



PARLIAMENT OF TASMANIA

**JOINT STANDING COMMITTEE ON
INTEGRITY**

**Report on the
Office of the Ombudsman**

*Laid upon the Tables of both Houses of Parliament pursuant to section 26
of the Integrity Commission Act 2009*

MEMBERS OF THE COMMITTEE

Legislative Council

Dr. Goodwin (Chairperson)
Mr Dean
Mr Farrell

House of Assembly

Mr Booth
Mr Hidding
Ms White

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1 INTRODUCTION

- 1.1 Pursuant to section 24(1) of the Integrity Commission Act 2009¹ (the Act), the Joint Standing Committee on Integrity (the Committee) has the honour to report to the Legislative Council and the House of Assembly on its examination of the Office of the Ombudsman.

2 OFFICE OF THE OMBUDSMAN

- 2.1 The Ombudsman is an independent statutory officer reporting directly to Parliament whose functions are prescribed by the Ombudsman Act 1978 (the Act). The Ombudsman's role is to investigate complaints about public authorities which include: State Government Departments; Tasmania Police; Local Government Councils; Government Business Enterprises; and the University of Tasmania. Some persons and bodies are not public authorities for the purposes of the Act, including: the Director of Public Prosecutions; the Solicitor-General; the Auditor-General; and judges and magistrates.

- 2.2 At the conclusion of every investigation, the Ombudsman provides a report to the authority concerned which includes, if necessary, recommendations for addressing and rectifying any action which in his opinion:

- appears to have been taken contrary to law;
- was unreasonable, unjust, oppressive, or improperly discriminatory;
- was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;
- was taken in the exercise of a power or discretion and was so taken for an improper purpose or on irrelevant grounds or on the basis of irrelevant considerations;
- was a decision that was made in the exercise of a power or discretion and the reasons for the decision were not, but should have been, given;
- was based wholly or partly on a mistake of law or fact; or
- was wrong.

Such criteria are prescribed by section 28(1) of the Act.

- 2.3 The Ombudsman may also provide a report to the relevant Minister and/or Parliament. The Ombudsman has no coercive power in relation to the adoption of recommendations and consequently relies upon constructive negotiation and persuasive argument.

¹ Integrity Commission Act 2009 (No. 67 of 2009)

- 2.4 The aim of the Ombudsman is to resolve individual complaints and to promote fairness, openness and good public administration in the State of Tasmania. The services provided by the Ombudsman are free, independent and impartial.
- 2.5 The Ombudsman is responsible also for the delivery of the following functions:-

RIGHT TO INFORMATION REVIEWS

Anyone who is aggrieved by decisions taken by public authorities under the *Right to Information Act 2009* not to release information sought by way of applications for assessed disclosure can seek a review of that decision from the office of the Ombudsman. If at the conclusion of a review the Ombudsman is of the view that the authority's decision was incorrect, the Ombudsman can make a fresh determination, which the authority is obliged to implement.

PUBLIC INTEREST DISCLOSURES

The office of the Ombudsman has a significant role under the *Public Interest Disclosures Act 2002* to receive and investigate public interest (or "whistle-blower") disclosures and oversee the manner in which public authorities deal with such disclosures.

PERSONAL INFORMATION PROTECTION

The office of the Ombudsman provides an avenue of redress for people who believe that their personal information has been misused by a public authority in breach of the *Personal Information Protection Act 2004*.

HEALTH COMPLAINTS COMMISSIONER

The Ombudsman is also the Health Complaints Commissioner under the *Health Complaints Act 1995* and receives complaints relating to the provision of a health service by a health service provider in either the public or the private sector.

The Commissioner's functions are outlined in section 6 of the Act and include:

- preparing and regularly reviewing a Charter of Health Rights;
- identifying and reviewing issues arising out of complaints and suggesting ways of improving health services and preserving and increasing health rights;
- providing information, education and advice in relation to the Charter, health rights and responsibilities, and the procedures for resolving complaints;

- receiving, assessing and resolving complaints; and
- enquiring into and reporting on any matter relating to health services at his or her discretion or on the direction of the Health Minister.

ENERGY OMBUDSMAN

Consumers are able to lodge complaints against energy entities with the Ombudsman for investigation and resolution under the *Energy Ombudsman Act 1998*. The Ombudsman has the power under the Act to make determinations and awards against the entities where appropriate.

WATER AND SEWERAGE

Pursuant to the *Water and Sewerage Industry Act 2009*, a customer of a water and sewerage corporation who has made a complaint to the corporation under its customer complaints process and who is not satisfied with the outcome of the complaint, may make a complaint about that outcome to the Ombudsman. It is a condition of a corporation's licence that it will be bound by the Ombudsman's determination in relation to the complaint. The broader administrative actions of the corporations also come within the general Ombudsman jurisdiction.

POLICE COMPLIANCE AUDITS

The office of the Ombudsman has the responsibility for ensuring compliance by Tasmania Police with the procedural requirements of the *Telecommunications (Interception) Tasmania Act 1999*, as well as the *Police Powers (Controlled Operations) Act 2006* and the *Police Powers (Surveillance Devices) Act 2008*.

OTHER STATUTORY FUNCTIONS

The office of the Ombudsman is also able to review certain decisions of the Commissioner of Police under the *Witness Protection Act 2000* and decisions about the release of information under the *Adoption Act 1998*.

REFERRAL SERVICE

The office of the Ombudsman plays an important role in referring members of the public to the body best able to address their concerns when those concerns relate to matters that are out of our jurisdiction. In most cases, we are able to advise a complainant of the body they need to speak to. We regularly refer people to the Commonwealth Ombudsman, the Telecommunications Industry Ombudsman, the Financial Ombudsman Service, the Office of the Anti-Discrimination

3 INQUIRY

- 3.1 The Committee noted the document entitled *Ombudsman Tasmania Annual Report 2011-2012* which was tabled in the Legislative Council and the House of Assembly on 13 November last.
- 3.2 On Wednesday, 12 December last, Leon Atkinson-MacEwen, Health Complaints Commissioner and Ombudsman appeared before the Committee, made the Statutory Declaration and was examined by the Committee in public.

Complaints

- 3.3 Mr Atkinson-MacEwen made the following submission in relation to the number of complaints received by his office:-

Complaints are rising across all my jurisdictions, and will continue to rise - that is not unique to me. All ombudsmen/energy ombudsmen/water and sewerage and health complaints commissioners see the same statistics year in year out. In the five years, 2007-08 through to 2011-12, complaints have effectively doubled in the ombudsman's jurisdiction, for example. At the moment they are running higher than they were this time last year. Last year we had a rise of 30 per cent in the ombudsman's jurisdiction and we expect it is probably going to be 35 per cent or possibly even 40 per cent this year. There is no particular thing you could point at to say that the rise is caused by degradation in services, or a lack of response. I simply think people are becoming more aware of the services of ombudsmen and health complaints commissioners and are getting used to asserting their rights, which is perfectly reasonable.

In the last nine months, since I took over, I have had a fairly significant look at the processes within the office. Generally speaking, the processes are very good and this is borne out by the statistics - as complaints rose each year, the number of complaints open versus the number of complaints closed has been more or less consistent, particularly in the ombudsman jurisdiction. As complaints rose, people's productivity rose to meet that increase. Over that five-year period resources were reducing so people have been running much harder in order to keep standing still with the number of complaints, as they have come in.

Simon (Allston), my predecessor, took the view that as cuts were made, he would make cuts to the most extent in the health complaints jurisdiction, not in the ombudsman jurisdiction. ... Up until about maybe 12-18 months ago that was probably sustainable. Now, with the latest round of budget cuts that have hit the office, cuts have had to impact on the ombudsman jurisdiction, because there is nowhere else to cut. In the next 12-18 months we are going to see degradation in the turnaround times - the resolution times for ombudsman complaints - and an increase

² Ombudsman Tasmania: Annual Report 2011-2012, pp. 10-12.

in the number of complaints open compared to complaints closed over time. The carry forwards each year, which have roughly run at approximately 150 a year, are likely to rise significantly because we simply will not be able to deal with each of these complaints in the 12-month period. That will start to look a lot like what health complaints currently looks like. Health complaints is looking fairly dire in the sense that the number of complaints - open versus closed - has always been open over closed. The carry forward in health complaints is currently running at approximately 165, and that is just under half of what we would expect to get in health complaints each year. They start the financial year on 1 July with half the workload already sitting there open and waiting, and a year's worth of work about to hit them. Things are not going well in health complaints. Given the cuts were mainly made in health complaints, the pain is now going to be taken by the ombudsman jurisdiction. It is not easy to compare health complaints versus ombudsman complaints, but at the moment roughly 55 per cent of health complaints are resolved within three months and 80 per cent within 12 months, versus 85 per cent in three months for ombudsman and virtually 100 per cent within 12 months for ombudsman. Those figures are going to change and they are going to start looking roughly the same. That is, year on year, if we do not get additional resources, we are going to have, say, 20-25 per cent of our complaints running for more than 12 months simply because there are not enough staff to deal with them. As the complaints come in, the pile on the desk gets bigger and so it continues.

One of the signs of a healthy office is the amount of unpredicted leave you have - that is, sick leave, carer's leave and the like. That is rising, and it is almost double what it was five years ago. We are doing everything to ensure that staff are not being stressed by their workloads, but their health is an issue. We have a number of staff who are either about to go on maternity leave or who are returning from maternity leave and, strangely enough, maternity leave and leave during pregnancy are counted as unpredicted leave, and therefore they influence the stats a bit, but when you take that out, we are still running much higher than we ought to be and it is not good. It is not all doom and gloom, but it is just not good.

Budget

3.4 Mr Atkinson-MacEwen made the following submission in relation to the budget appropriation for his office:-

Up until this year, we have had about \$140 000 taken out of the budget. As of 2013-14 that rises to \$157 000 and in 2014-15 it rises to \$182 000. The office runs with about 80 per cent of the budget being staffing, and 20 per cent being operating expenses, with a number of operating expenses that are high and more or less fixed - rent, service level agreements with Justice in relation to IT, and IT contracts for the Resolve database system et cetera. We don't have a great deal of wriggle room in the operating expenses. In order to meet the sorts of savings we were asked to make, the cuts eventually have to come out of salary. We have lost 1.6 band 6 FTEs. The band 6 staff are the investigating officers - the senior investigating officers who do the bulk of the complex work - and we have lost 1.6 of those in the period since the start of 2011-12. I just let 0.4 of a

band 6 go in order to make my 2012-13 target and I will have to let another band 6 full-time FTE go in order to make my 2014-15 target, and that is taking the guts of the investigating team out of the office.

We have done a lot of things to improve processes. Simon put in an online complaint form, which has made things a lot easier. We have a database that is very good, but at the end of the day you need bums on seats to make it work and we don't have enough.

As complaints have risen year on year, the budget has shrunk year on year. It has got to the point where, if the budget continues to shrink and the complaints continue to rise, the bar at which we can accept complaints will have to go higher and higher. This is not good, but it is the only way we will be able to cope without additional funding.

The funding of the office is somewhat peculiar. Because of the number of hats we wear there are different funding arrangements in place for a number of those, for example, energy. The one jurisdiction that is fully funded by the industry is fine. They know that if they generate \$100 000 worth of complaints, they pay \$100 000 to me in order to recompense the work we do, or \$150 000 or \$200 000 - they have an incentive. Aurora has an incentive to minimise complaints in order to reduce the cost of the complaint handling that we do. The energy jurisdiction is fine.

The water and sewerage jurisdiction is an interesting one.

3.5 The Committee questioned Mr Atkinson-MacEwen as to whether, given the full industry funding, energy complaints received priority, he responded:-

They do not get priority as such. I simply have sufficient staff funded from the energy budget to do the energy complaints. But because the budget is set a year in advance, we have to be predictive about how many complaints we are likely to receive and how many staff we have.

... From an energy point of view, we are always likely to have enough staff to deal with energy complaints because the industry funds that for us.

Mr Atkinson-MacEwen explained that staff worked solely in that area and were not available to work on other investigations:

... because they are funded by the energy industry. I have to account each year for the expenditure of those funds. That is a common situation across all the energy ombudsmen in Australia. Either parliamentary schemes or industry-based schemes - they are invariably funded by the industries.

Energy and water is an interesting one. We currently do around \$95-100 000 worth of work each year on water and sewerage complaints. I have a principal officer and a couple of other staff members, some of whose time is spent on energy and water, and we are required to record that, because each year that dollar value - how much we have spent on dealing with their complaints - forms part of the licence fee of the water corporations. Treasury go to the three water corporations and say,

'Southern Water your split is \$40 000', and the other two might have a 30/30 split. They recoup that amount through the licence fees. Strangely enough, they only give me \$50 000, with indexation.

... It would be useful if water and sewerage, given that there is only going to be the one water corporation shortly, were to be put on the same basis as energy. That way they generate the complaints, then they pay for them. Ombudsman and health are funded out of the Consolidated Fund and there is no way of doing anything like the water and sewerage approach. Ombudsman sits across state and local government and health sits across both public and private health and it would be difficult to put some levy in place. That is essentially funded from the Consolidated Fund. We have within the office the official visitors scheme - the mental health official visitors and the prisoners' official visitors. We picked that up from Health and Human Services and it came across with about \$182 000 in funding which was not indexed - it did not cover superannuation and anything else. It was a lump sum, which has meant that since that time the office has been subsidising the gap between the \$182 000 and what it costs us to foster the programs. Do not get me wrong, it is extraordinarily worthwhile to have the OVs within the office, but we are ending up subsidising to a degree.

- 3.6 The Committee questioned the Ombudsman as to whether a 'fee for service' had been considered for implementation, such as already exists, for example, for audits conducted by the office of the Auditor-General. Mr Atkinson-MacEwen responded:-

It would be nice. We would probably need an administrative version of the PAC Act to put that in place, to give it the foundation that would legitimise that sort of approach. In a sense that would be fine for those services that are delivered by state and local government, in ombudsman, for example. Health only falls across state in terms of the hospitals and DHHS. There would be a whole set of the private sector that we could not recover funds from in that sense.

I have thought long and hard about a mechanism to tax departments in much the same way as the DPP has moved away from a fee-for-service to an underlying tax in every agency and department. We all pay a certain amount of money that goes to the DPP to fund that office. I do not think it would be unreasonable to tax government departments and agencies - you could do it on the basis of the number of complaints we get, or on a straight FTE basis, the size of the department, et cetera. What I will be looking for, in terms of dollars, in my discussions with Treasury next year, will be \$350 000 back in my budget to reverse the drain that has occurred over the last three-and-a-half to four years. It would give me one extra FTE, which would be enough, given the complaints we have and the own-motion work that we might have, to allow me to do some significant own-motion reporting. That is what I am after in my discussions with Treasury.

'Own motion' inquiries

- 3.7 Mr Atkinson-MacEwen made the following submission in relation to the capacity of his office to undertake 'own motion' enquiries:-

Fundamentally, we have gone backwards over the last five years, as has every other government department and agency. I am not saying that we are being treated any differently to anybody else. But, we are such a small agency with no discretion about the work we do - it is complaints. It is meant to be more than complaints, but at the moment and for a long time it has just been complaints. Therefore, without any additional funding, it will not only remain being just complaints but it is going to backwards in terms of the number of complaints we will be able to handle.

One startling example of the problems we have is that when I took over there were four major own-motion investigations under way. One was into child protection services, one was into the pharmaceutical services branch of DHHS, one related to the Launceston General Hospital and the fourth one was related to use of chemical restraint in emergency departments, in particular in the hospitals. Each of those matters has taken more than 12 months to resolve because they have been done off the side of the desk by officers who have been trying to advance the investigation at the same time as dealing with complaints.

... We have an extraordinarily limited capacity to do very necessary work, by way of own-motion investigations into systemic issues, without supplementation. We cannot do it. We end up taking much longer than it ought to take to get a resolution and a report out.

... At the moment there are probably half a dozen potential own-motion investigations that I could do, but I don't have the resources.

3.8 The Committee questioned the Ombudsman as to how the budget of his office was determined. Mr Atkinson-MacEwen responded:-

... My allocation is a straightforward budget allocation each year and it forms part of the appropriation bill.

... The mechanisms for getting funding in the past, where there has been a shortfall, have been through the RAF process. That is an inefficient process and fraught with danger from my perspective, in that I may not get the funding, which means I have a deficit at the end of the financial year, and there are significant issues there. In the Auditor-General's annual report, he has made the comment that I am vulnerable in terms of my budget, and I accept that.

... The only way we can remain in budget is to shed staff.

The \$400 000-odd worth of operating expenses is relatively inflexible.

The independence of an ombudsman or a health complaints commissioner, or any statutory officer, is not just the independence enshrined in the legislation. The financial independence is the key. I know that (the Auditor-General) Mike Blake has pursued this, and rightly so. There are mechanisms that could be put in place, that are used in other states, to involve members of parliament in the process of setting budgets. In Queensland, for example, the Queensland Auditor-General's

budget is set after consultation between the Auditor-General and members of the council.

- 3.9 The Committee questioned the Ombudsman as to what capacity, if any, he had to negotiate his budget with Treasury officials, he responded:-

I am told, 'Talk to us at budget time', or 'Put in a RAF and take your chances'. Literally, take your chances. That is an extraordinarily risky approach to take.

... It is a process whereby the response is, 'You're just another agency like every other agency. You stand in line, go through the committee process and get what you get at the end of it'. You have to accept that.

- 3.10 Later in the hearing the Ombudsman summarised his position regarding the budget as follows:-

Adequate funding ... funding that is appropriate, as the Auditor-General's funding is appropriate - would allow a much better set of administrative arrangements in government. Complaints are important to the individuals but they are generally a unique set of circumstances. The fundamental thing that the Office of the Ombudsman and Health Complaints Commissioner can do is identify systemic problems, and work cooperatively with agencies to fix them. When you fix a systemic problem, it is not just an individual who gets the benefit; a class of individuals get the benefit. That is where we make the most gain and provide the best 'bang for buck'. I do not want to denigrate the complaints work - it is extraordinarily important to the individuals who come to us with a complaint that we can investigate independently and fairly, and determine whether they have an issue, and try to get that issue resolved. That work is vital, but at the moment it is basically consuming us because it is so large a portion of our day. We cannot get on and do the systemic work, which is the really valuable stuff.

Independent Prisons Inspectorate

- 3.11 The Committee questioned the Ombudsman as to what, if any, progress had been made in relation to the establishment of a prisons inspectorate which could also have oversight of the Pontville Detention Centre. Mr Atkinson-MacEwen responded:-

I am aware the Department of Justice was pursuing some options, but beyond that I do not know. There was a promise made that in developing those options I would be consulted. I have yet to be consulted, so I am presuming the options have yet to be developed. I understand Justice has a lot of other things on its plate at the moment, but nothing to my knowledge has been progressed there. If there was to be some sort of additional role for my office, given the role of the official visitors at the moment, it is not out of the bounds of reason that you might put an

inspectorate inside my office. If it does not come with funding, and appropriate funding, it becomes yet another drain on resources.

... We currently have an arrangement between the commonwealth ombudsman and myself, so I presume if we pick up that role for the commonwealth, that arrangement would mean we get additional funding through that stream to do that.

... We (Australian jurisdictions Ombudsmen) have made our views known - that we support it and we think that there are natural homes for this inspectorate - but it has now gone into the policy development stage and that is where it lies.

Launceston office closure

- 3.12 The Committee questioned the Ombudsman as to what impact, if any, the closure of the Launceston office had had upon the provision of services. Mr Atkinson-MacEwen responded:-

Strangely enough it did not have a significant impact on the ombudsman jurisdiction. The decision was made to close the Launceston office on the basis that a substantial portion of the work was health complaints work. Without that base and person in Launceston, we now have to travel further and longer to attend to health complaints - particularly conciliation work - with complainants in the north and north-west. It has meant very little change in complaints and the way we deal with complaints with ombudsman, but it has stretched our resources in health complaints. I have staff travelling to Burnie and Launceston regularly to pick up work that would have ideally been done by the person based in Launceston.

4 RESPONSE OF THE ATTORNEY-GENERAL

- 4.1 At its meeting on 19 June last, the Committee resolved to provide the Attorney-General with a transcript of the evidence of the Ombudsman heard on 12 December last and be invited to respond in writing to the matters raised and personally or by representatives, to appear before the Committee on a date to be advised.
- 4.2 A response from the Attorney-General was received by correspondence dated 2 September 2013. In such correspondence the Attorney stated:-

I note the Ombudsman indicated in his evidence that he was speaking in the context of having 'inherited' the budget for his office given he was appointed early last year and after the budget decisions for the 2012/13 financial year had been made.

The budget process is the appropriate mechanism to deal with issues the ombudsman has raised about the resourcing of his office. The Ombudsman deals directly with the Department of Treasury and has the opportunity to put his

submissions on resourcing directly into the Cabinet budget process, where they are considered against all other priorities.

5 FINDINGS

- 5.1 There has been a significant increase in the number of complaints made to the Ombudsman during the last five years.
- 5.2 Budget savings have been required of the Ombudsman's office - \$140,000 in 2012/13, \$157,000 in 2013/14 and \$182,000 in 2014/15.
- 5.3 Reductions in staffing levels have been required to achieve the savings and it is predicted that this will have a negative impact on the resolution times for complaints.
- 5.4 There has been an increase in the level of unplanned leave over the past five years which is attributed to, at least in part, reduced staffing levels.
- 5.5 Different funding arrangements apply within the Ombudsman's office, with the energy industry fully funding complaints for that jurisdiction, while only partial funding is provided in relation to water and sewerage complaints.
- 5.6 There is a shortfall in the funding attached to the official visitors scheme which was transferred to the Ombudsman's office from the Department of Health and Human Services.
- 5.7 As a result of the increasing complaint workload and reduced staffing levels, the Ombudsman's office currently has limited capacity to undertake own motion investigations into systemic issues.

6 RECOMMENDATION

- 6.1 That the Government reviews the extent of the work undertaken by the Ombudsman's Office.
- 6.2 That the Government reviews the level of funding and the funding model for the Ombudsman's Office to ensure that it is adequately resourced to comply with the obligations imposed on the Office by legislation.

**Parliament House
HOBART
19 November 2013**

**Hon. Dr. Vanessa Goodwin MLC
CHAIRPERSON**