

**OMBUDSMAN BILL 2011**  
**EXPLANATORY MEMORANDUM**

The concept and, indeed, the name, comes from Scandinavia where years ago the government established a body basically independent of Government that would be able to receive complaints from the general public (and others) about the behaviour of public officers or corporate bodies owned by the State. The concept has been adopted throughout the world and each State in Australia has one. Many governments, while occasionally finding criticism of government difficult to take, generally find that attention is often shifted from government in circumstances where once government would be seen to be examining and passing on its own behaviour. The Ombudsman is a significant means of shifting difficult issues to an independent person and obtaining some relief from immediate criticism as well as the time consuming activity of investigation. If the Ombudsman finds for government it is generally accepted while if against the government the complainants are vindicated. In recent months discussions with the Commonwealth government has led to an agreement that Norfolk Island could proceed with its intended legislation to establish an Ombudsman and that the Commonwealth Ombudsman would undertake the position.

The Draft Bill is based fairly closely upon that of the *Ombudsman Act 1989* of the Australian Capital Territory which is a relatively small community and makes further allowance for the size of Norfolk Island. This will provide some assistance, if required, in the interpretation of the Bill. Additional attention has been given to the drafting experience of the Northern Territory.

Part 1 of the Bill provides a number of aids to interpretation and include several definitions the most extensive of which deals with a *prescribed authority*. The Bill will provide for the Ombudsman to examine matters arising from an *agency* that may be the public service (within the meaning of that term in the *Public Sector Management Act 2000*), or a body or person that is a *prescribed authority*. A prescribed authority may be a person holding a particular office or an entity established or controlled by the Administration. The interpretation provisions deal extensively with means of protection of individuals who are employed by a prescribed authority. Thus a person or body of persons who are required to assist a prescribed authority cannot be treated as if they are the authority but their actions are to be taken as those of the authority. Similarly a person is not taken to be a prescribed authority simply because they perform particular duties or the duties of a prescribed office, but rather their actions are to be taken as those of the agency or body concerned. In defining the “complaints officer” provision is included so that the principal officer of an agency is the person to appoint the office for the agency.

Part 2 of the Bill establishes the post of Ombudsman and Deputy Ombudsman and provides for the duties to be carried out. There are some exceptions to what can be investigated including actions by a member of the Legislative Assembly, a Minister, Judge, magistrate or coroner connected with their duties and also excludes actions in the appointment, promotion and discipline of public officers which are covered by the *Public Sector Management Act 2000*.

There are circumstances in which the Ombudsman may decline an investigation – particularly where the complaint has not previously been made to the agency complained of; where the complaint is of something that happened more than 12 months ago; if the complaint is seen to be frivolous or vexatious or if the complainant has no reasonable interest in the subject matter of the complaint or if having regard to the circumstances further investigation is not warranted.

The Bill provides the process of making a complaint (orally or in writing) and for the investigation of agencies of government including powers to call persons to give evidence and produce documents. Special provision also makes provision for persons in custody to make confidential complaints. Special provision is also made for some requests for investigation to be made by the Legislative Assembly, the Administrator or the Commonwealth Minister

The Ombudsman, will, in addition to the investigation of matters arising under the Bill, provide a general supervision of records maintained by the Complaints Officer who receives complaints in connection with the public sector. The complaints officer's duties and responsibilities are broadly set out in an Australian Standard for complaints handling in organisations. The Ombudsman's powers and obligations in commencing and carrying out investigations is also provided and are largely left to the Ombudsman's discretion. Thus while an investigation may be done in private and may be done without offering a person an opportunity to appear, the Ombudsman must not be critical of a person or agency unless that person or agency has been given the opportunity to appear and make submissions.

To assist in investigations the Ombudsman is empowered to give notice to a person to provide information but special provisions authorise the withholding of information on grounds of public interest if the Minister so certifies.

The Supreme Court is empowered to resolve issues that may arise as to the exercise of a power or performance of a function by the Ombudsman.

The Ombudsman is required to provide reports of his examination of an agency to the agency and the responsible Minister. The Ombudsman may also submit a copy of a special report issued to the Minister to the Legislative Assembly as well as provide other reports to the Assembly through the Minister.

PART 3 of the Bill provides for the appointment of the Ombudsman for a term that must not exceed 7 years or a term that would extend beyond the appointee's 70<sup>th</sup> birthday. The Part provides for the fixing of his remuneration and such things as his resignation or removal or suspension. The staff of the Ombudsman are ordinary public officers. The Part also takes account of the special circumstances that may relate to the Ombudsman should the appointment be made in accordance with an agreement with the Commonwealth

PART 4 covers a number of miscellaneous matters such as that the Ombudsman cannot be sued for anything done in good faith. The Ombudsman is also empowered to delegate certain powers. Staff must maintain confidentiality or face severe penalties. Persons who, without reasonable excuse fail to comply with a request to attend before the Ombudsman, to be sworn or make an affirmation, provide information or answer a question or produce a document or record, commit an offence as does a person who wilfully obstructs or hinders the Ombudsman or provides false or misleading information.

A person may not bring civil proceedings against a person who has made a complaint in good faith to the Ombudsman or who provides information.

The Part ends with the usual power to make Regulations.

The various clauses of the Bill are—

**Part 1 —Preliminary**

1. **Clause 1** provides the short title of the Bill.
2. **Clause 2** provides for Part 1 of the Bill to commence on publication of assent in the Gazette while the rest of the Bill will commence on a day or days to be fixed by the Administrator by notice in the Gazette.
3. **Clause 3** provides aids to interpretation and includes a number of definitions of regularly used expressions.

Thus in subclause 3(1)—

an “*agency*” is the public service as that term is defined in the *Public Sector Management Act 2000*, or prescribed authority that is separately defined in subclause 3(1);

an “*authorised person*” is defined as a person so appointed by the Ombudsman;

a “*Complaints Officer*” has the meaning given by section 8;

an “*officer*” in relation to the public service, (a term defined in the *Public Sector Management Act 2000*) may be a public sector employee or a person authorised to exercise powers or perform functions for a public sector agency but not a Minister, or in relation to a prescribed authority may be the person who constitutes the authority, acts as a member of the authority, is employed in the service of the authority even if not employed by the authority, or is empowered to exercise powers or perform functions for an authority.;

a “*prescribed authority*” includes a territory instrumentality (also possibly included in the definition of “public sector agency”) and certain bodies incorporated or unincorporated established for a public purpose (but not if they are established under the *Companies Act 1985* or the *Associations Incorporation Act 2005* unless owned by the Administration, or if they are not a prescribed authority for the purposes of the Act). However a body that might be otherwise exempted may nevertheless be prescribed by Regulation to be a prescribed authority provided that the Administration is in a position to exercise control of the body. The definition also includes persons holding or performing the duties of an office established by law but by subclause (3) such persons are not to be taken to be a prescribed authority just because they hold an office or perform a function but their actions are to be taken as those of the agency or body for whom they act.

a “*principal officer*” of an agency is the chief executive officer or officer in charge of the agency however called; and of a prescribed authority is the person holding an office declared by Regulation to be the principal office and if the authority is an Administration owned corporation (or the subsidiary of such a corporation) the principal officer is the chief executive officer but if there is none the chairman of the Board of Directors; in other cases the principal officer is the person who constitutes the authority or a person acting in the position or if the authority is constituted by 2 or more people the person entitled to preside at meetings ;

a “*responsible Minister*” is the Minister responsible for an agency or the Minister administering an enactment that establishes a prescribed authority, or the minister declared by Regulation to be the responsible Minister—the reference includes a Minister acting for and on behalf of a responsible Minister.

Subclause 3(2) provides that when an unincorporated body is established by an enactment to assist a prescribed authority, that body is not a prescribed authority but its acts are to be taken as those of the authority.

Subclause 3(3) provides, as previously noted that a person holding or performing certain duties is not solely by reason of so doing, a public authority but that persons’ actions are to be taken as those of the authority for which the person acts.

Subclauses 3(4) and (5) provides for further circumstances where actions of a person are to be taken as those of an agency and not of the person.

Subclause 3(6) provides that if Regulations provide that a person holding a particular office of an agency is not a prescribed authority, the Regulations may also provide that that person’s actions are not to be taken as actions of the agency concerned.

Subclause 3(7) provides for the circumstances where a persons actions are to be taken as those of a prescribed authority.

Subclause 3(8) describes what it means to “take action”.

Subclause 3(9) deems the Norfolk Island Police Force to be a prescribed authority and subsection 3(10) deems a member of the Police Force to be an officer.

Subclause 3(11) provides for the Minister in consultation with the Ombudsman to determine complaints handling standards for agencies. There is, for example, an Australian Standard “AS ISO 10002-2006 ‘Customer satisfaction – Guidelines for complaints handling in organisations’ ” which broadly sets out best practice for complaints handling in organisations.

4. **Part 2— Establishment, functions, powers and duties of the Ombudsman**

**Clause 4** establishes the positions of Ombudsman and Deputy Ombudsman and provides that within the Bill references to the Ombudsman include the Deputy Ombudsman unless the context clearly requires otherwise. The Ombudsman’s functions are to investigate complaints and perform functions provided by the Bill or any other enactment.

**Clause 5 — Functions**

Subclause 5(1) sets out the various functions of the Ombudsman which do not include investigating complaints of matters occurring before the Bill becomes law. The Ombudsman also is responsible to inspect the records of the complaints officer.

However subclause 5(2) makes it clear that the Ombudsman may not investigate certain complaints relating to certain decisions or deliberations - including those relating to the Administrator, Executive Council, the Ministers as Cabinet, members of the Legislative Assembly or of judicial officers, actions of a Royal Commission, actions by law officers or police officers in relation to criminal proceedings, or actions of the Chief Executive Officer with respect to persons in the public service.

Subclause 5(3) provides that a delegate of a Minister does not enjoy the exemption of action against the Minister.

Subclause 5(6) provides that the Ombudsman may exercise other powers and functions that may be conferred by another enactment.

**Clause 6 — Discretion not to investigate certain complaints.**

Subclause 6(1) makes it clear that the Ombudsman is not required to investigate every complaint that might be made. In particular is not required to investigate a complaint if the complainant became aware of the matter more than 12 months before the complaint is made or where the Ombudsman forms the opinion that the complaint is vexatious or not in good faith or where the complainant does not have a sufficient interest in the subject matter or if it is considered that further investigation is not, having regard to all the circumstances, warranted.

Subclause 6(2) provides that the Ombudsman may decide not to investigate a complaint against an agency if the complainant has not previously complained to the Complaints Officer.

Subclause 6(3) provides that the Ombudsman may decide not to investigate a complaint against an agency if the complainant has complained to the Complaints Officer unless and until the complainant has informed the Ombudsman that no redress has been granted or that redress has been granted but the redress is not, in the opinion of the complainant, adequate.

Subclause 6(5) provides that the Ombudsman may, but only if there are special reasons for so doing, investigate an action even if the complainant has asked for the complaint or action taken concerning it to be reviewed by a court or Tribunal.

Subclause 6(6) provides that the Ombudsman may defer an investigation if it is considered that a complainant has a right to have a matter reviewed by a court or Tribunal and it is or would be reasonable for the complainant to exercise that right.

Subclause 6(7) allows the Ombudsman to withhold investigation of a complaint where action is already under review at the request of the complainant or it would be reasonable for the complainant so to do.

Subclause 6(8) provides that where a complaint has been lodged by a complainant at the request of another party references to the complainant include that other party.

Subclause 6(9) provides that the Ombudsman may cease or not conduct an investigation if it is considered that a complaint relates to the commercial activity of an agency.

#### **Clause 6A — Transfer of complaints to Information Commissioner**

Clause 6A allows the Ombudsman to decide not to investigate or transfer to the Information Commissioner complaints that have been or are more appropriately dealt with by under the Privacy Act 1988 (Commonwealth) or Freedom of Information Act 1982(Commonwealth)

#### **Clause 6B — Preliminary inquiries**

Clause 6B confers similar authorisations and protections to officers who provide information to the Ombudsman for the purpose of preliminary inquiries as to whether the Ombudsman is authorised or should conduct an investigation into an action.

#### **Clause 6C — Executive and ministerial matters must not be investigated**

Clause 6C precludes investigation by the Ombudsman into deliberations of the Executive Council or Cabinet or the merits of a decision by the Administrator, Executive Council or Cabinet or a committee of the Executive Council or Cabinet.

#### **Clause 7 — Complaints**

Subclauses 7(1) and (2) establish the way in which complaints are made to the Ombudsman. These may be done orally or in writing and if orally the Ombudsman must put the complaint into writing or require the complainant to do so before proceeding any further.

Subclauses 7(3), (4) and (5) make provision for the manner in which complaints are to be made by persons in custody.

#### **Clause 7A — The Commonwealth Minister and Legislative Assembly reference of matter for investigation**

Clause 7A authorises the Commonwealth Minister and the Legislative Assembly to refer matters to the Ombudsman for investigation if the matter is otherwise within power and the Ombudsman is required to comply.

**Clause 8 — Complaints Officer**

Clause 8 provides for the Ombudsman to inspect the records of the Complaints Officer the Ombudsman to make recommendations to the Chief Executive Officer and where considered appropriate provide recommendations to the Minister as well as the Chief Executive Officer. Additionally a complaint to the Complaints Officer is deemed to be a complaint to the agency involved and the Complaints Officer is obliged to notify the agency if a complaint is received – this will usually be the principal officer of the agency.

**Clause 9 Investigations**

Clause 9 deals with the general manner and form of conducting investigations. It requires the Ombudsman to notify the principal officer of an agency of the investigation (subclause (1)); requires that subject to the Act, investigations are to be done in private, not in public (subclause (2)); empowers the Ombudsman to make inquiries and obtain information as thought fit (subclause (3)). Other provisions provide that a person need not be given a right to appear but no criticism of a person or agency can be made unless the person or agency has been given the opportunity to be heard (subclauses (4) and (5)). Further provisions deal with the right to representation by a person appearing before the Ombudsman and empowers the Ombudsman to discuss a matter relevant to an investigation with the Minister and requires the Ombudsman to bring evidence of a breach of duty or misconduct to the attention of the responsible persons.

**Clause 9A — Protection of persons providing information**

This clause contains extensive protection for individuals who provide information to the Ombudsman.

Subclause (1) sets out the various circumstance which if they apply, attract the protections of subsequent provisions.

Subclause (2) sets out circumstances in which information cannot be used against a person in other proceedings except where the information may be given in a manner that is itself an offence.

Subclause (3) provides that a person giving information cannot be made liable under any other Act for providing information to the Ombudsman. This is intended to mean that the act of providing information cannot itself be an offence but does not exclude committing an offence by unlawfully obtaining information (that may be an offence) that is then given to the Ombudsman (that is not an offence).

**Clause 10 — Power to obtain information and documents**

Clause 10 empowers the Ombudsman to require a person to give evidence or produce documents (clause 34 provides penalties for failure to comply). The clause provides for circumstances where compliance is not required and these include where the Minister or the Administrator issues a “contrary to public interest” notice (subclause 5) or the Crown Counsel or other principal law officer issues a notice that giving information could prejudice an investigation or detection of an offence. A person may not refuse to comply on various grounds such as a prohibition in another enactment or a tendency to incriminate, but any information, document or evidence given is not admissible in any other proceeding except those described in subclauses (6)(e) and (f). Where a person does give evidence contrary to another enactment that person cannot be made liable for breach of that enactment.

**Clause 11 — Unreasonable delay in exercising power**

Clause 11 empowers the Ombudsman to issue a certificate of unreasonable delay in making a decision to do an act or exercise a power and provides for the various circumstances and purposes for which the certificate may be used including as evidence to a Board or Tribunal that the delay has occurred.

**Clause 12 — Powers of Supreme Court**

Clause 12 empowers the Ombudsman or an agency to apply to the Supreme Court to determine a question concerning the exercise of a power or performance of a function by the Ombudsman but such an application may not be made before the responsible Minister has been informed of the reasons for the proposed application. The Minister has, in such circumstance, no power to do other than seek to be heard by the Court.

**Clause 13 — Complainant and agency to be informed**

Clause 13 requires the Ombudsman to notify an interested party if no action is to be taken on a complaint and the reasons therefore, provide copies of reports of an investigation and of recommendations made

**Clause 14 — Powers to examine witnesses**

Clause 14 empowers the Ombudsman to administer an oath or affirmation to witnesses and to examine under oath or affirmation.

**Clause 15 — Power to enter premises**

Clause 15 empowers the Ombudsman to enter certain premises of an agency or service providers to such an agency for the purposes of the Act. Clause 34 provides penalties for failure to cooperate.

**Clause 16 — Reports by Ombudsman**

Clause 16 requires the Ombudsman to provide reports of investigations under the Act to relevant agencies and the responsible Minister.



**Clause 17 — Special reports to Minister**

Clause 17 empowers the Ombudsman to inform the Minister if an agency fails to comply with a recommendation in the report of an investigation within a reasonable time and if this is done the Minister is to receive a copy of the report if it has not already been provided as well as a copy of any response of the Agency.

**Clause 18 — Special reports to the Legislative Assembly**

Clause 18 empowers the Ombudsman, where a report has been given to the Minister under clause 17, to provide to the Speaker for presentation to the Assembly copies of such report.

**Clause 19 — Annual reports to the Legislative Assembly**

Clause 19 empowers the Ombudsman to provide from time to time a report for the whole or part of a year of the operations of the Ombudsman and of matters relating to the exercise of powers or the performance of the functions of the Ombudsman.

The Administrator must be given copies of all reports and information given or submitted under clauses 16, 17, 18, or 19.

**Part 3 — Conditions of service, and staff, of the Ombudsman****Clause 20 — Interpretation**

Clause 20 makes it clear that Part 3 applies to the Ombudsman and the Deputy Ombudsman unless the contrary intent is clear.

**Clause 21 — Appointment of Ombudsman**

Subclauses 21(1) and (2) provide for the appointment of the Ombudsman by the Administrator if the appointment is not made under subclause (2).

Subclause (2) provides for the circumstance that the Ombudsman is the Commonwealth Ombudsman appointed by virtue of an agreement between the Administrator on the advice of the Minister and the Commonwealth that also establishes the terms and conditions of the appointment.

**Clause 22 — Tenure of Office**

Clause 22 sets the tenure of office of the Ombudsman as 7 years (the term may be extended) and provides that the appointment cannot extend beyond the appointee's 70<sup>th</sup> birthday.

**Clause 23 — Salary and allowances**

Clause 23 sets the salary and allowances of the Ombudsman to be by Regulation or determination of the Public Sector Remuneration Tribunal except where the appointment is by agreement with the Commonwealth.

**Clause 24 — Leave of absence**

Clause 24 makes provision for the Minister to grant of leave of absence of the Ombudsman except if the Ombudsman is the Commonwealth Ombudsman in which case leave is given in accordance with the Commonwealth Act.

**Clause 25 – Resignation**

Clause 25 entitles the Ombudsman to resign by notice to the Administrator but if the appointee is the Commonwealth Ombudsman resignation takes place under the Commonwealth Act and is deemed given to the Administrator.

**Clause 26 – Retirement**

Clause 26 empowers the Administrator with the consent the Ombudsman to retire the Ombudsman on grounds of physical or mental incapacity.

**Clause 27 – Suspension and removal of the Ombudsman**

Clause 27 This section does not apply if the Ombudsman is the Commonwealth Ombudsman but if that is not the case then it provides for the Administrator to be able to remove the Ombudsman from office if the Legislative Assembly sends an address praying for removal on grounds of misbehavior or physical or mental incapacity and also provides for the Administrator to suspend the Ombudsman on the ground of proven misbehavior or physical or mental incapacity and to give the Minister notice of that action. In this latter case the Administrator must send a statement of reasons for the suspension to the Minister who must table the reasons before the Legislative Assembly. The suspension will lead to removal by the Administrator if the Legislative Assembly resolves that the Ombudsman be removed from office but if no such resolution is passed within 3 sitting days after the statement of the Administrator has been tabled then the suspension lapses. The Ombudsman must be removed by the Administrator for bankruptcy and may be removed for unauthorised absence from duty.

**Clause 28 – Acting appointments**

Clause 27 Provides for the machinery of appointing an acting appointment by the Administrator but if the Ombudsman is the Commonwealth Ombudsman then the appointment is made in accordance with the Commonwealth Act.

**Clause 29 – Staff**

Clause 29 provides for the staff of the Ombudsman to be officers of the public service unless the Ombudsman is the Commonwealth Ombudsman in which case staff may be a mixture of public service officers and Commonwealth public officers.

**Clause 29A – Arrangement relating to Commonwealth Ombudsman**

Clause 29A allows the Administrator to make an agreement with the Commonwealth regarding the terms and conditions on which the Commonwealth Ombudsman and staff may perform actions under the Act.

**Clause 30 – Ombudsman not to be sued**

Clause 30 provides that the Ombudsman is not liable to any action suit or proceeding in connection with the performance of the Ombudsman's duties if done in good faith and exercised in accordance with or purported exercise of a power or authority under the Act.

**Clause 31 — Delegation**

Clause 31 empowers the Ombudsman to delegate powers other than those to issue reports under Division 2 of Part 2.

**Clause 32 — Officers to observe confidentiality**

Clause 32 imposes extensive obligations upon the Ombudsman and officers of the Ombudsman's staff or a delegate to maintain confidentiality of information provided subject to the other provisions of the Act and provides substantial penalties for breach.

**Clause 33 — Disclosure of information by Ombudsman**

Clause 33 makes it clear that the Ombudsman may disclose information in the various circumstances described particularly if it is considered in the public interest to do so but then this is subject to the caveats that the disclosure not identify a complainant unless it is fair and reasonable to do so or to express critical opinions of an agency unless the agency has been given proper opportunity to comment.

**Clause 34 — Offences**

Clause 34 establishes several offences that may occur for failure to comply with various provisions of the Act.

**Clause 35 — Protection from civil actions**

Clause 35 makes it clear that a person making a complaint to the Ombudsman cannot be subject to any civil proceedings in respect of good faith complaints made or statements or evidence provided to the Ombudsman.

**Clause 36 — Determination of fees and expenses of witnesses**

Clause 36 enables the Minister to determine by publication in the Gazette, fees that may be paid to witnesses before the Ombudsman.

**Clause 37 — Regulations**

Clause 37 provides a usual broad regulation making power to the Administrator for the purposes of the Act.