

**Submission
No 38**

**THE IMPLEMENTATION OF PORTFOLIO COMMITTEE No. 2
RECOMMENDATIONS RELATING TO WORKFORCE ISSUES, WORKPLACE
CULTURE AND FUNDING CONSIDERATIONS FOR REMOTE, RURAL AND
REGIONAL HEALTH**

Organisation: NSW Ombudsman

Date Received: 13 October 2023

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Dr Joe McGirr MP
Committee Chair
Select Committee on Remote, Rural and Regional Health
By email: remoteruralregionalhealth@parliament.nsw.gov.au

Dear Dr McGirr

NSW Ombudsman submission – *The implementation of Portfolio Committee No. 2 recommendations relating to workforce issues, workplace culture and funding considerations for remote, rural and regional health*

Thank you for your invitation to make a submission to the above inquiry.

The committee is seeking information about the progress of certain recommendations that were made by Portfolio Committee No. 2 in its May 2022 report, [Health outcomes and access to health and hospital services in rural, regional and remote New South Wales](#) (PC 2 report).

The PC 2 report recommendations of interest to the Committee are identified in its [terms of reference](#), and relate to workforce issues, workplace culture and funding considerations. They include in particular:

- **Recommendation 40** – recommending actions be taken by NSW Health and rural and regional Local Health Districts, including to commission an independent review of workplace culture and taking other steps to improve workplace culture and conduct; including provision of complaints management training and reviewing and enhancing whistleblower protections to ensure staff feel comfortable speaking up.
- **Recommendation 41** – recommending the establishment of a health administration ombudsman.¹

While neither recommendation was directed to, or refers to, the NSW Ombudsman, there are a number of functions and current and proposed activities of the NSW Ombudsman that may be relevant to the Committee's consideration of progress regarding these recommendations.

The purpose of this submission is to briefly outline those functions and activities.

¹ Refer to Portfolio Committee No. 2 May 2022 report, [Health outcomes and access to health and hospital services in rural, regional and remote New South Wales](#) for full text of recommendations accessed at: [Report \(nsw.gov.au\)](#).

The role of the NSW Ombudsman

The NSW Ombudsman is an independent integrity body that pursues fairness for the people of NSW. We aim to call administrative agencies and public officials to account when they do not live up to their responsibilities and help protect the public from misuse of public power and mistreatment.

A central function of the NSW Ombudsman is to receive complaints about, to monitor, and to investigate, the conduct of NSW public authorities. This includes State Government departments and agencies, NSW statutory bodies, and local councils. Conduct for this purpose means action or inaction of *an administrative nature*. Complaints may be made to us if such conduct may be unlawful, unreasonable or otherwise wrong within the meaning of section 26 of the *Ombudsman Act 1974 (Ombudsman Act)*.

In the health context, the NSW Ombudsman can receive complaints about (and, where section 26 wrong conduct is identified, investigate) the administrative conduct of NSW Health including the Ministry, local health districts and public hospitals, other health organisations, and professional councils, all of which are ‘public authorities’ for the purposes of the Ombudsman Act.

Part 4B of the Ombudsman Act provides protection from detrimental action to those who complain or disclose information to the NSW Ombudsman.

The recommendation for an ombudsman for ‘health administration’

In the PC 2 report, the Committee recommended (41) that the NSW Government establish a ‘health administration ombudsman’. In its response, the NSW Government noted that, as we had confirmed, such matters as were proposed to be covered by such a body already fall within the NSW Ombudsman’s existing jurisdiction.²

As the state’s broad-based parliamentary ombudsman, the statutory role, functions and powers of the NSW Ombudsman are consistent with those of the proposed health administration ombudsman.

Attachment A sets out each of the key features of the health administration ombudsman proposed in the PC 2 report against the equivalent (existing) NSW Ombudsman functions.

However, in our advice to Government, we also noted that the NSW public health system is the largest health care system in Australia with the largest workforce of all NSW Government departments, that the resources available to the Ombudsman have been highly constrained, and that the scope of the Ombudsman’s jurisdiction is very broad. In this context, we acknowledged that it has not always been possible for us to investigate all matters that may warrant further scrutiny. Nor is it likely that our role has always been widely promoted to or accessed by public officials working across the health sector.

Current and proposed activities of relevance to health administration

Training and advice

We provide training and resources to improve agencies’ own capability in complaint handling.

We are currently updating our suite of complaint-handling guidance for agencies, which are available on our website (www.ombo.nsw.gov.au).

The broader NSW Ombudsman website will soon be relaunched with accessibility and ease of access to relevant information about what we can and cannot do guiding the redevelopment process. This project is expected to contribute to increased awareness of our role in all the sectors we oversight.

² NSW Government response to PC 2 report accessed at: <[NSW Government response](#)>.

Public Interest Disclosures oversight

We oversee the public interest disclosures (PID) scheme in NSW.

Our role includes providing advice, guidance and training. We also have statutory powers to monitor and audit the exercise by agencies of functions under the PID legislation.

We are planning to include a health administration related PID audit under our audit program of work in 2024.

The new *Public Interest Disclosures Act 2022 (PID Act)* commenced on 1 October 2023. Whistleblower protections have been strengthened under the new Act. The PID Act applies to protect public officials who report 'serious wrongdoing', which includes corrupt conduct, serious maladministration, and serious and substantial waste of public resources.

We have published a range of resources to support agencies and public officials comply with their obligations under the new Act.³ This includes comprehensive guidelines, e-learning modules, and awareness videos.

We are actively engaged with the Ministry of Health in relation to implementation of the new PID Act. Our understanding is that our e-learning modules will be implemented across NSW Health via the My Health Learning platform and will be compulsory training for all disclosures officers and managers (as defined by the PID Act).

One of the issues we highlight in our PID training and guidance is the importance of agencies recognising that a PID has been made, in circumstances where PIDs may be made in the context of other processes, such as grievances or incident reporting mechanisms. This is an important issue across the public sector, but has particular relevance for health administration where the reporting of a clinical incident or concern might also constitute a disclosure of serious wrongdoing (as defined in the PID Act) and therefore trigger the protections and obligations of the PID Act. For example, while a report of a clinical error (even one that may amount to negligence) would not usually be a PID (because it does not concern one of the categories of 'serious wrongdoing', as currently defined in the PID Act), in some circumstances the report could be a PID – for example, if as well as reporting the clinical error the person making that report also discloses information that shows or tends to show that the error was not properly dealt with by administrators (which may constitute serious maladministration) or that the error was 'covered up' (which may constitute serious maladministration or corrupt conduct).

We will soon be establishing a dedicated whistleblowers advice and support team within our PID unit. The role of this team will include providing advice and support specifically to public officials who have made, are considering making, or are unsure whether they can make, a PID.

The NSW Ombudsman also chairs the PID Steering Committee which is responsible for advising the NSW Government on the operation of the legislation, as well as making recommendations for reform.

An ongoing issue in this regard is that public health workers who report concerns or wrongdoing may be subject to different whistleblower protections, depending on what and to whom they report. We have previously suggested that consideration be given to expanding the current categories of serious wrongdoing under the PID Act. Of particular relevance we have previously suggested that public officials who report any 'serious risk to public health and safety' should have equivalent protections as whistleblowers under the PID Act.⁴ As noted above, currently, a disclosure that is about a clinical incident

³ NSW Ombudsman webpage accessed at: <[The Public Interest Disclosures Act 2022 - NSW Ombudsman](#)>.

⁴ See for example NSW Ombudsman report, 'Special report by the NSW Ombudsman on the Public Interest Disclosures Bill 2021' accessed at: <[Special Report by the NSW Ombudsman on the Public Interest Disclosures Bill 2021](#)>.

or a failure or risk to health and safety will generally not be protected as a PID, unless it also discloses serious maladministration or corrupt conduct (such as an attempt by administrators to conceal that clinical incident, failure or risk).

Now that the new PID Act has commenced, we will be formally referring this issue to the PID Steering Committee for the purpose of the Committee advising the NSW Government as to whether legislative amendments (for example, to the definition of ‘serious wrongdoing’ in the PID Act, or to other related legislation) should be considered.

Complaint-handling by agencies

Under amendments to the Ombudsman Act enacted in 2022, the Ombudsman has additional powers in respect of oversighting the handling of complaints by agencies, and in particular:

- Reviewing the complaint handling systems of public authorities – this new function under s 25A of the Ombudsman Act extends on our earlier work on the Complaint Handling Improvement Program which led to a range of complaints handling reforms across the NSW Government sector.⁵ In 2023-24, we will be establishing a dedicated complaint handling system review unit. Health-related complaints handling system reviews will be included under that program of work.
- Referring matters raised in complaints to an organisation for its investigation – this new provision under s 12A of the Ombudsman Act is an additional tool for NSW Ombudsman staff to utilise when determining the appropriate action for addressing complaints received. The provision enables us to closely monitor the conduct of the investigation, and the public authority is required to report to us on the outcome of our referral.

Reviews of the deaths of children

The NSW Ombudsman registers and conducts research regarding the deaths of all children in NSW in its role as convenor of the NSW Child Death Review Team (CDRT), as well as having a discrete function of reviewing the deaths of particular children who have died in circumstances of, or suspicious of, abuse or neglect (‘reviewable deaths’). This work frequently includes examination of the role of health organisations in preventing child deaths.

At the time of writing, the NSW Ombudsman is monitoring six recommendations to NSW Health (five CDRT recommendations and one recommendation relating to reviewable deaths).

In 2023, we completed an investigation under the Ombudsman Act about the conduct of a local health district in relation to the death of a child. A summary of this investigation will be included in our report, ‘Formal investigations summary report 2022-23: A summary of completed investigations under section 13 of the *Ombudsman Act 1974* for the period from 1 October 2022 to 30 September 2023’ due to be tabled in Parliament on 30 October 2023.

The appointment of a Deputy Ombudsman focused on health administration

Noting the issues raised in the findings of Portfolio Committee No. 2 Inquiry, we submitted a budget proposal to government to establish a Health Administration Unit comprising of 4 new ongoing positions to be led by a dedicated Deputy Ombudsman. The role of the new unit is to support enhanced capacity,

⁵ The NSW Government referred to a range of actions implemented as a result of the program including, ‘...workforce culture and engagement activities, further staff training in complaints management and implementing new complaints management systems to strengthen interface with consumers and reporting to Local Health District Boards.’ NSW Government response to PC 2 report accessed at: [<NSW Government response>](#).

expertise, effort and focus on health administration, working with and through the Ombudsman's existing statutory functions. In particular, the Health Administration Deputy Ombudsman will work alongside and support other existing Ombudsman functions as they handle health matters, including complaints and PIDs. The Deputy Ombudsman and Health Administration Unit will be charged with promoting awareness of, and confidence in, the role of the Ombudsman within the public health system, and with monitoring systemic issues relating to health administration.

The Health Administration Deputy Ombudsman will take the lead on continued engagement with the Ministry of Health and the Health Care Complaints Commission (HCCC). We understand through our liaison to date that the NSW Health website has been updated with information about our role and that the updated information was sent to all staff.⁶

Government has advised that this proposal will be funded, and we will establish the unit in the 23/24 financial year.

Memorandum of Understanding – HCCC and Ombudsman

In collaboration with the HCCC, we have finalised a review of the information sharing and complaint referral Memorandum of Understanding (MoU) between the NSW Ombudsman and the HCCC. The MoU is publicly available on the NSW Ombudsman website. The revised MoU supports the timely and appropriate referral of complaints (or parts of complaints) between our two organisations.

Please contact Monica Wolf, Chief Deputy Ombudsman at
further information about the NSW Ombudsman's office or this submission.

if you require

Yours sincerely

Chris Clayton
Acting NSW Ombudsman

⁶ NSW Health webpage accessed at: <[Help for a workplace issue - Workplace culture \(nsw.gov.au\)](https://www.nsw.gov.au/help-for-a-workplace-issue-workplace-culture)>.

Attachment A

Features of proposed Health Administration Ombudsman ⁷	Equivalent NSW Ombudsman functions
an independent office	<p>The NSW Ombudsman is a separate statutory office. Staff are employed by the Ombudsman in an office which is a 'separate agency' under the <i>Government Sector Employment Act 2013</i> and a 'separate GSF agency' under the <i>Government Sector Finance Act 2018</i>.</p> <p>The NSW Ombudsman is structurally and operationally independent of government, is not subject to direction and control by a Minister and reports directly to Parliament.</p>
to receive and review concerns about the administrative conduct	<p>The NSW Ombudsman receives complaints about 'conduct', which is defined to mean any action or inaction 'of an administrative nature'.</p> <p>NB: The NSW Ombudsman also has the power to take action, including to investigate, such conduct of its own motion.</p>
of management of Local Health Districts and NSW Health	<p>Local Health Districts and NSW Health, and their staff, are 'public authorities' subject to the jurisdiction of the NSW Ombudsman.</p>
from staff, doctors, patients, carers and the public	<p>Complaints can be made to the NSW Ombudsman by 'any person'.</p> <p>NB: Complaints received from public officials may also be 'public interest disclosures' under the <i>Public Interest Disclosures Act 2022</i>.</p>
empowered to review administrative decisions	<p>The NSW Ombudsman can 'investigate' conduct (including decisions) of an administrative nature and may make findings of 'administrative wrong conduct' under s 26 <i>Ombudsman Act 1974</i>, including if a decision was made that was:</p> <ul style="list-style-type: none"> • unlawful • unreasonable • unjust • made for an improper purpose • discriminatory • otherwise wrong. <p>The NSW Ombudsman can recommend corrective action be taken, including that a different decision be made.</p> <p>NB: The NSW Ombudsman cannot simply substitute its own decision or make a binding determination as to what the decision should be. That is, it is not a tribunal (like NCAT) and does not conduct a full merits review. There is no right to 'review'; rather, the Ombudsman has discretion whether to 'investigate' a complaint. The Ombudsman considers whether there has been 'wrong administrative conduct' and makes (non-binding) findings and recommendations only. However, this limitation is inherent in the concept of an 'ombudsman', and presumably would also be the case with a specialised Health Administration Ombudsman.</p>

⁷ See PC 2 report recommendation 41.

Features of proposed Health Administration Ombudsman ⁷	Equivalent NSW Ombudsman functions
of NSW Health and Local Health District management	As noted above, NSW Health and Local Health Districts, and their staff, are public authorities subject to the jurisdiction of the NSW Ombudsman.
including but not limited to, alleged coverups of medical errors or deaths	<p>The ‘cover up’ of medical errors or deaths would be wrong administrative conduct under s 26 of the <i>Ombudsman Act 1974</i>.</p> <p>NB: A wilful ‘cover up’ would also likely constitute corrupt conduct and be reportable to the ICAC under s 11 <i>ICAC Act 1988</i>.</p>
False or misleading data, inaccurate communications and/or media reporting,	<p>The provision of false data/information would be wrong administrative conduct under s 26 of the <i>Ombudsman Act 1974</i>.</p> <p>NB: The wilful provision of false information may also constitute corrupt conduct and be reportable to the ICAC under s 11 <i>ICAC Act 1988</i>.</p>
Visiting Medical Officer accreditation decisions, staff blacklisting and bullying or harassment of whistle-blowers	<p>It appears that the matters of concern to the Parliamentary Committee would come within the Ombudsman’s jurisdiction, noting:</p> <ul style="list-style-type: none"> • again, there must be a reasonable suspicion of wrong administrative conduct (ie, there is no automatic right to ‘review’ any decision) • conduct that relates (merely) to the appointment of a particular person as an officer/employee or that (merely) affects a particular person in their capacity as an officer/employee is excluded (cl 12 Sch 1 <i>Ombudsman Act 1974</i>); for example, the Ombudsman cannot investigate matters that are simply ‘employment/industrial disputes’. (The policy justification for this is that these matters are the concern of the Industrial Relations Commission). • bullying/harassment in reprisal for a public interest disclosure (PID) is not excluded from the Ombudsman’s jurisdiction (so the NSW Ombudsman can investigate), even if it otherwise would be excluded as an employment/industrial matter. NB: PID reprisal (including by way of bullying) is also likely to constitute corrupt conduct and so be referred to ICAC under s 11 <i>ICAC Act 1988</i>.
is to provide an annual report to Parliament and the public	<p>The NSW Ombudsman is required to table an Annual Report (as well as a separate ‘public interest disclosures’ annual report).</p> <p>The Ombudsman can also make a special report to Parliament on any matter relevant to its functions at any time.</p> <p>There is no specific requirement to report in detail on complaints/investigations relating to health, although in practice the Ombudsman does report on the number of complaints received (broken down as appropriate eg number of complaints about Ministry of Health and Local Health Districts with highest complaint numbers) as well as on any formal investigations undertaken.</p> <p>Section 76 of the <i>Public Interest Disclosures Act 2022</i> requires specific details about PIDs to be included in the Ombudsman’s annual report).</p>