

1976

COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

OMBUDSMAN BILL 1976

EXPLANATORY MEMORANDUM

(Circulated by the Attorney-General,
the Honourable R. J. Ellicott, Q.C., M.P.)

Ombudsman Bill 1976Introduction

The purpose of the Ombudsman Bill 1976 is to establish a Commonwealth Ombudsman, to whom complaints may be made by persons aggrieved by administrative actions of Commonwealth officials and agencies.

2. Before describing in detail the provisions of the Bill, it is desirable to say something about the nature of an Ombudsman's functions and his relation to other dispute-settling machinery, as well about the general structure of the Bill.

3. The essential function of an Ombudsman is to investigate complaints made to him about administrative actions of officials. For this purpose he is given power to question officials and other persons and to inspect documents and premises. If he finds evidence of what might broadly be called maladministration, he reports accordingly to the Department or other agency concerned and to the responsible Minister. He will usually make recommendations for remedial action. If his recommendations are not accepted, or other appropriate remedial action not taken, the Ombudsman can inform the Prime Minister and made a report on the matter to the Parliament.

4. The report to the Parliament, with the attendant publicity and the possibility of Parliamentary censure of the Department or agency concerned, is the ultimate sanction possessed by the Ombudsman. He cannot compel the

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Department or other agency to put his recommendations into effect. Nor does he have power to overrule a decision and substitute his own view of what ought to have been done.

5. Thus the function of the Ombudsman is quite different to that of an appeal tribunal, such as the Administrative Appeals Tribunal, the Taxation Boards of Review and the various Repatriation Appeals tribunals. These bodies are empowered to hear appeals from decisions and, where they think fit, to overrule these decisions and substitute their own. They are limited to considering decisions, and are not ordinarily concerned with other administrative actions. They are, moreover, confined to specified classes of matters, whereas the Ombudsman has power to investigate the whole field of administrative activity of government.

6. To prevent overlap between the Ombudsman and the other processes of review of administrative actions, such as appeal tribunals and the courts, it is customary to provide that the Ombudsman is excluded from investigating a matter if another remedy is provided by law, except where there are special circumstances that justify his doing so.

7. The present Bill would provide for the appointment of a Commonwealth Ombudsman and define his powers and functions. It would also provide for 2 Deputy Ombudsmen, one of whom would perform the functions of Ombudsman in Australian Capital Territory matters and the other in Northern Territory matters. This arrangement would leave the Ombudsman himself free to concentrate on

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federal matters. There will be a staff to assist the Ombudsman and the Deputy Ombudsmen, provided under the Public Service Act. The Bill provides for the necessary powers of investigation and reporting.

8. The role of the Ombudsman in Northern Territory matters will have to be reconsidered as a local Executive Government develops in that Territory. At the time the Bill was drafted, the form and powers of that Executive had not been established.

9. The Bill seeks to ensure that the Ombudsman's power to investigate grievances will extend over the whole range of administrative activities carried on by or on behalf of the Commonwealth Government. The agencies employed by the Commonwealth in its administration vary widely in nature. The Bill deals with this diversity of administrative agencies by splitting them up into two broad categories, Departments of the Public Service, and prescribed authorities. The term 'prescribed authority' is used in the Bill to cover all administrative agencies that do not form parts of Departments. In addition, it includes some parts of Departments, these being the cases where statutory bodies like the Trade Practices Commission or statutory office-holders like the Commissioner of Taxation are provided with staff employed under the Public Service Act.

10. The administrative agencies by means of which Commonwealth activities are carried on include, in addition to the Departments of the Public Service, the following:-

- . statutory corporations
- . unincorporated bodies established by statute

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- . holders of statutory offices (who may or may not also be officers of the Public Service)
- . bodies established by executive action by the Governor-General or a Minister
- . companies, either wholly or partly owned by the Commonwealth, incorporated under the companies law of a State or Territory
- . persons appointed by the Governor-General or a Minister, but not holding an office established by or under a statute, to perform duties on behalf of the Commonwealth
- . State officials exercising powers and performing functions under Commonwealth legislation.

This wide diversity of administrative agencies has necessarily led to much complexity in the interpretation provisions in clause 3 of the Bill. These provisions are explained in detail in the explanatory notes on clause 3.

11. As explained above, the ultimate sanction the Ombudsman has is his power to make a special report to the Parliament if what he considers to be a deficient administrative action is not remedied to his satisfaction. This requires that at an earlier stage the Minister responsible for the relevant administrative agency shall have been consulted and shall also have been informed of any adverse report and any recommendations made by the Ombudsman to a Department or agency for which he is responsible under the Administrative Arrangements Order. The Bill therefore contains a provision, in sub-clause 3(1), that enables the appropriate Minister to be identified in each case.

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PART I - PRELIMINARY

Clause 1 - Short title and citation

12. This clause provides for the Act establishing the office of Ombudsman to be cited as the Ombudsman Act 1976.

Clause 2 - Commencement

13. The Ombudsman Act will be brought into force on a date to be proclaimed. Before the Act can be brought into force necessary administrative arrangements - appointments, accommodation, initial staff, etc.- for setting up the Office must be completed. It is expected that these will take some time after the Act has been passed, and that the Ombudsman will be able to begin operations early in 1977.

Clause 3 - Interpretation

14. Sub-clause (1) contains definitions of terms used in the Bill. Particular definitions that might be noted are:

- (a) "authorised person": the Ombudsman would be able to authorise other persons, who may be members of his staff, to carry out certain activities on his behalf. A person so authorised will be empowered -
 - (i) to hear submissions by Departments, statutory authorities or officials or other persons who are to be subject to criticism in a report by the Ombudsman - sub-clause 8(5); and

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- (ii) bodies having power to take evidence and including amongst their members Judges or persons who have the status of Judges. Particular examples of bodies so excluded are -

- . the Conciliation and Arbitration Commission
- . the Grants Commission - the present Chairman is Elsie-Mitchell J. who has the status of a Judge of the A.C.T. Supreme Court.

The reason for this exclusion is that it is considered not appropriate for the Ombudsman to investigate the activities of bodies of this kind, headed by or including Judges. This exclusion does not however exempt bodies such as the Australian National University merely because a Judge happens for the time being to be a member of the Council of the University.

- (iii) this exception excludes from the scope of prescribed authority the bodies referred to in sub-clause 3(2) - see note on that sub-clause below - and bodies that may be excluded by regulations made under the Ombudsman Act. Consideration will have to be given to whether some statutory authorities, particularly those set up for carrying on commercial

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functions in direct competition with private enterprise, should be subject to investigation by the Ombudsman. It should be noted, however, that no agency can be excluded from the operation of the Ombudsman under this provision if either House of the Parliament does not approve - a regulation can be disallowed by either House.

- (iv) it is not appropriate that the fully-elected
and
(v) Legislative Assemblies of the A.C.T. and the Northern Territory, or officials answerable directly to those bodies, should be subject to the Ombudsman.

- (C) Paragraph (b) of the definition of prescribed authority enables agencies set up by executive action and companies over which the Commonwealth has control to be brought under the Ombudsman. An example of a body of the first kind is the Interim Council of the A.C.T. Schools Authority, which was established by the then Minister for Education, and an example of a company under the control of the Commonwealth is Commonwealth Hostels Limited. It is contemplated that companies carrying on services on behalf of the Commonwealth, such as Commonwealth Hostels Limited, might be brought under the Ombudsman. It may be

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quite fortuitous whether a particular function is performed directly by a Department, or whether a statutory authority is set up, or whether a company is incorporated for the purpose. Again, it will be a matter for consideration whether a commercial organization such as Qantas should be within the jurisdiction of the Ombudsman.

- (D) Paragraph (c) of the definition of 'prescribed authority' is intended to bring within the scope of the Ombudsman actions of persons who are statutory office-holders but who are not officers of Departments. Thus this paragraph would include the Commissioner of Taxation, but not the Commissioner of Patents - he is an officer of the Department of Business and Consumer Affairs. Again provision is made to exclude by regulation the holder of a statutory office if it is thought not appropriate that his activities should be subject to investigation by the Ombudsman. An obvious example would be the Defence Force Ombudsman if that office is established by legislation.
- (E) Paragraph (d) of the definition of 'prescribed authority' would enable persons appointed by the Governor-General or a Minister to

perform administrative functions on behalf of the Commonwealth to be brought within the scope of the Ombudsman. An example of such a person is the Civil Commissioner at Exmouth.

- (e) "principal officer": the purpose of this definition is to identify the head of the Department or prescribed authority with whom the Ombudsman has to deal - see, in particular, sub-clause 8(1) of the Bill, which requires the Ombudsman to inform the 'principal officer' of the Department or prescribed authority concerned that he proposes to investigate a complaint.
- (f) "responsible Minister": the purpose of this definition is likewise to identify the responsible Minister with whom the Ombudsman has to deal - see, again, sub-clause 8(1), which requires the Ombudsman to inform the 'responsible Minister' that he proposes to investigate a complaint.

15. Sub-clause (2). The purpose of this sub-clause is to prevent a body that is a subsidiary of a body that is a prescribed authority from being treated for the purposes of the Bill as a separate prescribed authority. For example, the Australian National University Act establishes the Council of the University and a number of subsidiary organs, such as the Professorial Board. Each subsidiary organ of this kind would, but for this sub-clause, itself be a separate prescribed authority by virtue of paragraph (a) of the definition of 'prescribed authority'.

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16. Sub-clause (3). The purpose of this sub-clause is to exclude the holders of certain statutory offices from the scope of paragraph (a) of the definition of 'prescribed authority'. Paragraph (a) of this sub-clause is self-explanatory.

17. Sub-paragraph (b)(i) of the sub-clause will enable Departmental officers and members of staffs of prescribed authorities who hold statutory offices to be treated as part of the staff of the Department or authority concerned. For example, the Inspector-General in Bankruptcy is an officer of the Department of Business and Consumer Affairs and is, under the Public Service Act, responsible to the Permanent Head of that Department for the efficient and proper performance of his duties. The effect of sub-paragraph (b)(i) is that, if there is a complaint to the Ombudsman about an action by the Inspector-General in Bankruptcy, the Ombudsman will inform the Secretary to the Department of Business and Consumer Affairs of the intended investigation and report to him. If the Inspector-General in Bankruptcy were treated as a prescribed authority separate from the Department of which he is an officer, then the procedures the Ombudsman is required to follow would not take account of the relevant Public Service relationships. By way of contrast, the Commissioner of Taxation is not an officer of the Department of the Treasury, so that the Ombudsman deals with him directly, and not with the Secretary to the Treasury.

18. Sub-paragraph (b)(ii) of the sub-clause has the effect that a member of a body, where the office of member is established by statute, is not treated by the Bill as a prescribed authority separate from the body of which he is a member.

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a member. Taking again the example of the Australian National University, the holder of the office of Vice-Chancellor would, but for this paragraph, have to be treated as a prescribed authority separate from the University itself by virtue of paragraph (c) of the definition of 'prescribed authority'.

19. Sub-paragraph (b)(iii) of the sub-clause relates to offices such as that of the Second Commissioner of Taxation. The effect is to prevent these offices from being treated as separate prescribed authorities.

20. Sub-clause (4). This sub-clause relates to those cases where functions are performed on behalf of the Commonwealth by persons who are not officers of Departments or prescribed authorities. For example, under certain Commonwealth Acts State officers may be authorized or appointed to perform inspection functions. The effect of this sub-clause is to make the responsible Commonwealth Department answerable to the Ombudsman for any complaint about an action of such a person. Where the person is an officer of a State Department, the Ombudsman does not, of course, have any jurisdiction over the State Department.

21. Sub-clauses (5) and (6). These sub-clauses must be examined in relation to sub-clause 5(1) of the Bill. That sub-clause empowers the Ombudsman to investigate actions taken by a Department or a prescribed authority. The purpose of sub-clauses (5) and (6) of clause 3 is to deem action taken by an officer of a Department or a prescribed authority to be action taken by that Department or authority, as the case may be, for the purposes of the Ombudsman's investigations. Attention is invited particularly

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to two points:-

- . That an officer acts in excess of his authority does not enable his Department or prescribed authority to deny responsibility to the Ombudsman for the action.
- . That an officer holding a statutory appointment has an independent discretion as to how he carries out the functions of that appointment does not enable his Department or prescribed authority to deny responsibility to the Ombudsman for his actions.

22. Sub-clause (7). A reference in the Bill to the taking of action is to include the making of a decision or a recommendation, and the failure or refusal to take any action or make a decision or recommendation.

23. Sub-clause (8). Where the Bill refers to international relations of Australia it is to be clear that the reference is to relations both between Australia and other governments and Australia and international organisations.

24. Sub-clauses (9) and (10) establish specifically that the Commonwealth Police Force and the Police Forces of the mainland Territories are subject to the Ombudsman's investigations in respect of administrative actions by members of those Forces. The Ombudsman is to be empowered to investigate such complaints pending a decision on the recommendations by the Australian Law Reform Commission in its Report on Complaints Against the Police. See also the note on sub-clause 5(3) below.

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PART II - ESTABLISHMENT, FUNCTIONS, POWERS AND DUTIES OF THE OMBUDSMAN

Division 1 - Establishment and Functions

Clause 4 - The establishment of offices of Ombudsman and Deputy Ombudsman

25. This clause establishes the offices of the Commonwealth Ombudsman and 2 Deputy Commonwealth Ombudsmen. The roles of the Deputy Ombudsmen are explained later in clause 24.

26. Sub-clause (2) describes the functions of the Commonwealth Ombudsman. The details of those functions are set out elsewhere in the Bill.

Clause 5 - Functions of Ombudsman

27. Sub-clause (1). Subject to the other provisions of the Bill, the Ombudsman is required to investigate a complaint made to him about action taken by a Department or prescribed authority that relates to a matter of administration. He is also able to initiate inquiries himself. It does not matter whether the action complained of was taken before or after the commencement of the Act. Thus the Ombudsman will be empowered to investigate grievances about past actions by Departments or authorities. It should be noted that sub-clause 6(1) of the Bill would give a discretion not to investigate a matter of which the complainant was aware 12 months before he made the complaint if the Ombudsman does not consider that his refusal to deal with the matter would cause undue hardship to the complainant.

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28. The Bill does not define the phrase "matter of administration". No satisfactory definition has yet been formulated. The experience in the States and in other countries is that it is better not to attempt a definition, which might unduly limit the flexibility of the Ombudsman. Certain actions are, however, excluded from investigation by the Ombudsman by sub-clause (2) of clause 5.

29. Sub-clause (2). Those matters that the Ombudsman is not authorised to investigate are:-

- (a) action by a Minister (who in the exercise of his portfolio is already answerable to the Parliament). This does not, however, exclude the Ombudsman from investigating a recommendation made to a Minister, or action by a Department to give effect to a Minister's decision.
- (b) action taken by a Judge of a court created by the Parliament. The existing courts in this category, so far as relevant, are the Federal Court of Bankruptcy, the Australian Industrial Court, the Family Court of Australia and the Supreme Courts of the A.C.T. and the Northern Territory. This paragraph is not intended to exclude from investigation the administrative action of officials of the Courts.
- (c) action taken by a magistrate or coroner of the Australian Capital Territory or Northern Territory. This paragraph is not intended to extend to action taken in some other capacity by a person who is a magistrate.

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- (d) matters relating to employment in the Australian or Northern Territory Public Service or with a prescribed authority. The Committee on Administrative Discretions (the Bland Committee) recommended that employment matters be excluded from investigation by the Ombudsman. In the States, the position varies. In some States the State Ombudsman is excluded from investigating employment matters; in others he is not so excluded. This paragraph is not intended to exclude pre-employment matters, such as the conduct of entrance examinations or interviews for employment, or the seeking of information about a prospective employee.
- (e) action that the Defence Force Ombudsman (to be established under separate legislation) may investigate.
- (f) action taken with respect to an appointment to a statutory office outside the Australian Public Service or the Northern Territory Public Service or the service of a prescribed authority.

30. Sub-clause (3). The purpose of this sub-clause is to enable the Ombudsman to investigate the manner in which a complaint against a police officer has been internally investigated by the police. Generally it is considered desirable that the police themselves should, at least in the first instance, investigate complaints about misconduct by a

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police officer; see, e.g., the Report of the Australian Law Reform Commission on Complaints Against the Police. The view taken in the drafting of the Ombudsman Bill is that, pending a decision on the recommendations in that report, it would be desirable for the Ombudsman to be empowered to investigate a grievance that a complaint made against a police officer had not been properly investigated by the police or that adequate action had not been taken as a result of the police investigation. It was thought that such an internal investigation, or disciplinary action following such an investigation, would, if no special provision were made, be excluded from the Ombudsman by paragraph (d) of sub-clause 5(2) (which provides that the Ombudsman is not authorised to investigate matters relating to employment, including action taken with respect to the discipline of an employee). Sub-clause 5(3) is intended to remove that exclusion in the case of a complaint about a member of a Police Force.

Clause 6 - Discretion not to investigate certain complaints

31. Sub-clause (1) sets out those cases in which the Ombudsman himself may decide not to investigate, or decide to discontinue an investigation of, a complaint, viz:-

- (a) if the complainant was aware of the action complained of more than 12 months before he complained and the Ombudsman is satisfied that the complainant will not suffer undue hardship if the complaint is not investigated.

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- (b) if the complaint is frivolous or vexatious or is not made in good faith, or if the complainant does not have a sufficient interest in the matter to justify his making the complaint, and there are no special reasons justifying an investigation. Thus, even though the Ombudsman may consider that the person making a complaint does not have a sufficient interest in the matter, he may nevertheless consider that special reasons justify his undertaking an investigation.
- (c) if in all the circumstances the Ombudsman considers that investigation or further investigation of the complaint is unnecessary.

32. It will be seen that the Ombudsman does not have a general discretion to refuse to investigate a complaint. He is entitled to refuse to investigate only where the matter is stale, or there is no real substance to the complaint, or an investigation is unnecessary, as where the matter has been put right by the Department or authority concerned.

33. Sub-clauses (2) and (3). These sub-clauses give effect to the principle that the Ombudsman does not investigate complaints where the complainant is entitled to other means of redress, unless there are special reasons for doing so, or where it would be unreasonable, perhaps because of the cost involved, to expect the complainant to exercise that other right of redress.

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34. Sub-clauses (2) and (3) preclude the Ombudsman from investigating a matter where the complainant either has exercised or has available a right of appeal to a court or to a tribunal established by an enactment for review of his case. In those cases the Ombudsman must consider whether, in relation to the first alternative, there are special reasons why he should investigate the matter or, in relation to the second alternative, whether it is unreasonable to expect the complainant to exercise that right of appeal, as, for example, where it would cost too much in relation to the value of the matter in dispute.

35. Sub-clause (4). Where a complaint is made about a matter that is open to review under some administrative procedure rather than by a statutory body, the Ombudsman may decline to investigate if he considers that it is reasonable to seek review by that means.

36. Sub-clause (5). This is a provision to deal with the case where the complaint to the Ombudsman is not made by the person with the grievance but by someone on his behalf. The Bill recognises that there may be many, especially migrants or elderly people, who would have difficulty in making complaints themselves or who would be reluctant to do so.

Clause 7 - Complaints

37. Sub-clause (1). Complaints to the Ombudsman are to be made in writing. This is not to say that a person would not be able to approach the Ombudsman or his staff personally and outline in discussions the matter in issue. But at an appropriate stage the details of the complaint will need

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the staff of the Ombudsman would be available to assist in putting a complaint in writing if necessary. But it should also be noted that the Ombudsman can investigate a matter of his own motion - sub-clause 5(1).

38. Sub-clause (2). A person who is in custody, e.g., in a prison, is to be provided with proper facilities for making a complaint to the Ombudsman.

39. Sub-clause (3). A letter to the Ombudsman from a person in custody is not to be opened by the custodial authority. Thus there is to be no censorship of mail addressed to the Ombudsman by a prisoner.

Clause 8 - Investigations

40. This clause deals with the manner in which the Ombudsman will be required to conduct his investigations on receipt of a complaint concerning the action of a Department or prescribed authority. The essence of the procedure is that it is to be flexible and informal, but also to ensure that proper notice is given to the Department or authority to be investigated, and that it can put its case to the Ombudsman.

41. Sub-clause (1). Before commencing his investigation, the Ombudsman is to inform the Minister administering the particular Department concerned in the complaint; in the case of a prescribed authority he is to inform the Minister administering the legislation under which the authority operates. The principal officer of the Department or authority

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is also to be informed. The terms "responsible Minister" and "principal officer" are defined in sub-clause 3(1).

42. Sub-clauses (2) and (3). Investigations are to be conducted in private, and, subject to the other provisions of the Bill, in such a manner as the Ombudsman thinks fit according to the particular circumstances of the matter. He may obtain such information and make such enquiries as he thinks fit.

43. The Ombudsman will ordinarily proceed by informal and personal inquiry by himself or his staff into a complaint, and by discussions or correspondence with departments or other sources as necessary. He is to be empowered to conduct a formal hearing - clause 9 - but it is expected that this power would be rarely used.

44. Sub-clauses (4) - (7). In keeping with the flexible character of the Ombudsman's operations, he is not bound to conduct a hearing - sub-clause (4) - unless he proposes to be critical in his report of some person (whether an official or the complainant or any other person), or of a Department or authority. In such a case he is bound to give the person, or the principal officer of the Department or authority, concerned an opportunity to put his case.

45. Sub-clauses (8) and (9). It is to be open to the Ombudsman to discuss any matter relevant to the investigation with the Minister concerned. A Minister may request the Ombudsman to consult with him on relevant matters, in which case the Ombudsman shall consult with the Minister before

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the Ombudsman forms a final opinion that there has been some administrative deficiency or error.

46. Sub-clause (10). If the Ombudsman considers that his investigations reveal some misconduct or breach of duty he may, if he believes the circumstances justify his doing so, bring the matter to the notice of the principal officer of the Department or prescribed authority. If that officer is the one considered to be at fault, the notice is to go to the responsible Minister.

Clause 9 - Power to require persons to answer questions and produce documents

47. This clause empowers the Ombudsman, for the purposes of his enquiries, to require persons who may be able to give relevant information to answer questions and produce documents.

48. Sub-clause (1) empowers the Ombudsman to give a notice in writing to the person from whom information is required, specifying the relevant information or documents required to be provided or produced and the period within which the person must comply.

49. Sub-clause (2) enables the Ombudsman to require the complainant or, where the complaint was made at the request of another, that other person, or an officer of a Department or prescribed authority to attend and answer relevant questions. If he wishes to require any other person to give information, the Ombudsman must first obtain the approval of the Minister administering the Ombudsman Act.

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50. Sub-clause (3). Certain information or documents may be withheld from the Ombudsman on a certificate by the Attorney-General that disclosure to the Ombudsman would be contrary to the public interest. The information or documents that may be so withheld relate to defence, national security or foreign relations, communications between Commonwealth and State Ministers, or discussions in Cabinet or the Northern Territory Executive Council.

51. Sub-clause (4). A person is not to be excused from giving relevant information or documents on the grounds that to do so would contravene some other legislation, be contrary to the public interest, incriminate him, make him liable to a penalty or disclose legal advice to a Minister, Department or prescribed authority. Answers required by the Ombudsman are not admissible in evidence in other proceedings except prosecutions for offences under clause 37 of the Bill - which deals with failure to answer questions, obstructing the Ombudsman and giving false testimony.

52. Sub-clause (5). A person is not to be liable to a penalty under the provisions of any other legislation for giving information or documents to the Ombudsman in a case where he is required to do so under the Ombudsman Act.

Clause 10 - Unreasonable delay in exercising power

53. This clause would establish a procedure whereby a person who experiences delay in getting a decision under statutory powers may be able in appropriate cases to bring the matter directly before the Administrative Appeals Tribunal for decision.

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54. A person may complain to the Ombudsman of delay by a Department or prescribed authority in taking a decision in the exercise of a statutory power. The Ombudsman would investigate the reasons for the delay as generally provided in the Bill. If the matter is one in which an appeal lies to the Administrative Appeals Tribunal, the Ombudsman, if he considers the delay to be unreasonable, may issue a certificate to that effect. The issue of that certificate will then enable an application to be made to the Administrative Appeals Tribunal as if the matter had been decided against the complainant and he had appealed to the Tribunal in the ordinary way.

55. This procedure would not apply where the relevant legislation provided that the decision under the statutory power must be taken within a specified period. The Administrative Appeals Tribunal Act itself deals with the case of failure to decide a matter within a prescribed period. In those cases the Ombudsman would not ordinarily be empowered to make an investigation, since the matter could be taken direct to the Tribunal.

56. The clause applies only where the legislation under which the decision in question may be taken provides for the Tribunal to hear appeals against decisions of that nature. If the Ombudsman receives a complaint of a delay in a matter not subject to appeal to the Tribunal then his ordinary powers of investigation would enable him to investigate the complaint in the usual way.

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Clause 11 - Reference of question to the Administrative Appeals Tribunal

57. This clause would establish a procedure by which the Administrative Appeals Tribunal could be asked to give an advisory opinion on how a statutory discretion should be exercised, even though the relevant legislation under which the discretion is exercised does not provide for an appeal to the Tribunal. The clause gives effect to a recommendation by the Committee on Administrative Discretions. If the Ombudsman recommends that an advisory opinion be sought from the Tribunal, the principal officer of the Department or prescribed authority concerned is to be obliged to refer the matter to the Tribunal.

58. The Administrative Appeals Tribunal Act contains corresponding provisions enabling the Tribunal to give advice on a question referred to it under this clause.

Clause 12 - Complainant to be informed

59. Sub-clause (1). This sub-clause would require the Ombudsman, where he does not investigate or complete an investigation into a complaint for any reason, to inform the complainant and the Department or prescribed authority concerned, in writing, of the reasons why he did not investigate or complete the investigation.

60. Where he completes his investigation of a complaint, the Ombudsman is to provide both the complainant and the Department or prescribed authority concerned with particulars

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of the results of his inquiries. This information would be given in the manner and at the time that the Ombudsman considers appropriate.

61. Sub-clause (2). If the Ombudsman considers that adequate and appropriate action with respect to recommendations he makes is not taken by a Department or prescribed authority within a reasonable time after receiving his report, the Ombudsman shall inform the complainant of the recommendations made and may add any comments he thinks fit.

Clause 13 - Power to examine witnesses

62. Where, under clause 9, the Ombudsman requires a person to attend before him in order to provide information or answer questions relevant to his inquiries, the Ombudsman may administer an oath or affirmation to that person. He may then examine the person on oath or affirmation.

Clause 14 - Power to enter premises

63. Sub-clause (1) empowers an authorised person to enter any place occupied by a Department or prescribed authority and carry on an investigation for the purposes of the Act. An authorised person for this purpose is the Ombudsman or a Deputy Ombudsman (sub-clause 14(5)) or a person authorised by the Ombudsman (sub-clause 3(1)).

64. Sub-clause (2) provides, however, that the Ombudsman may not enter certain places, specified under the Crimes Act or the Defence (Special Undertakings) Act, without approval by the relevant Minister, and then only in compliance with the conditions specified by the Minister.

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65. Sub-clause (3) empowers the Attorney-General to specify additional places which the Ombudsman may not enter without Ministerial consent. The Attorney-General may act under the sub-clause only where he is satisfied that the conduct of an investigation at a place might prejudice the security or defence of the Commonwealth.

66. Sub-clauses (4), (5) and (6). Before an authorised person enters the premises of a Department or prescribed authority for the purposes of an investigation, he shall inform the principal officer concerned. Inspection of documents on those premises is to be undertaken by arrangement with the principal officer. This provision is not to restrict the power of an Ombudsman to require the production of documents under clause 9.

Division 2 - Reports

Clause 15 - Reports by Ombudsman

67. This clause provides for the Ombudsman to report to the Department or prescribed authority concerned where he finds that some kind of maladministration has occurred.

68. Sub-clause (1) sets out the circumstances of maladministration. It attempts to present a complete catalogue of the cases in which an administrative action would be considered defective. Only one item calls for specific comment. It is sub-paragraph (a)(v), which refers to an action being 'otherwise, in all the circumstances, wrong'. This is not intended to empower the Ombudsman to question the merits of a decision where no element of

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maladministration has intruded into the making of the decision. Rather it is intended to enable the Ombudsman to question the propriety of an action by an official where the impropriety may not fall within one of the other categories specified in paragraph (a) of the sub-clause.

69. Sub-clause (2) requires the Ombudsman to report to the Department or prescribed authority concerned where he considers that remedial action should be taken in order to correct the deficiency revealed in his investigation into a complaint.

70. Sub-clause (3) requires the Ombudsman to include in his report the reasons for the opinions he has reached on the corrective action required. He may also include any recommendations he wishes to make, for example, as to how the particular matter should be put right or as to improvements that should be made in a department's procedures or operations to prevent a recurrence. Under sub-clause (4) he may require the Department or prescribed authority to inform him within a specified time of the action that it intends to take concerning the remedial action proposed and any recommendations made by the Ombudsman in his report.

71. Sub-clause (5). Where the Ombudsman makes a report under sub-clause (2) the Department or prescribed authority may make any comments it desires on the report. If the Ombudsman takes the matter further, by reporting to the Prime Minister and to the Parliament, he must include these comments in his further report.

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72. Sub-clause (6). The Ombudsman is required to send to the responsible Minister a copy of his report made under sub-clause (2).

Clause 16 - Reports to Prime Minister

73. Sub-clauses (1), (2) and (3). If the Ombudsman considers that a Department or prescribed authority has not, within a reasonable time after receiving a report from him, taken action adequate and appropriate to the circumstances, he may inform the Prime Minister in writing of the situation. A copy of his report to the Department or authority and of any comments made by it on the report are also to be sent to the Prime Minister. In deciding whether to inform the Prime Minister under this clause, the Ombudsman is required to consider any comments that the Department or authority may have made to him on receipt of his report.

Clause 17 - Special reports to Parliament

74. This clause provides for the Ombudsman to report to the Parliament the failure by a Department or prescribed authority to take proper remedial action following a report by him under clause 15 and the Prime Minister being informed of the matter under clause 16. The report to the Parliament must include the comments of the Department or authority supplied to him under sub-clause 15(5).

Clause 18 - Reports relating to Northern Territory

75. This clause provides means for informing the Northern Territory Legislative Assembly, as the body exercising legislative power under the Northern Territory

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(Administration) Act, of a report made to the Parliament by the Ombudsman on action taken under legislation of the Northern Territory.

76. Sub-clause (1) provides that a copy of a report under clause 17 to the Parliament concerning investigation of action taken under legislation of the Northern Territory is to be sent by the Ombudsman to the Speaker of the Legislative Assembly for presentation to the Assembly.

77. Sub-clauses (2) to (5). These sub-clauses provide for reports on actions under the Local Government Ordinance of the Northern Territory, or on actions of Councils established under that Ordinance or of Council staff. If the Ombudsman considers that adequate and appropriate steps have not been taken within a reasonable time in regard to matters or recommendations included in a report in respect of such an action, he may inform the Minister for the Northern Territory accordingly. Copies of the Ombudsman's initial report on the action in question and of any comments made by the Department or authority concerned are also to be sent to the Minister. The Ombudsman is required to consider the comments made on his report in deciding whether to inform the Minister for the Northern Territory. Where proper remedial action is not taken, the Ombudsman may send a copy of his report and the comments made on it to the Speaker of the Legislative Assembly for presentation to that Assembly. This procedure is in place of the procedure for reporting to the Prime Minister and the Parliament in other cases.

Clause 19 - Annual Report and other Reports

78. Apart from the special reports that may be made under clauses 17 and 18, the Ombudsman is required to submit annual reports as soon as possible after the close of each financial year. He may also submit reports of his operations during a part of a year.

79. An annual report is, under sub-clause (1), to be submitted to the Minister administering the Act for presentation to the Parliament. The Minister is to arrange for the Ombudsman's report to be laid before each House of Parliament within 15 sitting days of its receipt by him. This report is to cover the whole operations of the Ombudsman for the previous financial year.

80. A report is to be made to the Minister for the Capital Territory for presentation to the Legislative Assembly for that Territory, with respect to the Ombudsman's operations during the previous financial year in regard to complaints concerning action taken by a Department or prescribed authority in the exercise of powers or functions under A.C.T. Ordinances. Similarly, a report is to be sent to the Minister for the Northern Territory in regard to complaints concerning action taken in the exercise of powers or functions under Ordinances of that Territory. The Minister for the Northern Territory is to send the report to the Speaker of the Northern Territory Legislative Assembly for presentation to the Assembly.

81. Sub-clause (2) provides for the Ombudsman to make additional reports to the Parliament on his operations, and to the Territory Legislative Assemblies in respect to complaints concerning action taken under legislation of the respective

wished to do so, to make regular reports, e.g., on a quarterly basis as does the Victorian Ombudsman.

82. The first reports to be made by the Ombudsman are to be submitted as soon as practicable after 30 June 1977, and are to relate to the period between the commencement of the Ombudsman Act and that date.

83. Sub-clause (8) applies the provisions of sub-clause 8(5) to the annual reports that the Ombudsman makes under clause 19. Sub-clause 8(5) requires the Ombudsman, where he intends to make a report on a matter that may be critical of a department, authority or person to give an opportunity for the principal officer or person concerned to make submissions concerning the matter to the Ombudsman before he makes the report.

PART III - CONDITIONS OF SERVICE, AND
STAFF, OF THE OMBUDSMAN

Division 1 - Ombudsman

Clause 20 - Definition

84. This clause defines the term "Ombudsman" as used in the clauses in Division 1 of Part III to mean both the Commonwealth Ombudsman or a Deputy Commonwealth Ombudsman, as appropriate.

Clause 21 - Appointment of Ombudsman

85. Appointment of an Ombudsman is to be made by the Governor-General.

86. The terms and conditions under which an Ombudsman holds office, other than those for which the Bill provides, are to be as prescribed by regulations. Those terms and conditions dealt with in the Bill are as follows:

Clause 22 - Tenure of office

24 - salary and allowances

25 - leave of absence

26 - resignation

27

to - termination, suspension and removal

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30 - superannuation

32 - preservation of rights of member of
the Australian Public Service appointed
as Ombudsman.

Clause 22 - Tenure of appointment

87. An Ombudsman ceases to hold office when he attains the age of 65 years. Subject to later provisions as to resignation, retirement and removal from office, an appointment as Ombudsman is a career appointment to the retirement age of 65 years.

88. A person who has attained the age of 65 years shall not be appointed as an Ombudsman.

Clause 23 - Deputy Ombudsman

89. Sub-clause (1) enables one of the two Deputy Ombudsmen to be designated by the Minister administering the Ombudsman Act as the Deputy Ombudsman for the Australian Capital Territory and the other for the Northern Territory.

90. Sub-clauses (2) and (3). The Deputy Ombudsman for a Territory is to have all the powers and to be able to exercise all the functions of the Ombudsman in relation to action taken in that Territory, except the power to make a special report to the Parliament if proper remedial action is not taken in respect of a complaint. The residents of each of those Territories would thus have access to a Deputy Ombudsman having special responsibilities in that Territory.

91. The reason for reserving to the Ombudsman himself the power to make a special report to the Parliament is to ensure that consistency of principle is preserved in making these reports and that they have the authority of the Ombudsman himself behind them. It may be expected that such

a report would only be made when the Department or prescribed authority concerned has resisted the recommendations of the Ombudsman for reasons that it regards as matters of principle, and probably with the support of its Minister. The matter may even have been taken to Cabinet by the Minister or by the Prime Minister. It therefore seems desirable that only the Ombudsman himself should have the power to take a matter so far as the special report to Parliament.

92. Sub-clause (4) makes it clear that even though a Deputy Ombudsman has been designated for each of the two Territories the Ombudsman himself is still able to carry out all his functions and exercise all his powers in respect of actions in those Territories.

Clause 24 - Salary and Allowances

93. The remuneration payable to an Ombudsman shall be as determined by the Remuneration Tribunal; if there is no determination by the Tribunal then remuneration may be set by the regulations. Travelling allowances and any other allowances due may be prescribed in the regulations. These provisions of the clause are to have effect subject to the Remuneration Tribunals Act 1973-1974.

Clause 25 - Leave of Absence

94. Provision is made for the Minister to grant an Ombudsman leave of absence on such terms and conditions, including as to remuneration, as determined by the Minister.

Clause 26 - Resignation

95. An Ombudsman may resign by delivering his written resignation to the Governor-General.

Clause 27 - Retirement for physical or mental incapacity

96. The Governor-General may, with the consent of an Ombudsman, retire him from office on the ground of physical or mental incapacity.

Clause 28 - Suspension and Removal of Ombudsman

97. Sub-clause (1). As an officer occupying a position of independence of operation involving investigation of administrative actions of departments and authorities, it is appropriate that an Ombudsman be afforded a high degree of security in his appointment. Unless he has resigned his office under clause 26 or has agreed to retirement under clause 27, or sub-clause (7) applies, the Ombudsman or a Deputy Ombudsman can only be removed from office by the Governor-General on an address presented to the Governor-General by each House of the Parliament in the same session of the Parliament and seeking removal of the Ombudsman on the ground of misbehaviour or physical or mental incapacity.

98. Sub-clauses (2) to (6). There is provision for suspension of an Ombudsman by the Governor-General for misbehaviour or physical or mental incapacity. In such a case the Minister is to arrange for a statement of the grounds of suspension to be laid before each House of the Parliament within 7 sitting days of the suspension. Within

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15 sitting days of the statement being laid before it, either House may resolve that the Ombudsman should be removed from office. If both Houses so resolve, the Governor-General is required to remove the Ombudsman from office. If, at the end of the 15 sitting days, a House has not passed such a resolution the suspension terminates and the Ombudsman would then be free to return to duty. Normal salary and allowances are to be paid during any period of suspension.

99. Sub-clause (7). In the event that an Ombudsman becomes bankrupt or does any of the other acts as set out in sub-clause (7) the Governor-General shall remove him from office.

100. Sub-clause (8). An Ombudsman may not be suspended or removed in any way other than that specified in clause 28.

Clause 29 - Acting Appointments

101. The clause provides for the Governor-General to appoint a person to act in the office of Commonwealth Ombudsman or in an office of Deputy Commonwealth Ombudsman during absences or suspension of the office-holder or a vacancy in the office, and to terminate an acting appointment at any time.

102. An acting appointment during a vacancy in an office of Ombudsman is not to continue after 12 months from the occurrence of the vacancy. It is not desired that an acting appointment should continue indefinitely and a period of 12 months from the time the vacancy occurs would be a reasonable period in which to make a substantive appointment to the vacant office.

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103. If a Deputy Ombudsman is appointed to act as Commonwealth Ombudsman, his office as Deputy is deemed to be vacant during that appointment. It would be possible therefore for an acting Deputy to be appointed, keeping all the statutory offices occupied.

104. If an acting appointment as an Ombudsman is made for reasons other than a vacancy (e.g. absence of the occupant on leave for illness etc.) and that office becomes vacant during the period of the acting appointment, the person acting in the office may continue to act until the Governor-General otherwise directs, the vacancy is filled or the period of 12 months from the occurrence of the vacancy expires, whichever first occurs.

105. Terms and conditions for acting appointments are to be as determined by the Minister. Provisions in the Bill as to leave of absence and resignations also apply to acting appointments.

106. A person appointed under this clause to act in an office has all the powers and functions of that office as provided in the Bill. The clause does not permit any challenge to the validity of any act done by a person acting in an office on the ground that the statutory basis for his appointment did not exist or that this appointment had ceased to have effect. Thus no claim can be made that the acts of an acting Ombudsman are invalid because the person normally holding that office was in fact available or that he had not vacated the office.

Clause 30 - Superannuation

107. The purpose of this clause is to ensure that an Ombudsman who is removed from office after being suspended on the ground of physical or mental incapacity is entitled to superannuation under the Superannuation Act.

Division 2 - StaffClause 31 - Staff

108. The staff of the Commonwealth Ombudsman are to be employed under the Public Service Act and the Ombudsman is to be given the powers of a Permanent Head under that Act in relation to his staff.

Division 3 - MiscellaneousClause 32 - Preservation of rights

109. If a serving officer of the Public Service or a person to whom the Officers' Rights Declaration Act applies is appointed as an Ombudsman he is to retain all his existing and accruing rights.

PART IV - MISCELLANEOUSClause 33 - Ombudsman not to be sued

110. No liability is to attach to the Ombudsman, a Deputy Ombudsman or a person acting within the direction or authority of the Ombudsman for acts done in good faith in the exercise of powers or functions under the Act.

Clause 34 - Delegation

111. The Ombudsman may delegate to a Deputy Ombudsman, a staff member or, with the consent of the Minister, another person, any of his powers and functions except those powers of making reports. This provision will enable the staff of the Ombudsman to conduct investigations under the Act.

Clause 35 - Officers to observe secrecy

112. Sub-clauses (1) to (6). It is essential to the success of the operations of an Ombudsman that he should have the greatest possible access to departmental and other official files relating to the matters under investigation. The complement to this is that officials should be able to rely on information they give to the Ombudsman and his staff being kept confidential except to the extent to which it must be disclosed for a report by the Ombudsman to be meaningful. The purpose of these sub-clauses is to put the Ombudsman, the Deputy Ombudsmen, the staff of the Ombudsman and others who operate under his authority under obligations of secrecy in respect of information obtained by them under the Act.

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113. Sub-clause (7). This sub-clause permits the Ombudsman to provide information on a matter arising under a State Act or under a joint Commonwealth-State undertaking to an Ombudsman or equivalent officer of that State. The information which may be so disclosed may not include matters in respect of which the Attorney-General has given a certificate under sub-clause (5) of this clause. The purpose of this clause is to facilitate investigations of matters where both Commonwealth and State officials are involved, or where there is a joint undertaking, such as the Albury-Wodonga Development Corporation.

114. Sub-clause (8). The Ombudsman, a Deputy Ombudsman or a member of his staff or a delegate of the Ombudsman cannot be compelled in other proceedings to disclose information disclosed to or obtained by him under the provisions of the Bill.

Clause 36 - Offences

115. The offences created by this clause are ancillary to the powers of the Ombudsman to compel the attendance of witnesses and the production of documents.

Clause 37 - Protection from civil actions

116. The purpose of this clause is to protect from civil actions, e.g., defamation, a person who makes a complaint to the Ombudsman or a person who gives information to the Ombudsman or a member of his staff or a person authorized by him.

.../43.

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Clause 38 - Regulations

117. This clause empowers the Governor-General to make regulations.

CORRIGENDUMOmbudsman Bill - Explanatory Memorandum

Paragraphs 87 and 88 of the Memorandum should be deleted and the following paragraphs inserted in their stead:

"87. An Ombudsman is to hold office for a term of years, up to a maximum of 7 years, that is to be specified in the instrument of his appointment.

88. An Ombudsman is to be eligible for re-appointment. A maximum age of 65 years is specified beyond which an Ombudsman cannot be appointed or hold office."

CORRIGENDUMOmbudsman Bill - Explanatory Memorandum

The following alterations should be made to the Explanatory Memorandum relating to the Ombudsman Bill:

P.28. Delete paragraph 66 and insert the following:

"66. Sub-clauses (4) and (5). An authorised person is to be entitled to inspect documents on the premises of a Department or prescribed authority, subject to any certificate issued by the Attorney-General under sub-clause 9(3) and by arrangement with the principal officer. This provision is not to restrict the power of an Ombudsman to require the production of documents under clause 9."

P.35. Delete paragraphs 87 and 88 and insert the following:

"87. An Ombudsman is to hold office for a term of years, up to a maximum of 7 years, that is to be specified in the instrument of his appointment.

88. An Ombudsman is to be eligible for re-appointment. A maximum age of 65 years is specified beyond which an Ombudsman cannot be appointed or hold office."