

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

OMBUDSMAN ORDINANCE 1989

No. 45, 1989

The Ombudsman Ordinance 1989 (the Ordinance) will commence on the implementation of Self-Government. It is modelled on the Ombudsman Act 1976 of the Commonwealth. The Ordinance essentially reproduces that Act subject to modifications to reflect the differing constitutional and institutional arrangements which are required as a result of the transfer of government responsibilities to the Territory. The principal differences between the terms of the Act and those of the Ordinance are that the latter does not provide for the office of Deputy Ombudsman and it permits the Territory and the Commonwealth to make an agency arrangement for the Commonwealth Ombudsman to be appointed as ACT Ombudsman in his or her own right. In this context section 28 of the ACT Self-Government (Consequential Provisions) Act 1988 provides that the Commonwealth Ombudsman shall be taken to be the ACT Ombudsman until an ACT Ombudsman is appointed.

The Ordinance provides for an ACT Ombudsman and enables him or her to investigate complaints about action that relates to a matter of administration taken by an agency (being an administrative unit of the Public Service of the Territory or a prescribed authority). The Ombudsman is given wide powers to obtain information and where the Ombudsman finds evidence of maladministration he or she can make recommendations to have the defect remedied. Where recommendations are not acted upon the Ombudsman can inform the Chief Minister and make a report to the Legislative Assembly.

The details of the Ordinance are set out in the Attachment.

ISSUED BY AUTHORITY OF THE
MINISTER OF STATE FOR THE ARTS
AND TERRITORIES

Details of the Ombudsman Ordinance 1989

Section 1 identifies the short title of the Ordinance as the Ombudsman Ordinance 1989.

Section 2 provides that the Ordinance will commence on the same date as section 22 of the Australian Capital Territory (Self-Government) Act 1988.

Section 3 deals with matters of interpretation.

Section 4 establishes the office of the Australian Capital Territory Ombudsman with the function of investigating complaints made under the Ordinance and such other functions as are conferred by the Ordinance.

Subsection 5(1) provides that the Ombudsman shall investigate action that relates to a matter of administration:

- . taken after the commencement of the Ordinance by an agency and in respect of which the Ombudsman receives a complaint;
- . in respect of which a complaint is transferred to the Ombudsman under section 28 of the ACT Self-Government (Consequential Provisions) Act 1988; or
- . taken before the commencement of the Ordinance but complained of after its commencement where, if the complaint had been made to the Commonwealth Ombudsman before that commencement, it would have been transferred to the ACT Ombudsman under section 28 of the ACT Self-Government (Consequential Provisions) Act 1988.

This subsection also permits the Ombudsman of his or her own motion to investigate actions that relate to matters of administration.

Subsection 5(2) provides that the Ombudsman is not authorised to investigate action taken by:

- . a Minister;
- . a judge of a court;
- . a magistrate or coroner of the ACT;
- . any body or person with respect to public servants of the Territory, being action taken in relation to the employment of those persons; or

- an agency with respect to the appointment of a person to an office established under an enactment, not being an office in the Public Service of the Territory or in a prescribed authority.

Subsection 5(3) provides that notwithstanding the previous subsection the Ombudsman is authorised to investigate action taken by a delegate of a Minister.

Subsection 5(4) provides that for the purposes of subsection 5(3) action shall be deemed to have been taken by a delegate of a Minister even where the action is taken under a statutory power which deems the exercise of the power by the delegate to be the action of the Minister.

Subsection 5(5) provides that action taken by an agency shall not be regarded as having been taken by a Minister only because the action was taken by the agency in relation to action taken or to be taken by a Minister personally.

Subsection 6(1) gives the Ombudsman a discretion not to investigate an action, or to cease an investigation if started, in the following circumstances:

- if satisfied that the complainant knew of the action for more than 12 months before complaining to the Ombudsman;
- if the complaint is frivolous, vexatious or not made in good faith;
- if the complainant does not have sufficient interest in the subject matter; or
- if investigation or further investigation is not warranted in the circumstances.

Subsection 6(2) gives the Ombudsman a discretion not to investigate an action until the complainant complains to the agency.

Subsection 6(3) gives the Ombudsman a discretion not to investigate an action unless he or she has been informed by the complainant that no, or inadequate, redress has been granted.

Subsection 6(4) provides that the Ombudsman shall investigate an action complained of where a complainant has complained to an agency and has received no, or inadequate, redress and where the Ombudsman concludes that the redress is inadequate or a reasonable time has passed in which redress could have been granted.

Subsection 6(5) provides that the Ombudsman shall not investigate, or continue to investigate, an action where the complainant has taken action to have his or her complaint reviewed by a court or tribunal, unless there are special reasons justifying the investigation or continued investigation.

Subsection 6(6) provides that where the Ombudsman considers that it would be reasonable for the complainant to exercise a right to have the action complained of reviewed by a court or tribunal, and the complainant has not done so, the Ombudsman may decide not to investigate the action or not to investigate further.

Subsection 6(7) provides that the Ombudsman may decide not to investigate an action complained of or not to investigate further, if he or she concludes that there is adequate provision made under an administrative practice for the review of action of that kind and if the action has been, is being, or is to be reviewed under that practice, or where he or she concludes it would be reasonable for the complainant to exercise an entitlement to have the action so reviewed.

Subsection 6(8) provides that where a complaint is made to the Ombudsman at the request of another person or body of persons, this section applies as if references to the complainant were references to the person or persons at whose request the complaint is made.

Subsections 7(1) and 7(2) provide that a complaint may be made orally or in writing but where it is made orally the Ombudsman may put it in writing or require the complainant to do so. The Ombudsman may decline to investigate until the complainant has done so.

Subsection 7(3) provides that a person detained in custody has the following entitlements:

- . upon request, the facilities for preparing a complaint in writing and for providing any further relevant information to the Ombudsman and the facilities for enclosing the complaint and further information in a sealed envelope;
- . to give to the custodian a sealed envelope addressed to the Ombudsman and to have it sent to the Ombudsman without undue delay; and
- . to have delivered to him or her, without undue delay, any sealed envelope addressed to him or her sent by the Ombudsman that comes into the possession of the custodian.

Subsection 7(4) provides that, in relation to an envelope referred to in the preceding subsection, a custodian is not entitled to open the envelope or inspect its contents.

Subsection 7(5) provides that the Ombudsman may make appropriate arrangements with custodial authorities for the identification and delivery of sealed envelopes sent by him or her to persons in custody.

Section 8 provides a mechanism under which the Ombudsman may make preliminary enquiries of the principal officer of an agency, or of a nominated contact officer within that agency, for the purpose of:

- . determining whether or not he or she is authorised to investigate the action; or
- . determining whether, if authorised, he or she may exercise a discretion not to investigate the action.

Subsection 9(1) provides that the Ombudsman shall, before commencing an investigation, inform the principal officer of the agency that an action is to be investigated.

Subsection 9(2) provides that the Ombudsman may make an arrangement with the principal officer of an agency as to the manner in which he or she is to notify the principal officer that he or she proposes to investigate an action of that agency.

Subsection 9(3) provides that an investigation shall be in private and in such manner as the Ombudsman thinks fit.

Subsection 9(4) provides that the Ombudsman may obtain information from such persons, and make such inquiries, as he or she thinks fit.

Subsections 9(5) and (6) provide that whilst it is not necessary for any person to be afforded an opportunity to appear before the Ombudsman, a report critical of an agency or person shall not be made unless the principal officer, or the officer most concerned in the subject action, or the person named, has been given an opportunity to appear before, and present a submission to, the Ombudsman or an authorised person in relation to that action.

Subsection 9(7) provides that where an opportunity to appear has been given under subsection 9(6), the principal officer may authorise a person to appear on his or her behalf.

Subsection 9(8) provides that where an opportunity to appear has been given by subsection 9(6) to a person other than a principal officer, that person may be represented by another person.

Subsection 9(9) requires the Ombudsman to put a complaint in writing and to inform the responsible Minister that the action is being investigated when he or she proposes to give a person an opportunity to appear and make submissions under subsection 9(6) or where he or she proposes to make a requirement under section 11.

Subsection 9(10) permits the Ombudsman to discuss any matter relevant to the investigation with the relevant Minister.

Subsection 9(11) requires the Ombudsman, upon request, to consult with the responsible Minister before forming a final opinion on any of the matters referred to in subsections 18(1) or (2).

Subsection 9(12) provides that where the Ombudsman concludes there is evidence of a breach of duty or of misconduct by an officer of an agency and the evidence is of sufficient force to justify so doing, the Ombudsman shall disclose the evidence to:

- . the responsible Minister where the person is the principal officer of a Department;
- . the principal officer of a Department if the person is a member of the staff of that Department;
- . the responsible Minister where the person is the principal officer of a prescribed authority; or
- . the principal officer of a prescribed authority where the person is an officer of that authority.

Section 10 provides that the Ombudsman may make reciprocal arrangements in writing with the Commonwealth Ombudsman and the Ombudsman of one or more of the States (including a Territory) in relation to the investigation of action that relates to a matter of administration.

Subsection 11(1) enables the Ombudsman to require a person, who the Ombudsman has reason to believe may be able to assist in an investigation, to provide information or documents to the Ombudsman for the purpose of the investigation where the Ombudsman has requested in writing that information or those documents.

Subsection 11(2) provides that where the Ombudsman believes that an unidentified officer of an agency is able to assist in an investigation, he or she may, by notice in writing, require the principal officer of an agency or a nominee to attend before a specified person and answer questions relevant to the investigation and produce specified documents or other records.

Subsection 11(3) permits the Ombudsman to retain or copy documents produced to the Ombudsman under subsections (1) or (2) or under subsection 14(2).

Subsection 11(4) provides that the Ombudsman may require, by notice in writing, a person to attend before a specified person and answer questions relevant to the investigation.

Subsection 11(5) provides that the Ombudsman is not entitled to require a person to provide information where the Minister certifies that disclosure of that information would be contrary to the public interest because:

- . it would involve the disclosure of a communication between a Minister and a Minister of State of the Commonwealth, or of a State or of a Territory, that would prejudice relations between the parties to the communication; or
- . it would involve the disclosure of deliberations or decisions of the Executive or of a Committee of the Executive.

Subsection 11(6) provides that the Ombudsman is not entitled to require a person to disclose documents or information or to answer questions where the Attorney-General of the Commonwealth certifies that to do so would be contrary to the public interest because:

- . it would prejudice the security, defence or international relations of the Commonwealth;
- . it would involve the disclosure of communications between a Minister of State of the Commonwealth and a Minister of a State or of a Territory that would prejudice relations between the Commonwealth Government and the Government of a State or of a Territory; or
- . it would involve disclosure of deliberations or decisions of the Cabinet of the Commonwealth or of a Committee of the Cabinet.

Subsection 11(7) provides that a person is not excused from providing information or documents on the ground that to do so would contravene the provisions of another enactment, would be against the public interest, self-incriminating or would disclose legal advice provided to a Minister or agency. Any information so provided is not admissible in evidence against the person in proceedings other than an application under subsection 14(2) or proceedings under section 35.

Subsection 11(8) provides that no penalty attaches to a person under another enactment for giving information under the Ordinance.

Subsection 11(9) provides an extended definition of officer in relation to a body corporate other than a prescribed authority.

Subsection 12(1) provides that where the Ombudsman concludes that there has been unreasonable delay by a person having a power to do an act or thing under an enactment, and where there is no time limit imposed by the enactment and there is a right under an enactment to have the decision reviewed by a tribunal, the Ombudsman may give a certificate to this effect to the complainant.

Subsection 12(2) provides that for the purposes of an application to a tribunal to review the decision of a person referred to in subsection (1), the decision of that person not to do the act or thing is deemed to have been made on the date the Ombudsman certifies there has been unreasonable delay in making that decision.

Subsection 12(3) provides that where the Ombudsman concludes there has been unreasonable delay by a person having a power to do an act or thing under an enactment and there is a right under an enactment to have the decision reviewed by a person and a similar right to have the decision of that person reviewed by a tribunal, the Ombudsman may give the complainant a certificate to this effect.

Subsection 12(4) provides that for the purposes of an application to a person to review the decision of a person referred to in subsection (3), the decision of the person having the power under an enactment not to do an act or thing is deemed to have been made on the date the Ombudsman certifies there has been unreasonable delay in making that decision.

Subsection 12(5) extends the definition of person empowered to make a decision for the purposes of subsections (1), (2), (3) and (4) to include a board, committee or other body.

Subsection 12(6) provides a definition of "prescribed tribunal" which includes the Australian Capital Territory Administrative Appeals Tribunal.

Section 13 provides that the Ombudsman may recommend to the relevant principal officer in a report under section 18, or during the investigation of an action, that a specified question relating to that action be referred to the Australian Capital Territory Administrative Appeals Tribunal. When such a recommendation is made the principal officer shall refer the question to the Tribunal which may then give an advisory opinion.

Subsection 14(1) permits the Ombudsman or the principal officer of an agency to apply to the Supreme Court for a determination of a question concerning the exercise of a power or function of the Ombudsman.

Subsection 14(2) provides that, where a person fails to provide information or documents as required under section 11 the Ombudsman may apply to the Supreme Court for an order that the person do that which is required under section 11.

Subsections 14(3) and (4) provides that neither the Ombudsman nor the principal officer can apply to the Supreme Court under this section without first informing the responsible Minister in writing.

Subsection 14(5) confers jurisdiction on the Supreme Court.

Subsections 15(1) and (2) provide that the Ombudsman shall inform the complainant and agency concerned when he or she does not investigate, or ceases to investigate, action taken by the agency. This requirement does not operate in respect of a matter in respect of which the Ombudsman has made an arrangement with an agency concerning the manner of informing the agency or an arrangement that the agency need not be informed.

Subsections 15(3) and (4) provide that when the Ombudsman completes an investigation he or she may, in such manner and at such time as he or she thinks fit, give particulars of the investigation to the complainant and to the agency. The Ombudsman may also comment on a matter arising out of an investigation to any agency, body or person other than an agency, body or person in receipt of a report under section 18.

Subsection 15(5) provides that where the Ombudsman gives a report to an agency under section 18 containing recommendations and those recommendations are not acted upon within a reasonable time, then the Ombudsman shall give the complainant a copy of the recommendations, and such comments as appropriate and, in any other case, may give the complainant a copy of the recommendations and any comments.

Section 16 provides that the Ombudsman may administer an oath or affirmation to a person required to attend before him or her under section 11 and may examine the person.

Section 17 gives the Ombudsman or an authorised person the power to enter premises of an agency and conduct the investigation at that place and the Ombudsman or person is entitled to inspect any relevant documents at the premises of an agency other than documents subject to a certificate under subsections 11(5) or (6).

Subsection 18(1) provides that this section applies to an action, when after investigating the action the Ombudsman concludes that it was:

- . apparently unlawful;
- . unreasonable, unjust, oppressive or improperly discriminatory;
- . in accordance with a rule of law, an enactment or practice which was itself unreasonable, unjust, oppressive or improperly discriminatory;
- . based wholly or partly on a mistake of law or fact;
- . in all the circumstances, wrong;
- . taken for an improper purpose or on irrelevant grounds;
- . taken after considering irrelevant considerations or failing to consider relevant considerations; or
- . taken without giving the complainant or some other person who should have been informed, the reasons for deciding to exercise the power, or not, as the case may be.

Subsection 18(2) provides that the Ombudsman may report to the agency concerned when he or she concludes:

- . that the decision, recommendation, act or omission constituting the relevant action should be reconsidered;
- . that some particular action should be taken to rectify, mitigate or alter the effects of an action;
- . that a decision to which this section applies should be cancelled or varied;
- . that a rule of law, enactment, or practice on which the action was based should be altered;
- . that reasons for a decision should have been given, but were not; or
- . that any other thing should be done in relation to an action to which this section applies.

Subsection 18(3) requires the Ombudsman to include in his or her report the reasons for his or her opinions and gives a discretion to make such recommendations as the Ombudsman considers appropriate.

Subsection 18(4) provides that the Ombudsman may request an agency to give, within a specified time, particulars of any action that it proposes to take with respect to the matters and recommendations included in the report.

Subsection 18(5) gives an agency a right to comment on the report by the Ombudsman.

Subsection 18(6) requires the Ombudsman to give a copy of the report to the relevant Minister.

Subsection 19(1) provides that where the Ombudsman concludes that appropriate action has not been taken within a reasonable time with respect to the findings in a report to an agency under section 18, he or she may inform the Chief Minister accordingly in writing.

Subsection 19(2) requires the Ombudsman when informing the Chief Minister under this section to also provide a copy of the report, if not previously given, and a copy of the comments of the agency on that report, if any.

Subsection 19(3) requires the Ombudsman, in considering whether to give the Chief Minister information in relation to a report, to have regard to any comments of the agency.

Section 20 empowers the Ombudsman to give to the Presiding Officer of the Legislative Assembly copies of his or her report, including comments of an agency, when he or she has provided information to the Chief Minister under subsection 19(1).

Section 21 provides for the making of an annual report for presentation to the Legislative Assembly and for the presentation of additional reports as the Ombudsman sees fit. The first annual report shall deal with the activities of the Ombudsman from the commencement of the Ordinance up until 30 June 1990.

Section 22 provides for the appointment of the Ombudsman.

Section 23 deals with tenure of office.

Section 24 sets out the mechanism for determining the salary and allowances of the Ombudsman.

Section 25 provides for the granting of leave of absence to the Ombudsman.

Section 26 provides for the method of resignation of the Ombudsman.

Section 27 provides for the retirement of the Ombudsman.

Subsection 28(1) provides that the Executive may remove the Ombudsman from office on receipt of an address from the Legislative Assembly praying for that removal on the grounds of misbehaviour or physical or mental incapacity.

Subsections 28(2) to (5) provides that the Executive may suspend the Ombudsman from office for the same reasons, but the Minister must inform the Legislative Assembly of the reasons for so doing within 7 days. Where the Legislative Assembly has been informed of the reasons for suspending the Ombudsman it may pass a motion, within 15 sitting days after the day it received the statement, that the Ombudsman should be removed from office and the Executive must then do so. If the Legislative Assembly does not pass a motion that the Ombudsman should be removed from office the suspension terminates.

Subsection 28(6) provides that the Executive may remove the Ombudsman when the Ombudsman becomes bankrupt or insolvent.

Subsection 28(7) provides that where the Ombudsman is absent from duty for specified periods, except on leave granted by the Minister, the Executive may remove the Ombudsman.

Subsection 28(8) provides that the Ombudsman shall not be suspended or removed otherwise than under the circumstances of this section.

Subsection 28(9) provides that the suspension of the Ombudsman does not affect his or her entitlement to remuneration and allowances.

Subsection 28(10) provides that this section does not apply to a person holding the office of Ombudsman under section 28 of the ACT Self-Government (Consequential Provisions) Act 1988 or under an arrangement between the Territory and the Commonwealth.

Subsection 29(1) lists the circumstances when the Executive may appoint a person to act as Ombudsman.

Subsection 29(2) provides that a person acting as the Commonwealth Ombudsman shall be taken to be the Ombudsman notwithstanding technical defects in his or her tenure of the position.

Subsection 29(3) provides that anything done by, or in relation to a person purporting to act as Ombudsman, is not invalid merely because the occasion for the appointment had not arisen, or there was a defect in the appointment, or the appointment had ceased to have effect, or the occasion to act had not arisen or had ceased.

Section 30 provides that the staff for the purposes of the Ordinance are public servants of the Territory or persons appointed or employed under the Public Service Act 1922 of the Commonwealth.

Section 31 ensures, subject to section 33, that the Ombudsman, or a person acting under his or her direction or authority, is not liable for any act or omission made in good faith under this Ordinance.

Subsection 32(1) enables the Ombudsman to delegate his or her powers under the Ordinance except those powers given by sections 18, 19, 20 and 21 and a power delegated by the Ombudsman of the Commonwealth or of a State (including a Territory).

Subsection 32(2) requires a delegate, upon request, to produce the instrument of delegation, or a copy, for inspection by a person affected by the exercise of delegated powers.

Subsection 32(3) permits the Ombudsman to exercise the powers of the Ombudsman of the Commonwealth or of a State (including a Territory) where those powers can be lawfully delegated and the Minister consents in writing.

Subsection 33(1) defines "officer" for the purpose of this section.

Subsection 33(2) provides for a penalty of \$500 where an officer records, divulges or communicates any information that was obtained under the provisions of the Ordinance.

Subsection 33(3) provides that subsection 33(2) does not prohibit the disclosure of information by an officer for purposes connected with the duties of the Ombudsman under this Ordinance. Similarly, it does not prevent an officer disclosing information provided by an officer of an agency, in the course of his or her duties, if the principal officer of that agency, or the responsible Minister consents or, in any other case, the person consents.

Subsection 33(4) provides that subsection (2) does not prevent the Ombudsman from disclosing in a report such matters as he or she considers should be included in the report.

Subsection 33(5) makes it an offence for an officer to disclose information or documents where the Minister or the Attorney-General of the Commonwealth gives the Ombudsman a certificate stating, that for reasons referred to in subsections 11(5) or (6), it would be contrary to the public interest to do so.

Subsection 33(6) limits the operation of subsection (5) to permit the passing of information or documents from one officer to another.

Subsection 33(7) provides that, subject to subsection 33(8), the Ombudsman shall satisfy himself or herself that statutory provisions corresponding to this section exist in Commonwealth or State legislation before making any disclosure in the exercise of powers under this Ordinance, to the Commonwealth Ombudsman or the Ombudsman of a State (including a Territory).

Subsection 33(8) provides that subsection (7) does not apply in respect of information or documents obtained by the Ombudsman in the exercise of delegated powers under subsection 32(3).

Subsection 33(9) gives a person who is, or has been, an officer, an immunity from disclosing information acquired in his or her capacity as an officer under the Ordinance to any court or person lawfully empowered to take evidence.

Subsection 34(1) provides that nothing in the Ordinance precludes the Ombudsman from disclosing information with respect to the performance of his or her statutory functions if he or she considers that it is in the interests of an agency or person, or otherwise in the public interest, to disclose that information.

Subsection 34(2) prohibits the Ombudsman from disclosing information if to do so would interfere with an investigation or the making of a report under the Ordinance.

Subsection 34(3) prohibits the Ombudsman from criticizing an agency or person unless subsection 9(6) has been complied with or from identifying a complainant unless it is fair and reasonable to do so when disclosing information or making a statement under subsection (1).

Subsection 34(4) provides that the section has effect notwithstanding the operation of subsection 9(3) and that part of section 33 other than subsection 33(5).

Section 35 provides for offences under the Ordinance.

Section 36 provides that no civil proceedings can be taken against a person in respect of the making of a complaint to the Ombudsman or the making of a statement or the disclosure of documents to an officer within the meaning of the section 33 for the purposes of the Ordinance provided that the acts were made in good faith.

Section 37 provides that the Minister may, by notice in the Gazette, determine the amount of fees and expenses for witnesses appearing before the Ombudsman. The section also provides for the delegation of the power.

Section 38 provides for the making of regulations under the Ordinance.