

**Submission
No 7**

INQUIRY INTO LEGISLATIVE COUNCIL COMMITTEE SYSTEM

Organisation: NSW Ombudsman

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The Director
Select Committee on the Legislative Council Committee System
Parliament House
Macquarie St
Sydney NSW 2000

Dear Director

Inquiry into the New South Wales Legislative Council Committee System (Inquiry)

Thank you for the opportunity to make a submission to the Inquiry. The NSW Ombudsman's office welcomes the Inquiry and the opportunity to assist the Select Committee in ensuring the committee system can assist the Legislative Council to effectively fulfil its role as a House of Review.

While the Select Committee's Discussion paper raises a range of important questions, we have limited our comments in this submission to those areas most relevant to our office's expertise and experience.

Introduction

The Ombudsman's office respects Parliament's role in holding the Ombudsman's office to account and appreciates the important accountability mechanism that parliamentary committees provide. In 1990, Ombudsman David Landa OAM welcomed the NSW Government's initiative to establish a Committee of the Parliament to oversight the Ombudsman.¹ Throughout the life of successive parliaments, our office has enjoyed a positive working relationship with the Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (JPC).

More recently, our office has come under the scrutiny of the Legislative Council Select Committee and the General Purpose Standing Committee No 4 in relation to a specific investigation being carried out by the Ombudsman's office. Both committees inquired into the progress of "Operation Prospect".

Enhancing guidance and accountability

The proposal to establish the JPC to oversight the Ombudsman was premised on the understanding that the JPC's functions would not extend to reviewing decisions of the Ombudsman on individual complaints or investigations. The Premier of NSW, Mr Nick Greiner, commented that the committee "would not be involved in reviewing specific cases, but rather would look at general operational and policy matters."² When introducing the Bill to Parliament, Attorney General John Dowd noted that "the committee is not to investigate any matter relating to particular conduct ... it is intended that the committee will be responsible for examining the general conduct and procedures of the Office of the Ombudsman and will not become involved in reviewing specific cases."³ In debate, it was noted that it was "not appropriate for a parliamentary committee to get down to the sort of detail ... the Ombudsman [does], not least because of logistical problems in canvassing matters in depth. Parliamentary committees just do not have the time or the capacity to do that."⁴

This limitation is reflected in section 31B of the *Ombudsman Act 1974*; it provides that the JPC can monitor and review the exercise of the Ombudsman's functions, but is not authorised to investigate matters relating to particular conduct or reconsider decisions about particular investigations or complaints.

¹ NSW Ombudsman, *The Independence and Accountability of the Ombudsman*, Special report to Parliament under s31 of the *Ombudsman Act 1974*, July 1990.

² The Hon Nick Greiner MP, Premier, correspondence to NSW Ombudsman David Landa, 24 May 1990.

³ *Parliamentary Debates*, Legislative Assembly, 13 November 1990, 9483 (John Dowd, Attorney General).

⁴ *Parliamentary Debates*, Legislative Assembly, 20 November 1990, 10062 (Andrew Tink).

While the permitted scope of the JPC is clear, the functions and powers of other parliamentary committees are not. The capacity of Legislative Council Select Committees and General Purpose Standing Committees to scrutinise the Ombudsman's operations appears, at present, to be open-ended. It is apparently open to a committee to undertake the type of inquiry that the JPC is prevented from undertaking by section 31B.

The Ombudsman's office submits that the Parliament should expressly address whether and in what circumstances it may be appropriate for a committee to undertake an inquiry of the kind that the JPC is prevented from undertaking by section 31B. If, for example, there are thought to be exceptional circumstances when there may be a genuine public interest in a parliamentary committee inquiring into a specific investigation carried out by an oversight body, it would be desirable if the exceptional circumstances or public interest considerations were spelt out by the Parliament in an appropriate resolution or formal guideline. This could be accompanied by a statement of the principles and safeguards that should apply if such an inquiry is undertaken.

Although it is for Parliament to decide when an inquiry should be established and the terms of reference for an inquiry, we support the limitation in section 31B. In our view it preserves Parliament's supervisory role while respecting the independence and integrity of the Ombudsman in undertaking, finalising and reporting on investigation work in accordance with the requirements of its legislation. Section 31B accommodates the practical difficulty the office can face in commenting in a public inquiry by a parliamentary committee on the substance of an ongoing investigation. It is generally inappropriate for the office to engage in public debate on matters that are under investigation; the office is also constrained by secrecy, privacy, confidentiality and procedural fairness obligations as to what it can say.

It is nevertheless open to a parliamentary committee to undertake a simultaneous investigation of a matter that is before the Ombudsman. Our submission should not be seen as questioning the Parliament's discretion to do that when it is warranted.

Our proposal is in line with the suggestion referred to in the Discussion paper that the NSW Parliament adopt resolutions, similar to those adopted by the Australian Senate, that set boundaries for what committees may do.⁵ It may also be appropriate for there to be greater procedural guidance around decisions to establish Committee inquiries into specific investigations conducted by oversight bodies.

Release of confidential information

The Discussion paper notes that there are no guidelines to regulate how a committee should manage information that has been received on a confidential basis, for example, because it contains adverse comment about a third party. Nor are there guidelines as to how a committee should respond in circumstances where they anticipate that an inquiry participant may give evidence that will reflect adversely on a person. As the Discussion paper notes, if an allegation by a witness is kept confidential, certain lines of inquiry may be left incomplete, and persons the subject of the allegation may have no chance to respond. On the other hand, an allegation that is made public may be untested and reported without due process being provided to an aggrieved party and in breach of the confidentiality of inquiry participants.

The handling of confidential information is a matter of particular concern to our office. The Ombudsman's ability to publicly discuss operational matters (including individual investigations) is fettered by a number of factors, including secrecy provisions, privacy and confidentiality requirements, procedural fairness obligations and operational imperatives. Information given to the Ombudsman by a third party is typically provided under the protection of legislative secrecy provisions, on a confidential basis, and on the understanding that investigations are conducted in the absence of the public.

Our view is that the need for confidentiality in investigations should be given appropriate weight by parliamentary committees when requesting information from the Ombudsman. Inappropriate disclosure of information through a committee process may defeat the legitimate expectation of parties that deal with the

⁵ See also Beverly Duffy and Sharon Ohnesorge, 'Out of step? The New South Wales Parliamentary Evidence Act 1901' (Paper presented at the 2015 Australian Study of Parliament Group conference, Wellington, 2 October 2015), p 22.

Ombudsman on a confidential basis, and discourage individuals and agencies from cooperating with us in the future. Unregulated disclosure can also prejudice the conduct of investigations and handling of complaints, and cause reputational harm and other damage to affected parties.

The Ombudsman is nevertheless committed to the importance of transparency in conducting investigations. The *Ombudsman Act 1974* requires that complainants and agencies be told of investigation findings. In addition, the details of investigations are frequently publicised in reports to the Parliament and in other publications and statements (having regard to the privacy of individuals).

The Ombudsman also attaches a high value to responding to requests for information from parliamentary committees, including requests for confidential information. To facilitate this cooperation we may seek to provide evidence confidentially or *in camera* as a way of managing the risks associated with the disclosure of information. Above all, the Ombudsman is anxious to avoid any perception that we are not cooperating with a committee. This could damage the reputation of our office, and diminish public confidence in its commitment to upholding the public interest and working collaboratively with the other arms of government.

The Discussion paper notes, in suggesting the adoption of resolutions similar to those of the Australian Senate, that these could include procedural protection for witnesses and a formal framework for resolving difficult issues about sharing confidential information or adverse remarks or allegations. We support this suggestion. In our view, enhanced guidance and procedures on matters such as the publication of evidence and the giving of evidence *in camera* would strengthen the committee system, improve its efficiency and provide a fairer process for all.

In particular, resolutions could be aimed at ensuring that untested allegations are not made without procedural fairness being afforded to an adversely named party and that witnesses are protected from unjustified criticism and reputational damage. The resolutions could also establish a formal procedure to be followed when an agency requests that evidence be given *in camera*, outlining relevant considerations to be taken into account when a request is made, and providing for a formal decision-making process for determining whether and to what extent confidential evidence should be made public.

Strengthening the proactive relationship between the Ombudsman and Parliament

Finally, we would like to make the somewhat tangential but important observation that, while interacting with parliamentary committees is an important and often productive mechanism by which our office engages with Parliament and individual members, there is significant untapped potential for a more proactive and flexible approach to be adopted. For example, we draw the Committee's attention to the very positive outcomes that have recently been achieved through our collaboration with certain MPs and MLCs, among other stakeholders, to facilitate:

- a draft joint protocol to reduce the contact of young people in residential care with the criminal justice system; and
- guiding principles for strengthening the participation of local Aboriginal communities in child protection decision making.

We look forward to identifying similar appropriate opportunities to work positively with members in the future in order to obtain better outcomes for the public we jointly serve.

I trust our submission will assist the Committee's inquiry. If further information is required, please contact

Yours sincerely

Professor John McMillan AO
Acting NSW Ombudsman