

**FOLLOW-UP
ON THE
REVIEW OF SCHEDULE 1
OF THE
OMBUDSMAN ACT 1974**

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

August 2000

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COMMITTEE MEMBERSHIP

LEGISLATIVE ASSEMBLY



Mr P Lynch MP
Chairperson



The Hon D Grusovin MP
Vice-Chairperson



Mr M Kerr MP



Mr W Smith MP

LEGISLATIVE COUNCIL



The Hon P Breen MLC



The Hon J Gardiner MLC



The Hon J Hatzistergos MLC

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Ms H Minnican - Director
Ms T Bosch - Research Officer

Ms H Parker – Committee Officer
Ms P Adam - Assistant Committee Officer
Ms N O'Connor – Assistant Committee Officer

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 by the *Police Legislation Amendment Act 1996* which provided 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*.”

Chairman's Foreword

The previous Parliamentary Committee's 1997 review of Schedule 1 of the *Ombudsman Act 1974* was the first comprehensive examination of conduct excluded from the Ombudsman's jurisdiction since the establishment of the Office of the Ombudsman in 1975. The recommendations of the 1997 review aimed at ensuring that the conduct excluded from the Ombudsman's jurisdiction was appropriately selected and that amendments to Schedule 1 are not made on an arbitrary basis. The report also recommended that the Schedule be reviewed regularly.

In this follow-up report on that review, the current Committee expresses the same concern that there are as yet no established principles and procedures which can be referred to when changes to Schedule 1 are proposed.

The Committee is pleased to note that a pattern of consultation over prospective changes to the Schedule has been established with the Office of the Ombudsman since the last review. However, little progress has been made on the majority of the 1997 recommendations. The Committee finds it disappointing that the efforts of the previous Committee and the former Ombudsman, Ms Irene Moss, to arrive at an updated, appropriate schedule of excluded conduct were largely ignored. The previous Committee's recommendations were reasonable and for the most part uncontroversial and it is the opinion of this Committee that it would have been straightforward to give effect to the recommendations as a package of minor amendments to the Act.

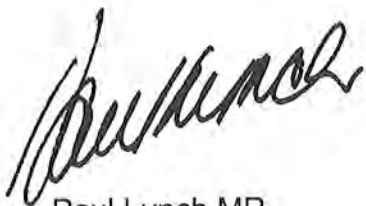
The Committee was further disappointed that neither the Cabinet Office nor the Premier's Department made a submission to the review. The Director-General of the Premier's Department, Dr Gellatly, informed the Committee that Cabinet Office Legal Branch has an ongoing role, and particular expertise, in commenting on the implementation of any recommendations arising from periodic reviews of the *Ombudsman Act*. He had been advised that Cabinet Office did not wish to make a formal submission in relation to the second review of Schedule 1 of the *Ombudsman Act* but that it intends to make appropriate comments upon publication of the Committee's report and in light of comments by other interested parties¹. The Committee notes the absence of a comprehensive response by Cabinet Office to the previous Committee's first review of Schedule 1.

The Committee would have been interested to know if steps were being taken to effect simple updates and to have the views of both Premier's Department and Cabinet Office on issues where there had been differing opinions in the past. This opportunity did not arise and the Committee regrets that it did not have the benefit of their contributions.

The Committee believes the scope of the Ombudsman's jurisdiction should be as broad as possible to ensure that confidence in a uniform high standard of public administration is maintained. The adoption of the Committee's recommendations

¹ Letter to the Chairman, undated

would safeguard the integrity of the process by which conduct is included in Schedule 1 and would produce an up-to-date, appropriate schedule.

A handwritten signature in black ink, appearing to read 'Paul Lynch', written in a cursive style.

Paul Lynch MP
Chairperson

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. In its 1997 Review of the Schedule the Committee on the Office of the Ombudsman and the Police Integrity Commission recommended establishing a reference framework and procedures for excluding conduct, to ensure the appropriateness of each new exclusion. The Committee wanted to establish firmly that the limitations on the Ombudsman's jurisdiction set out in Schedule 1 are to be read and interpreted narrowly. The Committee also recommended that the Schedule be reviewed at five-yearly intervals.

While it would appear that the Office of the Ombudsman is consulted on a regular basis on proposed exclusions, little progress has been made on the other recommendations. The Committee therefore recommends again that policy and procedures be formulated for excluding conduct from the jurisdiction of the Ombudsman.

The Committee makes thirteen recommendations dealing with specific clauses of the Schedule. These recommendations are substantially the same as those in the 1997 review (which were not acted upon). The recommendations deal with:

- ensuring that administrative conduct of a particular agency is not excluded
- making explicit the limitations of the excluded conduct
- consolidating and rationalising similar clauses
- ensuring that the Schedule reflects other legislation affecting the Ombudsman's jurisdiction
- up-dating the Schedule.

Summary of recommendations

Recommendation 1

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 2

The Committee recommends that specific minor amendments should be made to Schedule 1 by proclamation. Such amendments would include changes to names or rewording 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 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 4

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 proposed amendments to Schedule 1 should be consulted on those amendments.

Recommendation 5

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 6

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.

Recommendation 7

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 8

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

Recommendation 9

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 10

The Committee recommends that clauses 18, 27 and 28 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 11

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 12

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 13

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 14

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 15

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

Recommendation 16

The Committee recommends that clause 25 be repealed when all HomeFund matters are finalised.

Recommendation 17

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 18

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 19

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.

Chapter 1: Schedule 1 – Ombudsman Act 1974

1.1 The Legislation

The *Ombudsman Act 1974* established the Office of the Ombudsman to provide a mechanism by which public authorities exercising administrative powers and functions are held to account.

Section 12 of the *Ombudsman Act* specifies who may complain to the Ombudsman and the types of conduct which the Ombudsman may investigate. Section 12(1)(a) exempts conduct that is of a class described in Schedule 1 from the Ombudsman's jurisdiction.

Amendments to Schedule 1 may be made by proclamation or legislation in accordance with section 14 of the *Ombudsman Act*.

As a general principle, the conduct of public authorities exercising administrative powers or functions is included in the jurisdiction of the Ombudsman while the conduct of those exercising judicial or legislative powers and functions is excluded. This principle is reflected in Schedule 1.

However certain conduct relating to the exercise of executive and administrative powers and functions is also excluded by Schedule 1:

- a) the conduct of the Governor and Ministers of the Crown;
- b) the conduct of officers of the Parliament (ie the Ombudsman and his three statutory officers, 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);
- c) the conduct of public authorities where acting as legal advisers or in relation to the carrying on of legal proceedings;
- d) conduct of certain public authorities relating to mediation and conciliation;
- e) conduct where the public authority is acting as employer or making decisions about employment;
- f) conduct of the ICAC, the NSW Crime Commission, Royal Commissions and Special Commissions of Inquiry;
- g) conduct of police officers and transit police;
- h) conduct of public authorities relating to decisions about the investment of funds;
- i) conduct of public authorities relating to alleged violations of privacy;
- j) conduct of the Hen Quota Committee;
- k) conduct of the HomeFund Commissioner and his staff;
- l) conduct of the Casino Control Authority.

Chapter 2: Background to reviews of Schedule 1

2.1 1997 Review

In 1997 the Committee on the Office of the Ombudsman and Police Integrity Commission undertook the first systematic examination of conduct excluded from the Ombudsman's jurisdiction since the establishment of the Office in 1975. Its review was prompted by concerns expressed by the Ombudsman about the scope of excluded conduct and the process by which such conduct is incorporated in Schedule 1.

The Committee therefore examined the appropriateness of each exclusion but also looked into the wider issues of the procedures followed for including conduct in Schedule 1 and the mechanisms used to define the extent of the Ombudsman's jurisdiction.

At the conclusion of its review proceedings the Committee recommended that changes to Schedule 1 should be systematically monitored, both at the time any amendments are proposed and at five-yearly intervals. The Committee also proposed that guiding characteristics and principles be developed for the type and scope of conduct appropriate for exclusion from the Ombudsman's jurisdiction.

In all, the Committee made thirty-three recommendations, the majority relating to specific clauses of the Schedule.

2.2 Current review

At a deliberative meeting on Thursday 25 November 1999, the Committee resolved to seek responses to the recommendations in the 1997 report from the Ombudsman and Premier's Department and also sought advice on any outstanding issues requiring examination. The thirty-three recommendations are listed in the table on page 8, together with their current status and commentary from the Ombudsman's Office. The Committee did not receive a submission from the Premier's Department. The Director-General of the Premier's Department, Dr Gellatly, informed the Committee that Cabinet Office Legal Branch has an ongoing role, and particular expertise, in commenting on the implementation of any recommendations arising from periodic reviews of the *Ombudsman Act*. He had been advised that Cabinet Office did not wish to make a formal submission in relation to the second review of Schedule 1 of the *Ombudsman Act* but that it intends to make appropriate comments upon publication of the Committee's report and in light of comments by other interested parties².

² Letter to the Chairman, undated

Chapter 3: Legislative Update

Since the Committee's 1997 Review, there have been four amendments to Schedule 1. In addition, the *Ombudsman Amendment (Child Protection and Community Services) Act 1998* amended section 121 of the *Community Services (Complaints, Appeals and Monitoring) Act 1993* to circumscribe the jurisdiction of the Community Services Commission and the Ombudsman. Section 125 of the *Police Integrity Commission Act 1996* was amended so as to exclude an officer of the PIC Inspector from the jurisdiction of the Ombudsman. Details of the amendments are given below.

3.1 Amendment to clause 12

Formerly, under clause 12 of Schedule 1, a person could not complain to the Ombudsman about conduct of a public authority relating to:

- a) the appointment or employment of a person as an officer or employee, or
- b) matters affecting a person as an officer or employee, unless such conduct arose from the making of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*) to the Ombudsman or to another person who had referred the disclosure to the Ombudsman under Part 4 of that Act for investigation or other action.

The clause was amended by proclamation (*Government Gazette No 92 of 12.6.1998*) so as to omit the words "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" from clause 12. This enables a complaint to be made about conduct arising from a protected disclosure regardless of to whom the protected disclosure was made.

3.2 Repeal of clause 16

Clause 16 of Schedule 1 excluded the conduct of the Privacy Committee constituted under the *Privacy Committee Act 1975*. The *Privacy Committee Act* was repealed in 1998 by the *Privacy and Personal Information Protection Act* which created the office of the Privacy Commissioner, subsuming all the functions and powers of the New South Wales Privacy Committee. Schedule 3.5 of this latter Act also repealed clause 16 of Schedule 1 of the Ombudsman Act.

The previous Parliamentary Committee had recommended this action in its 1997 Review (**Recommendation 28**) and the then Chairman of the Privacy Committee had no objection to the Privacy Committee being brought within the Ombudsman's jurisdiction¹. This position was given effect in the new Act.

3.3 Further amendment to clause 12

The *Ombudsman Amendment (Child Protection and Community Services) Act 1998* empowered the Ombudsman to oversee and monitor the systems which designated

¹ Privacy Committee, *Submission for 1997 Review*, page 1

public authorities and non-government agencies have in place for handling and responding to allegations of child abuse made against their staff. It also allowed the Ombudsman to directly investigate allegations as she or he sees fit.

Clause 12 of Schedule 1 excluded from the Ombudsman's jurisdiction the conduct of a public authority acting as an employer or making decisions about employment unless the conduct arises from the making of a protected disclosure (see 1. above). The *Ombudsman Amendment (Child Protection and Community Services) Act 1998* amended clause 12 of Schedule 1 so that conduct relating to a child abuse allegation or child abuse conviction (within the meaning of Part 3A of the Act), or to the inappropriate handling or response to such an allegation was conduct which the Ombudsman could examine.

3.4 Insertion of clause 28

The *Ombudsman Amendment (Child Protection and Community Services) Act 1998* inserted clause 28 in the Schedule as excluded conduct of public authorities:

Conduct of a conciliator in relation to the conciliation of a complaint under the *Community Services (Complaints, Appeals and Monitoring) Act 1993*.

Clauses 18 and 27 of Schedule 1 also exclude the conduct of certain mediators and conciliators from the jurisdiction of the Ombudsman.

In her 1997 submission, the Ombudsman found the provisions of clauses 18 and 27 anomalous, "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".

The Ombudsman supported the exclusion of conduct relating to mediation and conciliation from her jurisdiction where the conduct is necessary for the effective performance of a function. It was the specificity of the clauses to which she objected rather than the principle. She argued for a general 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"². The clause proposed by the Ombudsman thus adopts the wording of clauses dealing with the confidentiality of mediation or conciliation in the relevant Acts.

The Committee supported the repeal of clauses 18 and 27 and their replacement by the clause proposed by the Ombudsman (**1997 Recommendation 15**).

3.5 Jurisdiction of the Community Services Commission and the Ombudsman

At the time of the 1997 Review of Schedule 1, section 121 of the *Community Services (Complaints, Appeals And Monitoring) Act 1993* (CAMA Act) excluded from

² NSW Ombudsman *Submission for 1997 Review*, page 3

the *Ombudsman Act* “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”. The Ombudsman was concerned that the scope of excluded conduct was unclear: *While [section 121] 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.*³

The Ombudsman recommended a “class or kind” agreement with the Community Services Commissioner to determine the types of matters best dealt with by each body. The Community Services Commissioner believed that such an agreement was “an inappropriate substitute for legislation in determining fundamental jurisdictional boundaries”⁴. The Commissioner disagreed that there was confusion in relation to section 121 and argued that section 12 of the *CAMA Act* sets out the categories of conduct that fall within the Commission’s jurisdiction. The Commissioner noted that if the conduct complained of did not impact on a consumer (as required under s.12) the Commission refers the complainant to the Ombudsman or the Independent Commission Against Corruption, depending on the nature of the complaint.

The Committee felt that there was a need to clarify within the *Ombudsman Act* the types of complaints which can be investigated by the Community Services Commission and the Ombudsman. **(1997 Recommendation 22)**

Changes to the *Ombudsman Act* and the *CAMA Act* were made by the *Ombudsman Amendment (Child Protection and Community Services) Act 1998* which was introduced to overcome possible conflicts of interest when agencies investigate child abuse allegations made against their staff. The Act rewrote section 121 of the *CAMA Act* to delineate the jurisdiction of the Community Services Commission and the Ombudsman and to allow for co-operative arrangements to be made, as follows:

121 Jurisdiction of Commission and Ombudsman

- (1) 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*, except:
 - (a) a matter arising under Part 3A (Child protection) of that Act, or**
 - (b) a matter of a class or kind referred to in subsection (3).****
- (2) The Commission and the Ombudsman may enter into arrangements regarding the co-operative exercise of their respective functions.**
- (3) Any such arrangement may provide that matters of a specified class or kind that could otherwise be the subject of a complaint under the *Ombudsman Act 1974* should not be excluded from being the subject of such a complaint by this section.**

³ NSW Ombudsman, *Submission for 1997 Review*, page 7

⁴ Community Services Commission, *Further advice*, dated 23 October 1997, page 2

- (4) Any such arrangement may also provide for the furnishing to the Ombudsman of copies of complaints received by the Commission under this Act.
- (5) The Commission and Ombudsman are empowered and required to exercise their functions in conformity with any relevant arrangements entered into under this section.
- (6) Without limiting subsection (5), the Commission and the Ombudsman may disclose to each other any information obtained by them in relation to any matter within their respective jurisdiction.
- (7) Arrangements under this section are to be published in the Gazette by the Commission and the Ombudsman. However, a failure to do so does not affect the validity of the arrangement.

A Memorandum of Understanding was signed by the NSW Ombudsman and the Community Service Commissioner on 3 April 2000. The understanding is an interim arrangement, to be reviewed after six months, the purpose of which is to deal with matters arising pursuant to Part 3A of the *Ombudsman Act 1974* dealing with child protection issues.

It needs to be confirmed that there is no remaining uncertainty between the Ombudsman and the Community Services Commissioner about the responsibility for handling complaints concerning the conduct of DOCS staff, complaints alleging systemic deficiencies and all alleged conduct other than unreasonable conduct. The Committee intends to assess this issue in light of the findings of the review of the Memorandum of Understanding in September.

3.6 Conduct of an officer of the PIC Inspector excluded

Section 125 of the *Police Integrity Commission Act 1996* sets out the jurisdiction of the Ombudsman in relation to the conduct of the Police Integrity Commission and its Inspector. The Ombudsman cannot investigate the conduct of PIC Commissioner or an officer of the Commission unless a matter is referred by the PIC Inspector. The Ombudsman also cannot investigate the conduct of the PIC Inspector. In the 1997 Review, the Police Integrity Commission drew attention to section 125 not excluding the conduct of an officer of the Inspector despite the fact that secrecy obligations in section 56 of the *PIC Act* apply to such an officer. The concern was 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 1996⁵.

The PIC also argued that, because the PIC Inspector is subject to the scrutiny of the ICAC, it would be more consistent for the ICAC to have jurisdiction over officers of the Inspector.

⁵ Police Integrity Commission, *Submission for 1997 Review*, page 2

Section 125 of the *PIC Act* was amended to include an officer of the Inspector by Schedule 1 [13] of the *Police Integrity Commission Amendment Act 1998*, as had been recommended by the Committee in its 1997 Review. (**Recommendation 20**)

Chapter 4: Ombudsman submission to current review

Recommendation	Status	Ombudsman's Office Comment
<p><i>Recommendation 1</i> 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.</p>	Not implemented	Considered particularly important
<p><i>Recommendation 2</i> The Committee recommends that specific minor amendments should be made to Schedule 1 by proclamation. Such amendments would include changes to names or to reward 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.</p>	Not implemented	Second part of this recommendation considered particularly important
<p><i>Recommendation 3</i> 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.</p>	In recent years, the usual approach has been to consult with the Ombudsman before amendments are made affecting the jurisdiction of the Office.	Considered particularly important
<p><i>Recommendation 4</i> The Committee recommends that a second schedule be included in the <i>Ombudsman Act 1974</i> which specifies or lists the Ombudsman's functions under other statutes and would provide easy access to the conduct within the Ombudsman's jurisdiction.</p>	Not implemented	
<p><i>Recommendation 5</i> The Committee recommends that clauses 1 and 4 remain unchanged in Schedule 1 as both are appropriate exclusions from the Ombudsman's jurisdiction.</p>	Not implemented	
<p><i>Recommendation 6</i> 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.</p>	Not implemented	Considered particularly important
<p><i>Recommendation 7</i> 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.</p>		
<p><i>Recommendation 8</i> The Committee recommends that clause 6 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.</p>		
<p><i>Recommendation 9</i> The Committee recommends that clause 7 remain unchanged in Schedule 1 as it is</p>		

Recommendation	Status	Ombudsman's Office Comment
an appropriate exclusion from the Ombudsman's jurisdiction.		
<i>Recommendation 10</i> The Committee recommends that clause 8 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.		
<i>Recommendation 11</i> The Committee recommends that clause 9 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.		
<i>Recommendation 12</i> The Committee recommends that clause 10 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.		
<i>Recommendation 13</i> The Committee recommends that clause 11 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.		
<i>Recommendation 14</i> 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.	Not implemented	
<i>Recommendation 15</i> 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.	Not implemented	
<i>Recommendation 16</i> The Committee recommends that clause 19 be amended to refer to the New South Wales Crime Commission instead of the State Drug Crime Commission.	Not implemented	
<i>Recommendation 17</i> 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 <i>New South Wales Crime Commission Act 1985</i> .	Not implemented	
<i>Recommendation 18</i> The Committee recommends that clause 20 be amended to ensure that it is consistent with the provisions of the <i>Protected Disclosures Act 1994</i> . 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 <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.	Not implemented	

Recommendation	Status	Ombudsman's Office Comment
<p>Recommendation 19 The Committee recommends that a new clause be included in Schedule 1 which excludes from the Ombudsman's jurisdiction conduct of:</p> <p>(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 <i>Police Integrity Commission Act 1996</i>.</p> <p>Recommendation 20 The Committee recommends that section 125 of the <i>Police Integrity Commission Act 1996</i>, 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.</p> <p>Recommendation 21 The Committee recommends that clause 17 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.</p> <p>Recommendation 22 The Committee recommends that the <i>Ombudsman Act 1974</i> 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.</p>	<p>Not implemented</p> <p>Not implemented</p> <p>Partially addressed by s121 of the <i>Community Services (Complaints, Appeals and Monitoring) Act 1993</i> as amended by the <i>Ombudsman Amendment (Child Protection and Community Services) Act 1998</i>. This section clarifies that notwithstanding the jurisdiction of the Commission to otherwise deal with such complaints, the Ombudsman has jurisdiction over:</p> <ul style="list-style-type: none"> • matters arising under Part 3A of the <i>Ombudsman Act</i>; and • matters coming within a class or kind agreement reached between the Commission and the Ombudsman. 	<p>This recommendation may be based on a misunderstanding of the Ombudsman's jurisdiction. This Office has operated on the principle that we are precluded from dealing with matters within the jurisdiction of the Community Services Commission, whether or not they are taken up by the Commission (see s121 of the CAMA legislation). Further confusion concerning jurisdictional boundaries arose out of advice this Office sought from the Crown Solicitor during the drafting of the <i>Ombudsman Amendment (Child Protection and Community Services) Bill</i>. This advice indicates that the jurisdiction of the Community Services Commission may not extend to regulatory/policing type roles performed by the Department of Community Services. It was hoped that the Bill or other legislation would address this issue at that time. This did not occur.</p>

Recommendation	Status	Ombudsman's Office Comment
<i>Recommendation 23</i> The Committee recommends that clause 22 be repealed in order to bring Schedule 1 up to date.	Not implemented	Most recently (July 1999), the NSW Law Reform Commission has recommended that this matter be clarified.
<i>Recommendation 24</i> The Committee recommends that when the HomeFund Commissioner has completed his work and his period of appointment clause 25 be repealed.	Not implemented	
<i>Recommendation 25</i> 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.	Not implemented	
<i>Recommendation 26</i> The Committee recommends that clause 15 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.		
<i>Recommendation 27</i> 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'.	Not implemented	Cl 12 was amended by <i>Ombudsman Amendment (Child Protection and Community Services) Act 1998</i> to provide the Ombudsman with jurisdiction in relation to the conduct of a public authority relating to appointment or employment matters, where the conduct relates to a child abuse allegation or child abuse conviction (within the meaning of Part 3A of the <i>Ombudsman Amendment (Child Protection and Community Services) Act 1998</i>) or to the inappropriate handling or response to such an allegation or conviction.
<i>Recommendation 28</i> The Committee recommends that clause 16 be repealed to bring the conduct of the Privacy Committee within the Ombudsman's jurisdiction.	Implemented See Schedule 3 <i>Privacy and Personal Information Protection Act 1998</i>	
<i>Recommendation 29</i> 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.	Not implemented	

Recommendation	Status	Ombudsman's Office Comment
<p><i>Recommendation 30</i> The Committee recommends that clause 26 remain unchanged in Schedule 1 as it is an appropriate exclusion from the Ombudsman's jurisdiction.</p>		
<p><i>Recommendation 31</i> 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.</p>	<p>As far as the Ombudsman's Office is aware (a) and (b) have not been implemented. Rec 31(c) represents the current standard approach.</p>	<p>Considered particularly important</p>
<p><i>Recommendation 32</i> The Committee recommends that a provision be included in the <i>Ombudsman Act 1974</i> which puts beyond doubt that the limitations on the Ombudsman's jurisdiction set out in Schedule 1 are to be read and interpreted narrowly.</p>	<p>Not implemented</p>	<p>Considered particularly important</p>
<p><i>Recommendation 33</i> The Committee recommends that the <i>Ombudsman Act 1974</i> 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.</p>	<p>Not implemented</p>	<p>Considered particularly important</p>

Chapter 5: Principles and Procedures for Amending Schedule 1

The 1997 Review recommended the development of principles and procedures for excluding conduct from the Ombudsman's jurisdiction.

5.1 Guiding characteristics and principles for inclusion of authorities in Schedule 1

In the Fourth General Meeting with the NSW Ombudsman in December 1996, the Ombudsman expressed concern about the ad hoc manner in which items were included in Schedule 1 and provisions restricting the jurisdiction of the Ombudsman were made in other legislation. In order to maximise the accountability of agencies, conduct should not be included in Schedule 1 unless good reasons are given and established criteria met. The Committee agreed but recommended that any characteristics and principles should not be binding (**1997 Recommendation 31**).

5.2 Procedures for amending Schedule 1

i. *Appropriate use of proclamation and legislation*

Section 14 of the *Ombudsman Act 1974* confers the power to amend Schedule 1 by proclamation. At the time of the 1997 review, the Ombudsman felt that amendments by proclamation do not go through the scrutiny and debate to which principal legislation is subject and that adequate parliamentary review can only be achieved if proposed amendments to Schedule 1 are made by an Act of Parliament.

The Committee considered that it is appropriate to make minor "housekeeping" changes, such as re-naming or re-wording, by proclamation but that major amendments, especially additions to the Schedule, should be submitted to the more considered review available through amendment by statute. (**1997 Recommendation 2**)

- #### ii. *Consultation*: In its 1997 Review the Committee considered a consultative process was necessary before Schedule 1 was altered. This should entail
- review of proposed amendments by the Committee on the Office of the Ombudsman and the Police Integrity Commission to ensure changes are appropriate and consistent. Review would take place after tabling and before disallowance for proclamations and after introduction into Parliament of legislative amendments (**1997 Recommendation 1**). The Committee was consulted in 1998 by the Cabinet Office over the amendment of clause 12 of the Schedule (relating to protected disclosures) by proclamation in *Government Gazette No 92*.
 - consultation with the Ombudsman and bodies affected by the proposed amendment (**1997 Recommendation 3**). The Deputy Ombudsman has commented (14 December 1999) that in recent years, it has been usual for consultation to take place with the Ombudsman before amendments are made affecting the jurisdiction of the Office.

5.3 Interpretation of Schedule 1

The Committee supported the view of the Ombudsman that Schedule 1 should be read and interpreted narrowly (**1997 Recommendation 32**). A provision to this effect in the *Ombudsman Act* would give legislative effect to judicial decisions which have stated that the powers of the Ombudsman are to be construed widely and exclusions of jurisdiction narrowly⁶.

5.4 Five yearly review of Schedule 1 by the Committee

The Committee considered that a review of Schedule 1 every five years would provide an opportunity to assess the appropriateness and relevancy of exclusions (**1997 Recommendation 33**).

In its submission to this review of Schedule 1, the Ombudsman's Office regarded each of these recommendations as particularly important. While the Committee is pleased to note that consultation with the Ombudsman over amendments is taking place on a systematic basis and pleased to have been consulted itself over the amendment of clause 12, it believes action should be taken to define the principles and particularise the procedures by which Schedule 1 amendments are made.

Recommendation 1

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 2

The Committee recommends that specific minor amendments should be made to Schedule 1 by proclamation. Such amendments would include changes to names or rewording 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 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 4

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 proposed

⁶ New South Wales Supreme Court, *Botany Council v the Ombudsman*, 37 NSWLR 357, 1995, pp 367-8

amendments to Schedule 1 should be consulted on those amendments.

Recommendation 5

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 6

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 6: Recommendations concerning Specific Clauses

6.1 Consolidation of clauses 2 and 3

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.

In the 1997 review, the Committee considered that the exercise of judicial powers and functions and the conduct of judicial officers are appropriate exclusions from the Ombudsman's jurisdiction. 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.

However, the Ombudsman argued that courts administration should come within the Office's jurisdiction so as to provide an independent mechanism for dealing with misconduct and maladministration. A distinction is drawn between court registry staff, whose work is an extension of the judicial process, and staff involved in public administration, for example departmental staff who provide legal and policy advice to the Attorney General.

The Committee recommended the consolidation of clauses 2 and 3, with a clear identification of those people associated with a court whose conduct should be excluded (**1997 Recommendation 6**) to make it clear that the conduct of public sector staff performing the administrative work of the courts is included in the Ombudsman's jurisdiction (**1997 Recommendation 7**). In its submission to the current review, the Ombudsman's Office considered 1997 Recommendation 7 particularly important.

Recommendation 7

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 8

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.

6.2 Clauses 13 and 21 consolidated

- 13 Conduct of a police officer when exercising the functions of a police officer with respect to crime and the preservation of the peace.**
- 21 Conduct of a public authority when acting as a member of the transit police service.**

Clause 13 was intended "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"⁷.

The *Police Service Act 1990* was amended in 1996 to bring all police conduct, including administrative conduct, under the scheme of that Act. The meaning of "conduct" of a police officer is set out in Part 8A, Division 1, section 121. The Ombudsman suggested it may be appropriate to abbreviate clause 13 to read "Conduct of a police officer"⁸. This proposal was supported by the Ministry for Police⁹.

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*. The Committee therefore considered that clauses 13 and 21 should be consolidated to exclude the conduct of both transit police and police officers. (1997 Recommendation 14)

Recommendation 9

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.

6.3 Clauses 18 and 27 repealed and replaced by a consolidated clause excluding mediation and conciliation

⁷ The Hon Ronald Phillips MP, second reading speech, *Legislative Assembly Parliamentary Debates*, 14 April 1994, page 1236, Parliament of New South Wales.

⁸ Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 34

⁹ Ministry for Police, *Submission for 1997 Review*, page 2

- 18 **Conduct of a mediator at a mediation session under the *Community Justice Centres Act 1983*.**
- 27 **Conduct of a conciliator in relation to the conciliation of a complaint under the *Health Care Complaints Act 1993*.**

The Ombudsman argued:

*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.*¹⁰

Her objection was to the specificity of the exclusions rather than the conduct itself. She proposed that clauses 18 and 27 be repealed and replaced by:

*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.*¹¹

This wording is consistent with the relevant provisions in the *Community Justice Centres Act 1993* and the *Health Care Complaints Act 1993*. The Committee supported this proposal. **(1997 Recommendation 15)**

Clause 28, added to the Schedule in 1998, excluding the conduct of a conciliator in relation to the conciliation of a complaint under the *Community Services (Complaints, Appeals and Monitoring) Act 1993* should also be repealed, as this conduct would be excluded by the proposed generic clause.

Recommendation 10

The Committee recommends that clauses 18, 27 and 28 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.

6.4 Clause 19 updated plus specific conduct excluded

- 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 clause needs to be updated to refer to New South Wales Crime Commission instead of the State Drug Crime Commission. **(1997 Recommendation 16)**

¹⁰ NSW Ombudsman, *Submission for 1997 Review*, page 3

¹¹ *Ibid*

The *New South Wales Crime Commission Act 1985* provides for police to work with the Crime Commission under secondment or other arrangements. Under section 27A arrangements can be made with the Commissioner of Police for a police task force to assist the Crime Commission to carry out an investigation. Police officers involved in such an arrangement remain under the control and direction of the Commissioner of Police and so are subject to the police complaints system as set out in Part 8A of the *Police Service Act 1990*.

Section 32(5) of the *NSW Crime Commission Act 1985* provides for police officers to be seconded to the Crime Commission. The Crime Commissioner wrote to the Committee:

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.¹²

The Commissioner suggested the exclusion of the conduct of the Commissioner or an Assistant Commissioner of the NSW Crime Commission and any member of staff of the Commission acting under the supervision of the Commissioner and the Assistant Commissioner.

These exclusions are similar to the exclusions operating in relation to the Independent Commission Against Corruption. The Crime Commissioner commented:

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 the PIC.¹³

The Committee concurred. (1997 Recommendation 17)

Recommendation 11

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 12

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*.

¹² New South Wales Crime Commission, *Advice received in a letter 28 October 1997*, page 1

¹³ Ministry for Police, *Submission for 1997 Review*, page 2

6.5 Clause 20 - ICAC not exempt where conduct arises from the making of a protected disclosure

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 considered that her Office's jurisdiction to investigate complaints about the conduct of the ICAC where those complaints are made or referred under the *Protected Disclosures Act 1994* should be made explicit in this clause¹⁴. The Commissioner of the ICAC agreed that an amendment was necessary to ensure consistency with the provisions of the *Protected Disclosures Act 1994*¹⁵. The Committee supported the amendment. **(1997 Recommendation 18)**

Recommendation 13

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.

6.6 Inclusion in Schedule 1 of PIC, PIC Inspector and officers, PIC Commissioner and officers

Under section 125 of the *Police Integrity Commission Act 1996* the 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 PIC Inspector. The conduct of the Inspector and an officer of the Inspector is also excluded from the jurisdiction of the Ombudsman.

The Committee recommended a new clause be inserted in Schedule 1 excluding conduct of the Police Integrity Commission, the Inspector of the PIC or an officer of the Inspector, and the Commissioner of the PIC or an officer of the Commission (except in relation to matters referred to the Ombudsman by the Inspector) where exercising functions under the *PIC Act*. **(1997 Recommendation 19)** This would reflect the provisions of section 125 of the *PIC Act*.

Recommendation 14

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

¹⁴ Committee on the Office of the Ombudsman and Police Integrity Commission, *Fourth General Meeting Report*, page 35, and NSW Ombudsman, *Submission for 1997 Review*, page 5

¹⁵ Independent Commission Against Corruption, *Submission for 1997 Review*, page 1

- (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*.

6.7 Clause 22 repealed (Hen Quota Committee)

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

The Ombudsman argued that this clause should be omitted to bring Schedule 1 up to date as the *Egg Industry (Repeal and Deregulation) Act 1989* was repealed in 1991. The Committee agreed. (1997 Recommendation 23)

Recommendation 15

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

6.8 Clause 25 repealed (HomeFund Commissioner)

- 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 Committee recommended that clause 25 be repealed when the work of the HomeFund Commissioner was completed (1997 Recommendation 24). Recent advice from the Department of Fair Trading is that, although the office of the HomeFund Commissioner was abolished in December 1997, some litigation is still outstanding and that the clause should remain until all matters are finalised.

Recommendation 16

The Committee recommends that clause 25 be repealed when all HomeFund matters are finalised.

6.9 Terms of Clause 14 narrowed (investment)

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

The Committee supported the view of the Ombudsman that the scope of the exclusion was too broad and that complaints about administrative conduct in relation to investment should be within the jurisdiction of the Ombudsman (1997 Recommendation 25). The Ombudsman considered that:

where a complaint reveals some wrong-doing in relation to the investment of funds, the conduct ought to be within the Ombudsman's jurisdiction¹⁶ and that:

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 funds¹⁷.

Recommendation 17

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.

6.10 Clause 12 (employment) narrowed.

As noted previously, clause 12 was amended in 1998:

- by proclamation, to enable the Ombudsman to investigate any allegation of detrimental action arising from the making of a protected disclosure, regardless of to whom the protected disclosure was made, and
- by the *Ombudsman Amendment (Child Protection and Community Services) Act 1998*, to provide the Ombudsman with jurisdiction in relation to the conduct of a public authority which relates to a child abuse allegation or child abuse conviction (within the meaning of Part 3A of the *Ombudsman Amendment (Child Protection and Community Services) Act 1998*) or to the inappropriate handling or response to such an allegation or conviction.

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:**
 - (c) arises from the making of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*), or**
 - (d) relates to a child abuse allegation or child abuse conviction (within the meaning of Part 3A of this Act), or to the inappropriate handling or response to such an allegation or conviction.**

The Ombudsman believed that the wording in sub-clauses 12(a) and (b) gives rise to doubt as to the extent of conduct excluded. Ms Moss proposed that the clause should be narrowed to exempt:

*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.*¹⁸

¹⁶ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fourth General Meeting Report*, page 34

¹⁷ NSW Ombudsman, *Submission for 1997 Review*, page 5

¹⁸ NSW Ombudsman, *Submission for 1997 Review*, page 4

During his second reading speech for the Ombudsman Bill, Mr Maddison makes the intent of section 12 clear:

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 employer¹⁹.

The Committee recommended that the scope of the clause be narrowed to limit the conduct excluded to 'industrial matters' (**1997 Recommendation 26**).

Recommendation 18

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".

6.11 Clause 16 (Privacy Committee) repealed

The Committee recommended that the conduct of the Privacy Committee be brought within the Ombudsman's jurisdiction (**1997 Recommendation 28**). The clause was repealed by Schedule 3.5 of the *Privacy and Personal Information Protection Act 1998*.

6.12 Clause 24 (Casino Control Authority)

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

During the 1997 Review, it was argued that the Casino Control Authority's exclusion from the jurisdiction of the Ombudsman was justified on the grounds that:

- it is not a service delivery organisation but a regulatory body with considerable powers of enforcement;
- it is difficult to distinguish between administrative matters and its other functions, such as quasi-judicial or tribunal functions, already excluded from the Ombudsman's jurisdiction;
- its crime prevention and criminal investigation activities must be protected from the risk of penetration and any information it receives kept confidential (the

¹⁹ Parliament of New South Wales, *Legislative Assembly Parliamentary Debates*, 29 August 1974, page 778

requirement of the Ombudsman to report to the complainant may place the confidentiality of information in jeopardy);

- certain exemptions apply to the Authority which enable it to “act in a way which in some circumstances would be well outside conduct that would normally be acceptable in an administrative sense”.²⁰

During the Committee’s Fourth General Meeting with the Ombudsman, she 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. In a further submission to the 1997 Review, the Ombudsman commented:

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 action²¹.

The Committee considered that, as the Authority is subject to the jurisdiction of the ICAC, the NSW Crime Commission and the National Crime Authority with regard to corruption and organised crime matters and its financial reports are subject to auditing by the Auditor-General, it would seem reasonable for misconduct and maladministration to be investigated by the Ombudsman (**1997 Recommendation 29**).

Recommendation 19

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.

²⁰ LeCompte, Lindsay, *Evidence taken before the Committee, Thursday 24 July 1997*, page 16

²¹ NSW Ombudsman, *Further submission for the 1997 Review*, page 4