

**Submission
No 9**

PERFORMANCE MEASURES AND ACCOUNTABILITY OF OVERSIGHT AGENCIES

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Submission
for
Parliamentary
inquiry
conducted by
the
Ombudsman,
the Police
Integrity
Commission
and the Crime
Commission.
Performance
Measures and
Accountability
of Oversight
Agencies
(Inquiry)

January 23

2013

"Internal reports, like complaints and suggestions from the public, should be treated as a way to identify and address organisational problems." - ISBN: 978-1-921132-88-9 11/2011, NSW Ombudsman, November 2011.

Australian
Legislative
Ethics
Commission

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"ALECOMM believes that the term "watch dog" does not accurately describe the oversight functions of the NSW Ombudsman with the current performance indicators. We suggest the term "show dog" is more appropriate as the indicators only show that the Ombudsman looks like they are doing things, so the Government has something to tell the public when things go wrong, but none of the indicators show how well the Ombudsman performs its oversight / watch dog functions."

Wednesday, January 23, 2013

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Dear Sir/Madam,

Submission for Parliamentary inquiry conducted by the Ombudsman, the Police Integrity Commission and the Crime Commission. Performance Measures and Accountability of Oversight Agencies (Inquiry).

The Australian Legislative Ethics Commission would like to make a submission to your inquiry regarding the performance measures and accountability of oversight agencies in NSW.

<http://www.parliament.nsw.gov.au/prod/parlment/Commission.nsf/0/51566096A736B672CA257AA10001B992>

About the Australian Legislative Ethics Commission

The Australian Legislative Ethics Commission (Alecomm) has a long history of attempting to act as a "go between" for disenfranchised citizens of NSW and various government agencies, including the oversight agencies.

We are constantly frustrated in doing this, as the oversight agencies appear to be reluctant to do their jobs effectively and to ensure good governance in the NSW public service, by making them run with honesty and integrity, and in compliance with Statutory Laws.

In this submission, we will indicate (a) what the current status is in measuring what oversight agencies do, and (b), provide an example that highlights how the NSW Ombudsman's office is able to act dishonestly and ignore NSW Statutes, and "turn a blind eye" to public service corruption.

This case will highlight the fact that there is no public or legal accountability currently in NSW oversight agencies. We will also outline (c) what we would like to see changed to ensure accountability.

About the Authors

The authors, along with all others at the Australian Legislative Ethics Commission, provide their time in a voluntary basis. No reimbursements are made to Alecomm staff whatsoever, and all funds raised go directly to those in need.

Marney MacDonald

Marney is the Chief Operating Officer at the Australian Legislative Ethics Commission. Marney has held this position for fifteen years, and is responsible for developing the organisation and also overseeing all aspects of the day to day operations.

Marney also deals directly with those seeking the assistance of Alecomm, including assistance with obtaining government forms and so forth. Marney provides her time on a volunteer basis.

Michael Hart

Michael Hart is the organisations Senior Research Officer, and has specialist knowledge in the performance measurement of government services. Michael has worked as a private consultant in the benchmarking and performance measurement of government services for about fifteen years also. Michael is educated at postgraduate / thesis level.

Current Performance Indicators

Firstly, we would like to point out that the Commission has asked for submissions about the indicators of how well these Oversight Agencies are performing their tasks.

We would like to point out the difference between simply doing things (as in Activity), and performing a specified job correctly (as in Performance). To measure the "performance", we must first determine what the "goal" of the organisation actually is.

For example, when measuring the "performance" of a competition football team, it is insufficient simply to measure many times they pass the ball, or how many times they have a scrum. It is necessary to measure how many times they win more points than the opposing team, as that is what the team is supposed to do.

In measuring the performance of a public sector agency, it is therefore necessary to first define what the agency is supposed to do.

With the Ombudsman, for example, is the agency supposed to:

- a. Be an agency for the government to deal with complaints?
- b. Answer phones and respond to letters?
- c. Negotiate complaints between the public and government agencies?
- d. Provide a front for the Government to make it look like they have an independent investigative body?
- e. An agency for the Government to ask to investigate something when there is some bad press?
- f. An agency that ensures the **good governance of public sector agencies** through proper decision making?
- g. Make sure agencies are honest and accountable to the public they are supposed to serve?
- h. Make sure agencies follow the law?
- i. Ensuring agencies do not have any conflict of interests in decisions they make, but instead make decisions according to the public they serve?
- j. etc

We argue that the goal of oversight agencies is the last few of these. That means "to ensure good governance of public sector agencies", ensuring they run openly, honestly and according to the law.

Having this goal there appears to be no measure of performance that ensures the oversight agencies perform this role properly, or even at all. Typical indicators that are used measure their ACTIVITIES rather than their PERFORMANCE (i.e. KAIs rather than KPIs).

These indicators can typically include the number of complaints they received/processed, the number of calls they receive and so forth. However the oversight agencies are NOT there to deal with complaints. These are merely one mechanism for the oversight agencies to know when they need to intervene and produce change in the public service. In fact if government personnel did their jobs right and ensured there was good governance in public sector agencies there would be NO complaints made.

Alecomm notes that the United Nations defines “good governance” as

*“The process of decision-making and the process by which decisions are implemented (or not implemented)”*¹ and that a lack of good governance – or bad governance – “is being increasingly regarded as one of the root causes of all evil within our societies.”

The Role of the Oversight Agencies

It is the role / job of the oversight agencies to ensure that all NSW agencies, including the oversight agencies themselves, have good governance. In fact this is their sole responsibility and the legislation has been developed to assist them in doing this.

The front page of the NSW Ombudsman’s website also says this is their job.

¹ <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>

“The NSW Ombudsman is an independent and impartial watchdog. Our job is to make sure that agencies we watch over fulfil their functions properly and improve their delivery of services to the public. The current Ombudsman is Bruce Barbour.”²

The performance indicator for the Ombudsman, therefore, must reflect how well they perform this task.

Current Performance Measures

Currently the Australian Legislative Ethics Commission is unaware of any performance measures that the NSW Ombudsman uses to check how well they perform their job of overseeing NSW Agencies. The only measures we are currently aware of are activity measures as explained previously, such as the number of complaints processed and telephone calls made/received etc.

None of these have anything to do with how well the Ombudsman acts as an impartial watchdog. Indeed, even when complaints are “resolved” it is generally by ‘resolution’ rather than by the investigative/watchdog capacities of the Ombudsman and hence NSW Agencies are allowed to hide their wrongdoing if they can come to an agreement to keep a complainant silent.

² <http://www.ombo.nsw.gov.au/>

Alecomm has examined the performance of the Ombudsman

The Australian Legislative Ethics Commission is the only independent organisation we are aware of that examines the performance of the NSW Ombudsman - in undertaking his role of providing a governance watchdog in public service agencies.

Over the past two years we have written a number of articles on this and they are publicly available from our website here:

www.alecomm.com/index.php?option=com_content&view=category&layout=blog&id=316&Itemid=999

To our shame, we have discovered that the NSW Ombudsman, while reporting to the NSW Government they are actively engaged in overseeing the governance of Public Sector agencies, are in reality, actively falsifying evidence, ignoring evidence and concocting excuses for failing to investigate serious misconduct such as the fabrication of evidence during Child Protection where that fabricated evidence is designed specifically to cover-up dishonesty and misconduct in the agency. (Refer Appendix 1)

In the case highlighted in Appendix 1 the NSW Ombudsman has made the following excuses for not investigating the fabricated evidence.

Conflict Of Interest

Ombudsman: The people that fabricated the evidence were not the same as those that needed to cover up their wrongdoing so there is no conflict of interest.

Fact: As seen in Appendix 1, they were and so there is a conflict of interest

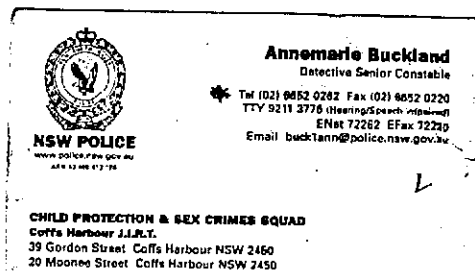
It is OK to fabricate evidence

Ombudsman: It is OK to fabricate evidence if it is used to avoid criminal charges or misconduct proceedings in child abuse investigations because the Ombudsman classifies it as "administrative information".

Fact: The religious organisations and churches tried this in the 1970s to 1990s - and it is only just being exposed now and forcing a Royal Commission into "covering up institutional wrong doing in child abuse cases".

The police do not have to investigate false evidence

Ombudsman: In a JOINT interview with the police from the NSW "Child Protection ... Squad" and DoCS the protection of the child is not relevant to the police so they are allowed to let DoCS fabricate evidence and say it is irrelevant in court and parents are irresponsible for raising it.



2. *Ignoring all the evidence provided by me about lack of preventative services and police officers refusing to discuss prevention/protection with me when I wanted to ...:*

It would seem to me that evidence about the existence or otherwise of "preventative services" provided (or not provided) by DOCS and DADHC was not really relevant or central to the police investigation of the alleged assault on Child by Person .

Yours sincerely

Bruce Barbour
Ombudsman

20/12/10

Fact: The police are misleading the public by providing business cards implying they are in a "Child Protection ... Squad" More significantly there are a number of NSW Statutory Laws that the NSW Ombudsman has ignored that place the protection of the Child as the priority of all decisions.

The Police Act

The Children & Young Persons Care and Protection Act

The Victim Services Act

Etc

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Fact: The NSW Ombudsman ignores the above Statutory Laws to allow DoCS to fabricate evidence.

The Ombudsman is not the watchdog and you have to ask DoCS to investigate themselves.

Ombudsman: you have not given DoCS the opportunity to investigate the situation themselves so the Ombudsman will not investigate it.

Fact: An internal investigation had been carried out by DoCS and the CEO reported false information as a result. This was provided to the NSW Ombudsman at the time

The fabricated evidence was not fabricated

Ombudsman: The fabricated evidence was not fabricated because the DoCS internal investigation (which the Ombudsman claimed in the same letter didn't occur) showed it was not fabricated.

Fact: It was proved to be fabricated later in court (the Administrative Decisions Tribunal)
<http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=159144>

It is too hard to investigate

Ombudsman: Well you have now proved all the excuses we made up before were wrong but it is too hard for use to investigate because it means we would have to interview people and they won't "fess up" to doing the corrupt conduct so we will not investigate it.



SwanExcuse1.wav

What is the Ombudsman for if the Ombudsman's Office refuses to investigate the motivation of fabricating evidence because they find it too hard?

Unfortunately this means that under the current "Activity" indicators the Ombudsman's office can report they have processed and closed this case. Yet they have used false information and fabricated excuses for the agency and even when it was proven they were wrong the

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Ombudsman refuses to ensure good governance in the Public Sector Agencies because they find it too hard to actually investigate wrong doing – unless ordered to do so from a politician.

This means no oversight has investigated the corrupt fabrication of evidence and the Ombudsman has provided false/misleading information to refuse to investigate the falsification of evidence and cover-up the corruption in the Child Abuse industry.

Unfortunately this not only leaves both the state government and individual agencies open to future legal claims – just like the churches are at the moment subject to compensation claims by victims who have had evidence covered up in child abuse cases - but also leaves the victims of institutional abuse suffering.

The current “performance” indicators for the NSW Ombudsman do not record this as a failure but as a success as they do not measure the PERFORMANCE of the Ombudsman in their role of ensuring good governance but simply measure ACTIVITY.

This is not the only case

While the abuse case goes into some detail of the methods the NSW Ombudsman uses to avoid his responsibilities in ensuring good governance the Australian Legislative Ethics Commission has received other comments on our web site about how the NSW Ombudsman fails in his performance. These comments include:

- *“Bruce Barbour is one of the most corrupt authorities in NSW Government and only when he resigns this state will move forward. He is doing the great disservice to NSW Citizens by holding this position for so long. My case is just one of so many examples where his skills and problem solving clearly shows that he is not up to this job. No matter how hard we try to improve things; as long as he is there, there is no progress. 25/4/2011*
- *Well, I will tell you this... Frank Kuiters from NSW Ombudsman's Office.. "No one is safe". He is worried about his grandchildren....only wish I had recorded it. 5/3/2011*
- *Answer Parliamentary Question 2297 Bruce! Nearly 3 years have passed and yet no reply to numerous letters have been received. Your incompetence aids and abets*

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criminal acts. Closed down 2 "investigations" leaving 27 questions still on the table. Even DoCS own INTERNAL report was far more scathing than any ineffectual lap dance with the Minister in this case by Barbour. Kinmond associated with Leigh Leigh-murder and Roger Rogerson but Assistant Commissioner of DoCS at the Ombudsman??? 4/3/2011

- Mr Barbour PISS OFF ... get out of the Office where you sit on your lazy proverbial butt day after day and hand your cap over to someone Who Cares About Our Children. You belong in INDONESIA 10/2/2011*
- I have that exact problem and funnier with docs and would like to speak to someone I have document proof... Been going on for ten years and still happening. 22/11/2012*
- I have had dealing with the ombudsman for ten years now and know all too well how it feels to have the buck passed. The first DoCS officer said the unregistered carers were supposedly known to me before my daughters went to their care and that is why they were Not properly departmental registered foster carers. Lie... Then it was to old a case to investigate, so I took it to Pru Goward & Linda Burney, to tell me that the ombudsman was investigating.. Hmm Parliament do Not even know their own policies, as these ministers should have known that it was to an old case for the ombudsman to investigate, so what has been done with ALL my evidence??? Shoved in a desk.... 18/4/2011*
- The Children's Guardian The Ombudsman...The Minister herself and her Damage Controller CEO Annette Gallard....NGO Directors They all know what's truly going on today in Child Protection NSW and they all tarred with the same COVER_UP Brush. What's going on in the whole Department along with all the cohorts is disgusting. The corruption victimisation unethical practices...immoral actions...is appalling in this day and age. SHAME ON THEM ALL 9/3/2011*
- Annette Gallard has Bruce Barbour controlled by her strings = Sing our song Bruce sing. 5/2/2011*
- Well we all know not to take our PUBLIC SERVANT complaints of abuse, corruption, cover ups to the Puppet On A String Ombudsman.....we'd all go into Shock and Horror if he ever seriously Investigated complaints with integrity, conscience, and moral ethics. SACK The Ombudsman 6/2/2011".*

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These comments do not represent the majority - but only those few that (a) happened across our web site and (b) had sufficient motivation to officially comment to us about the Ombudsman's performance despite knowing we could do very little

Clearly our research has shown the current methods of measuring the performance of oversight agencies, such as the NSW Ombudsman, are totally ineffective and these agencies simply do not do what they are tasked to do as a result:

The Ombudsman's position on poor performance

The Ombudsman is currently aware that at least 5% of cases involve poor investigative performance on the part of Ombudsman staff. These 5% consume 20% to 30% of the resources when complaints are too complex or too difficult for staff to comprehend. Instead of investigating why there is such a large error rate for these outliers and subsequent increase in resource burden the Ombudsman has simply decided to label these complaints as "Unreasonable".

http://www.ombudsman.vic.gov.au/resources/documents/Unreasonable_Complainant_Conduct_project_report.pdf (Note - despite this being a NSW Ombudsman's Report it can now be found on the Victorian Ombudsman's web site. A lecomm does not know how long this embarrassing document will stay there either)

The Ombudsman tries to reframe the poor performance of their staff as being the complainants fault and labelling the complainant as "unreasonable". Some characteristics that the Ombudsman considers typical of "unreasonable" complainants in the report include:

The complainant does not simply go away when the Ombudsman does not want to address the complaint (Unreasonably persistent).

They provide too little information (withhold information) and expect the Ombudsman to investigate the complaint impartially rather than just "process" it.

They provide too much information (including email and constant phone calls as well as excessive written material).

They demand an outcome based on justice and public interest rather than ????? (who knows what the Ombudsman considers as a good outcome if it is not these).

They request their complaint be reviewed more than once (don't ask for that from a doctor when they get it wrong).

The provide information in a manner that the Ombudsman has difficulty understanding.

They reframe their complaint if it appears to be misunderstood.

Instead of trying to work out how their staff can perform better and provide better governance over NSW government agencies the suggests labeling the complainant as having some type of mental health disorder (although advises against telling this to the complainant) and refusing to acknowledge the real concerns about governance. An analysis of these "difficult" complainants include:

Focus is on how to characterize / stereotype complainants (for example):

Male over 45

Suggestions of mental disorders etc

Lots of discussions on characterize the behaviours

They involved other agencies when they were refused a service

Focus on dealing with Complainants rather than dealing with Complaints :

In these cases the Ombudsman's report suggests focusing on how to fob off the complainant rather than looking at the complaint itself. That is how the complainant interacted with the Ombudsman's office rather than the substance of the complaint.

"Focus on behaviours not the person"

Just say "no"

The Ombudsman also makes suggestions about the mental health of the complainant and implies they has emotional problems or enjoys complaining rather than looking at the substance fo the complaint.

Attitudinal

- dissatisfaction with a person, an agency, the government or 'life' in general

Inspirational

- seeking 'justice' or a moral outcome
- a rigid focus on what is seen as a matter of 'principle'

Emotional or Psychological

- anger or frustration due to unmet expectations
- a 'crusade' seeking vindication, retribution or revenge
- an unreasonable refusal to accept an outcome that is unfavourable
- an unreasonable sense of entitlement or expectation of favourable treatment
- an inability to accept responsibility and a need to blame others (either people or

- agencies directly involved, or watchdog bodies who have not found in their favour)

An inability to 'let go' and move on

Recreational

An all consuming hobby (particularly for retirees) ³

At the Australian Legislative Ethics Commission, we are aware that hospitals have similar statistical outliers in resource usage, that are also linked to increases in hospital errors, and we are very glad that hospitals do not generally see these patients as "unreasonable" after being treated badly in hospital and refuse to treat them - but instead concentrate on improving the hospital performance for those patients.

Perhaps hospitals are more inclined to improve performance because their performance is more accountable on an individual case level through the media and through the judiciary. For example the oversight agencies are not required, by law, to get the information they are using correct if they do not want to, so can easily fabricate information in order to drop a case if it is likely to become difficult or a political minefield as there is no legal recourse for individuals to make.

³ NSW Ombudsman: Speech – Managing Unreasonable Complainant Conduct – CPD Symposium – 26 May 2009

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What performance indicators should there be?

Given the NSW Ombudsman's role is to ensure good governance within the public service agencies we believe every validated complaint should have with it details of the changes made to ensure the public sector agencies involved do not perform any misconduct again. This includes appropriate punishment as a deterrent.

In the case we have detailed, involving the fabrication of evidence in a child abuse case, this could include deterrents such as the recommendation of criminal charges of dishonesty against those that fabricated the evidence under the various section of the Crimes Act and Child and Young Persons Care and Protection Act. Alternatively, if the victim of the fabricated evidence agrees, a lesser punishment such as the sacking of those involved in the misconduct could serve as an appropriate warning for others not to engage in misconduct.

At the moment there are simply no performance indicators that measure capacity of the NSW Ombudsman to respond to public complaints and produce an outcome based on proper public sector governance and until appropriate information is collected at a case level about the changes or deterrents that were recommended by the Ombudsman we at the Australian Legislative Ethics Commission see no reason for change and no hope of improvement in the performance of the oversight agencies.

Along with these there needs to be a change in the legislation to ensure the oversight agencies cannot use false information or generate false excuses for covering up corruption in the NSW public sector.

Finally

We would like to acknowledge the importance of ensuring the oversight agencies act correctly and therefore the importance of the Commission in selecting appropriate performance measures.

As the words of the great philosopher, Albert Einstein, points out “The world is a dangerous place. Not because of the people who are evil; but because of the people who don't do anything about it.”

We hope the Commission chooses the performance indicators that will make the oversight agencies do something about what the United Nations describes as the evil that results from poor public sector governance.

Sincerely,

Marney MacDonald
Chief Operations Manager

Michael Hart
Senior Research Officer

20 January 2013

Attached : Appendix A