

## PART 5 INVESTIGATIONS - OMBUDSMAN ACT

---

Refer: *Independent Commissioner Against Corruption Act 2012 (ICAC Act)*  
*Ombudsman Act 1972 (Ombudsman Act)*  
*Royal Commissions Act (Royal Commissions Act)*  
*Whistleblowers Protection Act 1993 (Whistleblowers Protection Act)*

### TIMELY RESOLUTION OF INVESTIGATIONS

- Ombudsman SA aims to complete preliminary investigations within four months of receiving an initial approach.
- Ombudsman SA aims to complete full investigations within six months of receiving an initial approach.

**NOTE:** Staff should ensure that a matter has been properly assessed as a COMPLAINT under PART 5 before proceeding further.

### 1. INVESTIGATION POWERS & PROCEDURES

The Ombudsman can determine the procedure for an investigation but it must be in accordance with the Ombudsman Act.

#### Section 18 – Procedures on investigations:

##### 1.1 The Ombudsman MAY:

- conduct a preliminary investigation to decide whether a full investigation is required (section 18(1))
- decide the way in which information for the investigation will be sought
- hold a hearing for the purpose of the investigation
- decide from whom to seek information for the investigation
- decide whether a person involved in an investigation can have legal or other representation (section 18(3)(c)). The Ombudsman may decide in the investigation whether a person giving evidence in an interview may bring along a support person.

##### 1.2 The Ombudsman MUST:

- conduct every investigation in private (section 18(2))
- give the principal officer of an agency a reasonable opportunity to comment on the subject matter of the report before he makes a final report that affects the agency (section 18(4))
- report any breaches of duty or misconduct by a member, officer or employee of an agency to which the Ombudsman Act applies, to the principal officer of the agency (section 18(5))

---

This policy is a guide only. Staff must always refer to relevant legislation.

- determine the best procedure for undertaking an investigation in accordance with the Ombudsman Act
- comply with any directions and guidance issued by ICAC.

### Royal Commission powers

The Ombudsman Act gives the Ombudsman the powers of a royal commission (section 19 Ombudsman Act), being the powers to:

- enter and inspect any land, building, place, or vessel, and inspect any goods and other things (section 10(a) Royal Commissions Act)
- require, by summons, people to attend before the Ombudsman (or his delegates) (section 10(b) Royal Commissions Act)
- require, by summons, the production of any books, papers, documents or records (section 10(c) Royal Commissions Act)
- inspect any books, papers, documents or records that are produced to them and to keep them for any reasonable amount of time and may copy any matters from them that are relevant to the inquiry (section 10(d) Royal Commissions Act)
- examine witnesses on oath, affirmation or declaration (section 10(e) Royal Commissions Act).

The Ombudsman will generally use the powers of a commission under the Royal Commissions Act when:

- the gravity of the situation or intransigence of parties warrants it
- a decision has been made to conduct a full investigation of a matter
- there is reasonable evidence of a serious administrative error, and
- there is some potential conflict in relation to important evidence.

### Section 23 - enter and inspect on agency premises

1.3 The Ombudsman and delegates have the power to enter and inspect agency premises (section 23).

### Section 26 - confidentiality

1.4 Section 26 of the Ombudsman Act provides strict confidentiality and secrecy requirements in relation to an investigation. Refer PART 9.

### 'Authority to act' form

1.5 Where a person to whom the investigation relates has a representative who is not a practising lawyer, the Ombudsman will require the person to complete an 'authority to act' form.

## 2. SECTION 19A NOTICE

- 2.1 The Ombudsman may by notice in writing, direct at any time, an agency to stop performing an administrative act for a specified period, but not longer than 45 days.
- 2.2 The Ombudsman can only issue a section 19A notice if:
- continuing the relevant administrative act is likely to prejudice an investigation or a proposed investigation or
  - continuing the relevant administrative act would be likely to prejudice the effect or the implementation of a recommendation that the Ombudsman may make as a result of the investigation or
  - continuing the relevant administrative act is likely to cause serious hardship to a person.
- 2.3 A section 19A notice must not be issued if:
- compliance would result in the agency breaching a contract or other legal obligation or
  - compliance would cause a third party undue hardship.

## 3. INVESTIGATION PLAN

- 3.1 Before commencing an investigation, the investigating officer is to complete an Investigation Plan. The Investigation Plan template is in Resolve. The Investigation Plan is to be submitted to the Deputy Ombudsman for approval before the investigation is commenced. This plan then can be used as a guide for the progress of the investigation.
- 3.2 The Investigation Plan should establish the focus and terms of reference (the limits) of the investigation and help to organise, manage and review the investigation process.
- 3.3 The Investigation Plan should include:
- the date of the approach
  - whether an interpreter is required
  - the date of the creation of the Investigation Plan
  - the details of the complainant and the agency
  - the file number of the matter, and of related files
  - whether there are any indications/allegations of fraud or corruption (ACB referral?)
  - whether there are any indications/allegations of corruption or maladministration or misconduct in public administration (ICAC report)
  - whether the Whistleblowers Protection Act applies
  - whether there are reporting obligations under the ICAC Act
  - a description of the issues
  - the allegations
  - which aspects of section 25 are relevant to the investigation

---

This policy is a guide only. Staff must always refer to relevant legislation.

- any jurisdictional issues that may arise in the investigation
  - any powers that may need to be exercised in the investigation, such as:
    - section 19A – issue a notice of direction
    - Royal Commission powers
    - section 18(3)(c) – determine whether parties may have legal representation
    - FOI related matters/external review
    - section 23 – power to enter and inspect agency premises
  - whether conciliation would be appropriate – section 17A
  - whether there are any broader public interest concerns - e.g. whether an audit or systemic investigation is required.
- 3.4 Some investigations can be fully planned in advance and follow the plan with little variation. Others will develop very differently from the original plan and so flexibility is needed in carrying out the plan. Investigating officers should regularly revise the plan in light of any new evidence and/or situations which emerge during the investigation.

#### 4. BEFORE INVESTIGATION

- 4.1. Efforts should be made to establish what the focus of the investigation will be, and the following should be identified:
- the issues that are to be the subject of the investigation
  - the administrative acts that follow from these issues
  - any possible administrative errors
  - any possible potential issues of serious or systemic maladministration or misconduct in public administration that must be reported to OPI
  - the direction the investigation will take to establish administrative error or otherwise.
- 4.2. Investigations should be commenced having regard to the following possible outcomes in Resolve:
- Not substantiated
  - Ombudsman comment warranted
  - Resolved with agency cooperation
  - Section 25(1) finding.

#### 5. STANDARD OF PROOF

- The civil standard of proof applies when investigating whether the allegations contained in a complaint are established. Allegations have to be proved on the balance of probabilities. It must be more probable than not that the allegations are made out. This is a lower standard than is required in criminal matters, where allegations must be proved beyond reasonable doubt.

---

This policy is a guide only. Staff must always refer to relevant legislation.

- The *Briginshaw* principle applies to investigations carried out by Ombudsman SA. The High Court case of *Briginshaw v Briginshaw*<sup>1</sup> recognised that the strength of evidence necessary to establish an allegation on the balance of probabilities may vary according to the seriousness of the issues involved.

## 6. PROVISIONAL REPORTS

- 6.1. Towards the conclusion of a preliminary or full investigation and before making a (final) report affecting an agency, the Ombudsman must allow the principal officer of the agency a reasonable opportunity to comment on the subject matter of the report (section 18(4)). This is normally done by providing a copy of the provisional report to the principal officer.
- 6.2. An agency must be given the opportunity to comment on the subject matter of a report:
  - to allow for procedural fairness
  - to ensure that the Ombudsman has the correct facts.
- 6.3. Provisional reports are confidential and are to be done prior to any final reports on preliminary or full investigations. The final report will include the agency's and the complainant's comments on the provisional report and the Ombudsman's responses to these comments.
- 6.4. A provisional report should document:
  - details of the allegations
  - the facts that have been accepted
  - whether the allegations are within jurisdiction, and if they are not, whether a discretion has been exercised under the Ombudsman Act (e.g. section 16(1) gives the Ombudsman discretion to investigate a complaint that is out of time)
  - whether the complainant's identity is released or not, and if not why not
  - a summary of the steps taken in the investigation
  - the standard of proof (if necessary)
  - provisional views on each underlying issue (as identified in the Investigation Plan)
  - the relevance of any applicable legislation, policy, or case law.
- 6.5. A provisional report should not document whether a matter has been assessed by or is being assessed by OPI, unless all relevant authorisations and permissions have been obtained.
- 6.6. Steps to be followed:
  - The Ombudsman must provide the principal officer of the agency with a provisional report if it contains adverse views about the agency's actions.
  - The principal officer is to be given at least 14 days in which to comment on the provisional report.

---

<sup>1</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

- 6.7. The provisional report should also be sent to the complainant. When this should occur is determined on a case-by-case basis (taking into account that the purpose of the provisional report is to provide procedural fairness and to ensure that the facts are correct). However, it is usually appropriate to allow the agency to respond first if the report is adverse to the agency. Once the agency has had an opportunity to respond, the Ombudsman may revise the provisional report. In either case, the provisional report or the revised provisional report must then be sent to the complainant and the agency for comment.

## 7. PRELIMINARY INVESTIGATION

Section 18(1) of the Ombudsman Act authorises the Ombudsman to conduct a preliminary investigation to decide whether a complaint should be subject to a full investigation.

Letters should usually be sent to the principal officer of the agency and to the complainant informing them that the Ombudsman is undertaking a preliminary investigation of the matter.

A preliminary investigation may be undertaken to establish if there is evidence of administrative error and to determine:

- details of the agency's actions
- reasons for the agency's actions
- whether the agency sought legal advice and, if so, what advice
- the complainant's actions
- the existence of evidence of any potential administrative error
- if there have been any other investigations into the matter.

Preliminary investigation can include:

- assessing the information provided by the complainant
- seeking a response from the agency
- asking the agency for a written report
- clarifying the response from the agency
- asking for more information from the complainant or the agency
- consideration of relevant legislation, regulations, policies etc
- meeting with agency officers
- inspecting files and documents
- visiting the site
- conducting interviews
- conciliation
- preparing a provisional report
- forwarding the provisional report to the agency and the complainant for comment
- preparing the final report on the preliminary investigation

## 8. FULL INVESTIGATION

A full investigation may be required for the following reasons:

---

This policy is a guide only. Staff must always refer to relevant legislation.

- a complaint has been received and it has been assessed as requiring a full investigation due to evidence of administrative error
- if the error is of such significance that it warrants being brought to the attention of the Minister
- if recommendations to remedy the error are likely to be required.

The Ombudsman must inform the principal officer of the agency and the complainant before commencing a full investigation

The Ombudsman must inform the agency's principal officer before proceeding with a FULL INVESTIGATION (section 18(1a) of the Ombudsman Act).

The principal officer:

- is not always the chief executive officer – see section 3 definition
- if the agency is a council, the principal officer is the Mayor
- if the agency has a controlling board, the principal officer is the presiding officer of the board
- if the agency is a government department, the principal officer is the chief executive.

A full investigation must:

- include details of the complaint made and (if appropriate) the name of the complainant
- state what the agency is to do in response to the letter – by when it is required to respond, and if it needs to answer any specific questions or provide any specific information.
- obtain as many relevant facts as possible from the complainant, and supporting documentation
- put the complaint to the agency for a response
- consider relevant legislation, policies, and case law
- clarify the agency's response (if necessary)
- seek more particulars from the complainant (if necessary)
- put the agency's response to the complainant for comment
- consider whether conciliation may be appropriate at this stage
- meet with the agency or conduct an on-site inspection, if appropriate
- get all relevant documentation from the agency (call for (copies of) its files or attend the agency to inspect the files)
- interview witnesses if required
- prepare the provisional report
- forward the provisional report to the agency for comment
- forward the provisional report to the complainant (if appropriate) for comment
- consider the agency's and the complainant's responses to the provisional report
- prepare the final report

---

This policy is a guide only. Staff must always refer to relevant legislation.

- if error is administrative error is found under section 25(1) and recommendations are made under section 25(2), the agency should be given a reasonable timeframe in which to indicate its acceptance of the recommendation(s) and a timeframe to implement it and report back to the Ombudsman
- the final report must be sent to:
  - the complainant
  - the agency
  - the relevant minister (if administrative error under section 25(1) is found - as required by section 25(3) of the Ombudsman Act )
- the investigation file should then be closed
- the matter should then be forwarded to the Recommendation Implementation Team for follow up on the agency's implementation of the recommendation(s).

## 9. REPORTING BREACH OF DUTY OR MISCONDUCT— section 18(5)

- 9.1. Section 18(5) of the Ombudsman Act requires the Ombudsman to report any evidence of breach of duty or misconduct on the part of an individual member, officer or employee of an agency to the principal officer of the agency.
- 9.2. If an individual is named in a provisional report, procedural fairness requires that they be given the opportunity to hear the allegations (or a summary of the allegations) against them and to answer them.
- 9.3. The provisional report should be sent to the named individual to give them the opportunity to respond to the allegations.
- 9.4. Officers are usually identified by name in a report where evidence of a breach of duty or misconduct by a member, officer or employee of an agency is to be reported under section 18(5) of the Ombudsman Act.

## 10. REPORTING TO THE COMPLAINANT

The Ombudsman must inform the complainant of the result of an investigation. See section 17(3) and section 27.

In addition, the Ombudsman must inform the complainant of the Ombudsman's opinion (and may make further appropriate comments) if:

- the complaint is investigated; and
- a recommendation is made; and
- the Ombudsman believes that the agency has not taken reasonable steps to implement the recommendation within a reasonable time (section 27(2)).

## 11. RECOMMENDATIONS IMPLEMENTATION

- 11.1. The Recommendation Implementation Team monitors the implementation of recommendations made after a full investigation. The principal officer of the agency must, at the request of the Ombudsman:
  - report back to the Ombudsman in the time allowed
  - report what steps have been taken to give effect to the recommendation, or

---

This policy is a guide only. Staff must always refer to relevant legislation.

- if no steps have been taken, report as to why no steps have been taken (see section 25(4)).

11.2. If no steps have been taken by the agency in the time allowed in a final report, the Ombudsman may report it to the Premier (section 25(5)).

11.3. Where the Ombudsman makes a report to the Premier, the Ombudsman may also forward that report to the Speaker of the House of Assembly and the President of the Legislative Council with a request that they put the report before their Houses (section 25(6)).

11.4. A final report must not document whether a matter has been assessed by or is being assessed by OPI, unless all relevant authorisations and permissions have been obtained.

## 12. PUBLICATION OF AN INVESTIGATION REPORT

The Ombudsman may have a report published if it is in the public interest (section 26). It may be published on the Ombudsman SA website and AustLII.

## 13. INVESTIGATIONS IN RESPONSE TO ICAC REFERRAL - section 24(3)

Ombudsman investigations in response to a referral from OPI/ICAC under **section 24(3)** of the ICAC Act are conducted in the usual manner under the Ombudsman Act.

Ombudsman investigations in response to a referral from OPI/ICAC under **section 24(2)(a)** of the ICAC Act are conducted under the ICAC Act using the Ombudsman's investigative powers under the Ombudsman Act. None of the jurisdictional limitations or other obligations under the Ombudsman Act apply in these investigations. Refer PART 6.

## 14. WHEN MAY THE OMBUDSMAN DECIDE TO DEAL WITH A COMPLAINT BY CONCILIATION?

When considered appropriate, the Ombudsman may attempt to use conciliation to resolve a complaint. The Ombudsman may do so in person or through an appropriately trained and delegated Ombudsman SA officer.

It is appropriate to attempt to conciliate a complaint if, for example:

- there does not appear to be a serious administrative error
- there is no public interest in the Ombudsman proceeding to a report and recommendation(s)
- the parties are amenable to conciliation.

It may be appropriate to engage an expert conciliator or mediator to facilitate conciliation of some complaints.

If satisfied that the subject of the complaint has been resolved by conciliation, the Ombudsman may decide not to continue investigating the complaint.