as set out in Schedules 1-3.

**Amendment of Public Sector Management Act 1988 No. 33**

4. The Public Sector Management Act 1988 is amended by omitting from Schedule 2 the matter relating to the Ombudsman's Office.

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**SCHEDULE 1—AMENDMENTS RELATING TO DISCLOSURE OF INFORMATION**

(Sec. 3)

- 15 (1) Section 8 (**Deputy Ombudsman**)—  
     Section 8 (3)—  
     Omit "or 30", insert instead ", 30, 34A or 34B".
- (2) Section 10 (**Delegation**)—  
     Section 10 (2) (b)—  
 20      Omit "or 21A", insert instead ", 21A, 34A or 34B".
- (3) Section 22 (**Cabinet proceedings**)—  
     Section 22 (2)—  
     Omit "the head of the Premier's Department", insert instead "the Premier".
- 25 (4) Section 29 (**Report to complainant**)—  
     At the end of the section, insert:
- (2) The Ombudsman shall not disclose information, or make a statement, to a complainant pursuant to this section if—
- 30      (a) the disclosure of the information or the making of the statement is likely—
- (i) to pose a threat to prison security; or
- (ii) to endanger the life or physical safety of any person;  
         or
- (iii) to be contrary to the public interest; or

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 SCHEDULE 1—AMENDMENTS RELATING TO DISCLOSURE OF INFORMATION—*continued*

(b) the disclosure of the information would be contrary to section 34C.

5 (3) The Ombudsman shall not disclose information, or make a statement, to a complainant with respect to the exercise of the functions of, or an investigation by, the Ombudsman except pursuant to this section or section 34A.

(5) Section 34 (**Ombudsman and officers to observe confidentiality**)—

(a) Section 34 (1)—

10 Omit “The Ombudsman shall not, nor shall an officer of the Ombudsman”, insert instead “The Ombudsman or a former Ombudsman shall not, nor shall an officer or former officer of the Ombudsman”.

(b) Section 34 (1) (b1), (b2)—

After section 34 (1) (b), insert:

15 (b1) by the Ombudsman in the public interest in accordance with section 34A;

(b2) by the Ombudsman to a parliamentary committee in accordance with section 34B;

(6) Sections 34A–34C—

20 After section 34, insert:

**Disclosure by Ombudsman in the public interest**

25 34A. (1) The Ombudsman (subject to section 34C of this Act and section 26 of the Police Regulation (Allegations of Misconduct) Act 1978) may disclose information, or may make a statement, to any person or to the public or a section of the public with respect to the exercise of the functions of, or an investigation by, the Ombudsman under this Act or under the Police Regulation (Allegations of Misconduct) Act 1978 if it is in the interests of any public authority, Department or person, or is otherwise in the public interest, so to disclose that information or to make that statement.

30 (2) The Ombudsman shall not disclose information or make a statement under this section if the disclosure of the information, or the making of the statement, is likely—

35 (a) to interfere with the carrying out of any investigation under this Act; or

(b) to interfere with the making of a report under this or any other Act; or

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 SCHEDULE 1—AMENDMENTS RELATING TO DISCLOSURE OF INFORMATION—*continued*

- (c) to pose a threat to prison security; or
- (d) to endanger the life or physical safety of any person.

(3) The Ombudsman shall not, in disclosing information or making a statement under this section—

- (a) disclose the name of a complainant or any other matter that would enable a complainant to be identified unless it is fair and reasonable in all the circumstances to do so; or
- (b) set out opinions that are, either expressly or impliedly, critical of a public authority, a Department or any other person unless the Ombudsman has, as far as practicable—
  - (i) in the case of an opinion critical of a public authority, informed the public authority and the head of the public authority; and
  - (ii) in the case of an opinion critical of a Department, informed the appropriate Department Head; and
  - (iii) in the case of an opinion critical of some other person, informed the person,

of the substance of the grounds for the opinion and given the person so informed an opportunity to make submissions, either orally or in writing.

(4) If the Ombudsman discloses any information under this section to a person and notifies the person in writing that the information must not be disclosed, the person shall not disclose the information to any other person except with the consent of the Ombudsman.

Maximum penalty: 10 penalty units.

(5) In this section, “Department” and “Department Head” have the same meanings as in the Public Sector Management Act 1988.

### **Disclosure by Ombudsman to parliamentary committees**

34B. (1) The Ombudsman (subject to section 34C of this Act and section 26 of the Police Regulation (Allegations of Misconduct) Act 1978) may disclose information, or may make a statement, to a parliamentary committee of either or both of the Houses of Parliament, with respect to the exercise of the functions of, or an investigation by, the Ombudsman under this Act or under the Police Regulation (Allegations of Misconduct) Act 1978, either by giving evidence or by producing a document in evidence.

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SCHEDULE 1—AMENDMENTS RELATING TO DISCLOSURE OF  
INFORMATION—*continued*

5 (2) Where any evidence proposed to be given before, or the whole or a part of a document produced or proposed to be produced in evidence to, a parliamentary committee relates to a secret or confidential matter, the committee shall, at the request of the Ombudsman—

(a) take the evidence in private; or

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

10 (3) Where a direction under subsection (2) applies to a document or part of a document produced in evidence to a parliamentary committee, the contents of the document or part shall, for the purposes of this section, be taken to be evidence given by the Ombudsman and taken by the committee in private.

15 (4) Where, at the request of the Ombudsman, evidence is taken by a parliamentary committee in private—

(a) the committee shall not, without the consent in writing of the Ombudsman; and

20 (b) a person (including a member of the committee) shall not, without the consent in writing of the Ombudsman and the authority of the committee under subsection (5),

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

Maximum penalty: 10 penalty units.

25 (5) A parliamentary committee may, in its discretion, disclose or publish or, by writing under the hand of the chairperson of the committee, authorise the disclosure or publication of evidence taken in private by the committee, but this subsection does not operate so as to affect the necessity for the consent of the Ombudsman under subsection (4).

(6) Nothing in this section prohibits—

30 (a) the disclosure or publication of evidence that has already been lawfully published; or

35 (b) the disclosure or publication by a person of a matter of which the person has become aware otherwise than by reason, directly or indirectly, of the giving of evidence before the parliamentary committee.

(7) This section has effect despite section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975.

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**SCHEDULE 1—AMENDMENTS RELATING TO DISCLOSURE OF INFORMATION—*continued***

(8) Where evidence taken by a parliamentary committee in private is disclosed or published in accordance with this section—

(a) sections 5 and 6 of the Parliamentary Papers (Supplementary Provisions) Act 1975 apply to and in relation to the disclosure or publication as if it were a publication of that evidence under the authority of section 4 of that Act; and

(b) Division 5 of Part 3 of, and Schedule 2 to, the Defamation Act 1974 apply to and in relation to that evidence as if it were taken by the parliamentary committee in public.

**Premier's certificate that disclosure is contrary to public interest**

34C. (1) The Ombudsman shall not disclose information under section 29, 34A or 34B if the Premier has given the Ombudsman a certificate certifying that disclosure of the information would be contrary to the public interest for one or more of the following reasons:

(a) it would involve the disclosure of deliberations or decisions of cabinet or any committee of cabinet;

(b) it would involve the disclosure of deliberations or advice of the Executive Council;

(c) it would involve the disclosure of communications between a Minister and a Minister of another State, or of the Northern Territory or of the Commonwealth, which may prejudice relations between the State and the Government of another State, or of the Northern Territory or of the Commonwealth, as the case may be.

(2) Nothing in this Act prevents the Ombudsman from disclosing information under section 29, 34A or 34B if the Premier has notified the Ombudsman in writing that it is no longer contrary to the public interest to do so.

**SCHEDULE 2—AMENDMENTS RELATING TO STAFF OF THE OMBUDSMAN**

(Sec. 3)

(1) Section 5 (**Definitions**)—

Section 5 (1)—

After the definition of “conduct”, insert:

“corporation” means the corporation constituted by section 9A;



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SCHEDULE 2—AMENDMENTS RELATING TO STAFF OF THE  
OMBUDSMAN—*continued*

(2) Section 9A—

After section 9, insert:

**Constitution of Office of the Ombudsman as a corporation**

5           9A. (1) For the purposes of employing staff under section 32 and engaging the services of any person under section 23, there is constituted by this section a corporation under the corporate name of the “Office of the Ombudsman”.

          (2) The affairs of the corporation shall be managed by the Ombudsman.

10           (3) Any act, matter or thing done in the name of, or on behalf of, the corporation by the Ombudsman, or with the authority of the Ombudsman, shall be taken to have been done by the corporation.

(3) Section 23 (**Expert assistance**)—

15           Omit “the Ombudsman may, with the consent of the Minister,”, insert instead “the corporation may”.

(4) Section 32 (**Staff**)—

(a) Section 32 (1)—

Omit the subsection, insert instead:

20           (1) The corporation may—

          (a) employ such staff as may be necessary to enable the Ombudsman to exercise the Ombudsman’s functions; and

          (b) with the concurrence of the Public Employment Industrial Relations Authority, fix the salaries, wages, allowances and conditions of employment of any staff in so far as they are not fixed by or under another Act or law.

(b) Section 32 (5)–(8)—

After section 32 (4), insert:

30           (5) An appeal does not lie to the Government and Related Employees Appeal Tribunal concerning a promotional or disciplinary matter affecting a person employed for the purposes of subsection (1).

35           (6) The corporation may terminate an arrangement entered into for the purposes of subsection (2) at any time, and no appeal or other proceedings may be brought, in respect of the termination, by or on behalf of the person concerned.

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 SCHEDULE 2—AMENDMENTS RELATING TO STAFF OF THE  
 OMBUDSMAN—*continued*

(7) After the termination of such an arrangement respecting a former officer of the Ombudsman—

5 (a) disciplinary proceedings or disciplinary action may, in accordance with the procedures applicable to his or her principal employment, be taken against the former officer in connection with any act or omission committed while an officer; and

10 (b) any such act or omission shall, for the purposes of paragraph (a), be taken to have been committed by the former officer in the course of or during his or her principal employment; and

(c) no court or tribunal may make an order reinstating or having the effect of reinstating the former officer as an officer of the Ombudsman.

15 (8) The Public Sector Management Act 1988 does not apply to the appointment of officers of the Ombudsman and an officer is not, as an officer, subject to that Act (except in so far as may be relevant for the purposes of subsection (7)).

20 (5) Sections 33A, 33B—

After section 33, insert:

**Preservation of certain rights of staff**

33A. (1) In this section—

“member of staff” means an employee of the corporation, other than a person employed on a temporary basis;

25 “proclaimed body” means any body or organisation constituted or regulated by or under an Act that is declared by the Governor to be a body or organisation to which this section applies;

30 “superannuation scheme” means a scheme, fund or arrangement, under which any superannuation or retirement benefits are provided and which is established by or under any Act.

(2) This section applies where a member of staff was, immediately before being employed as a member of staff—

35 (a) an officer of the Public Service or a Teaching Service; or

(b) a member of the Police Force; or

(c) a contributor to a superannuation scheme; or

(d) an officer employed by a proclaimed body; or

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 SCHEDULE 2—AMENDMENTS RELATING TO STAFF OF THE  
 OMBUDSMAN—*continued*

(e) a person in respect of whom provision was made by any Act for the retention of any rights accrued or accruing to the person as an officer or employee.

(3) The member of staff—

5 (a) shall retain any rights accrued or accruing to him or her as such an officer, member, contributor or person; and

(b) may continue to contribute to any superannuation scheme to which he or she was a contributor immediately before being employed as a member of staff; and

10 (c) is entitled to receive any deferred or extended leave and any payment, pension or gratuity,

as if he or she had continued to be such an officer, member, contributor or person during his or her service as a member of staff.

15 (4) Service as a member of staff shall be regarded as service as an officer or employee for the purposes of any law under which those rights accrued or were accruing, under which he or she continues to contribute or by which that entitlement is conferred.

20 (5) The member of staff shall be regarded as an officer or employee, and the corporation shall be regarded as the employer, for the purposes of the superannuation scheme to which he or she is entitled to contribute under this section.

25 (6) If the member of staff would, but for this subsection, be entitled under subsection (3) to contribute to a superannuation scheme or to receive any payment, pension or gratuity under the scheme—

30 (a) he or she is not so entitled on becoming (whether on being employed as a member of staff or at any later time while a member of staff) a contributor to any other superannuation scheme; and

(b) the provisions of subsection (5) cease to apply to or in respect of him or her and the corporation in any case where he or she becomes a contributor to any such other superannuation scheme.

35 (7) Subsection (6) does not prevent the payment to a member of staff (on his or her ceasing to be a contributor to a superannuation scheme) of such amount as would have been payable to him or her if he or she had ceased, because of resignation, to be an officer or employee for the purposes of the  
 40 scheme.

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SCHEDULE 2—AMENDMENTS RELATING TO STAFF OF THE  
OMBUDSMAN—*continued*

(8) A member of staff is not, in respect of the same period of service, entitled to dual benefits of the same kind through the operation of this section.

5 **Member of staff entitled to re-appointment to former employment in certain cases**

33B. (1) In this section, “member of staff” and “proclaimed body” have the same meanings as in section 33A.

(2) A person who—

10 (a) being a member of staff, ceases to be employed by the corporation (except through dismissal on the ground of misbehaviour); and

(b) was, immediately before being employed as a member of staff—

15 (i) an officer of the Public Service or a Teaching Service; or

(ii) a member of the Police Force; or

(iii) an officer employed by a proclaimed body; and

(c) has not reached the age of 60 years,

20 is entitled to be appointed to some position in the Public Service, the Teaching Service, the Police Force or the service of the proclaimed body, as the case may be, not lower in classification and salary than that which the person held immediately before being employed as a member of staff.

25 (3) A member of staff who—

(a) immediately before the transition period was occupying a staff position in the Ombudsman’s Office as an officer of the Public Service; and

30 (b) during or before the transition period applies for appointment, or is appointed, to a position in the Public Service,

shall, in relation to the application or appointment and any matter concerning the application or appointment, be taken to be an officer of the Public Service.

35 (4) Subsection (3) does not apply to a person who applies for appointment, or is appointed, to a position in the Public Service if the person has, on a previous occasion in the transition period, been appointed to a position in the Public Service.

(5) For the purposes of this section, the transition period is the period of 3 years from the commencement of this subsection.

**SCHEDULE 3—MISCELLANEOUS AMENDMENTS**

(Sec. 3)

- (1) **Section 5 (Definitions)**—  
Omit section 5 (2).
- 5 (2) **Section 10 (Delegation)**—  
(a) **Section 10 (2) (a)**—  
Omit “(other than a report under section 28)”, insert instead  
“, except in accordance with subsection (2A)”.
- 10 (b) **Section 10 (2A)**—  
After section 10 (2), insert:  
(2A) The Ombudsman may delegate the exercise of the function  
to make a report—  
(a) under section 26 or 29, to an Assistant Ombudsman; and  
(b) under section 28, to a special officer of the Ombudsman.
- 15 (3) **Section 13 (Decision for investigation)**—  
Section 13 (1)—  
Omit “wrong”, insert instead “conduct referred to in section 26”.
- (4) **Section 19 (Inquiries)**—  
After section 19 (2), insert:  
20 (3) A witness appearing before the Ombudsman shall be paid  
such amount as the Ombudsman determines, but not exceeding  
the amount that would be payable to such a witness if he or she  
were a Crown witness subpoenaed by the Crown to give evidence.
- (5) **Section 21A (Injunction)**—  
25 Section 21A (2)—  
Omit “wrong”, insert instead “conduct referred to in section 26”.
- (6) **Section 26 (Report of investigation)**—  
(a) **Section 26 (1)**—  
Omit the subsection, insert instead:  
30 (1) Where, in an investigation under this Act, the Ombudsman  
finds that the conduct the subject of the investigation, or any part  
of the conduct, is of any one or more of the following kinds:  
(a) contrary to law;  
35 (b) unreasonable, unjust, oppressive or improperly  
discriminatory;  
(c) in accordance with any law or established practice but the  
law or practice is, or may be, unreasonable, unjust,  
oppressive or improperly discriminatory;

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- (d) based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations;
- (e) based wholly or partly on a mistake of law or fact;
- (f) conduct for which reasons should be given but are not given;
- (g) otherwise wrong,

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

- (b) Section 26 (2) (d)—

Omit “or” where lastly occurring.

- (c) Section 26 (2) (d1)—

After section 26 (2) (d), insert:

- (d1) that compensation be paid to any person; or

- (d) Section 26 (3) (c)—

Omit “the Public Service Act 1979, to the Public Service Board”, insert instead “the Public Sector Management Act 1988, to the Premier’s Office”.

- (7) Section 26A—

After section 26, insert:

**Authority to pay compensation**

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

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

- (b) with the concurrence of the Treasurer,

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

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

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

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SCHEDULE 3—MISCELLANEOUS AMENDMENTS—*continued*

- (4) The functions that may be delegated under section 530A of the Local Government Act 1919 by a council do not include a function relating to the authorisation of the payment of compensation under this section.
- 5 (5) Nothing in any other Act prevents the payment of compensation in accordance with an authority given under this section, and the amount of compensation paid may be the same as, or may be more or less than, any amount recommended in the Ombudsman's report.
- 10 (8) Section 28 (**Serious misconduct**)—  
Section 28 (c)—  
Omit "the Public Service Act 1979, to the Public Service Board", insert instead "the Public Sector Management Act 1988, to the Premier's Office".
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LEGISLATIVE COUNCIL

OMBUDSMAN (AMENDMENT) BILL 1989

Amendments to be moved in Committee

Miss Kirkby:

- (1) Page 2, Schedule 1, line 31. Omit all words on that line.
- (2) Page 4, Schedule 1, line 1. Omit all words on that line.

