The Powers and Functions of the Ombudsman in relation to Local Government

An Information Paper

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INTRODUCTION

This information paper provides an outline for Council Members and staff of the Ombudsman’s powers in relation to local government and the Local Government Act 1999 (the Local Government Act). It has been prepared to help improve understanding of the scope of the Ombudsman’s powers and how they can be exercised in a Local Government context, and to assist those staff and members who may deal with inquiries and investigations by the Ombudsman and his officers.

POWERS UNDER THE OMBUDSMAN ACT 1972

What are the Ombudsman’s powers to investigate?

Section 13 of the Ombudsman Act 1972 (the Ombudsman Act) gives the Ombudsman the power to investigate “any administrative act”. Such investigation can be made either on receipt of a complaint, on a referral from Parliament, or on the Ombudsman’s own initiative.

The Ombudsman may investigate any administrative act, notwithstanding any enactment that provides that the administrative act is final or not to be appealed against, challenged, reviewed, quashed or called into question.

The Ombudsman Act provides the Ombudsman with three investigative functions, namely:

- to make a preliminary investigation of an administrative act for the purpose of determining whether a full investigation ought to be commenced;
- to carry out a full investigation into an administrative act; and
- to conduct reviews of the administrative practices of an agency to which the Act applies.

What is an “administrative act”??

An “administrative act” is defined (at section 3 of the Ombudsman Act) to mean:

“(a) an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency; or

(b) an act done in the performance functions conferred under a contract for services with the Crown or an agency to which this act applies,

but does not include –

(c) an act done in the discharge of a judicial authority; or

(d) an act done by a person in the capacity of legal adviser to the Crown;

(e) an act of a class declared by the regulations not to be an administrative act for the purposes of this definition.”

Under the Ombudsman Act, “agency” is defined to include Local Government Councils.

Clearly, many of the functions performed by Councils will be considered administrative acts for the purposes of the Ombudsman Act.
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There has been some discussion with the Ombudsman about what role, if any, he is able to have in assessing council “policy”.

It is clear that the Ombudsman does not replace the democratic and elected role of the Council in determining policy positions that may then be implemented by subsequent “administrative act” (or acts). In *Salisbury City Council v Biganovsky* (1990) 54 SASR 177 (‘Biganovsky’), the Supreme Court of South Australia decided that the Ombudsman has no jurisdiction under the Ombudsman Act to carry out investigations over matters of policy.

Having said this, the Court did note that the dividing line between what is a matter of policy, and what is a matter of administration, is not always obvious.

The Ombudsman will have an interest in any “administrative act” that informed a Council policy position and/or the administration of the implementation of the policy. So, for instance, the adequacy of the report that informed a council policy decision may well be reviewed. The Court also stated in Biganovsky that it is not improper for the Ombudsman to draw to the attention of a Council the fact that the manner in which a policy operates produces unreasonable or unjust outcomes. However, according to the Court in Biganovsky, the correct reading of the Ombudsman Act, is that “…it was not intended that matters of policy should be the subject of an opinion or recommendation of the [Ombudsman]” (Biganovsky at p 124) Accordingly, Councils should be aware that a large range of their functions, even those that go to the creation of policy, and its implementation, are likely to be subject to review by the Ombudsman.

**How can a complaint be made?**

Section 15 of the Ombudsman Act states that a complaint in respect of an administrative act may be made by any person or body of persons. Where the person who may have made a complaint about an administrative act has died, or is unable to make the complaint personally for some other reason, the complaint may be made by a person who is, in the Ombudsman’s opinion, a suitable representative of that person.

A complaint about an administrative act may, with the consent of that person, be made on behalf of that person by a member of Parliament and, with the consent of that person, that member may act on behalf of the person in and in connection with all matters relating to the complaint.

However, the Ombudsman must not entertain a complaint unless it is made by a person, or body of persons, directly affected by the administrative act to which the complaint relates.

Section 16 of the Act states that a complaint must not be entertained by the Ombudsman if it is made more than 12 months after the date on which the complainant first had notice of the matters alleged in the complaint, unless the Ombudsman is of the opinion that, in all the circumstances of the case, it is proper to entertain the complaint.

Section 17 states that the Ombudsman must not proceed with an investigation of a complaint if it appears that the person by or on whose behalf the complaint was made is an employee, and the complaint relates to an administrative act done by another in the capacity of an employer of that person.
Outcome of an investigation

The Ombudsman may make a broad range of findings following an investigation, including among other things, that the administrative act was ‘contrary to law’, that it was ‘unreasonable’ or that it was ‘wrong’.

If the Ombudsman decides that the complaint against the administrative act is justified, the Ombudsman can make recommendations to rectify the situation. If those recommendations are ignored by the Council, he can report that failure to the Minister, the Premier and the Parliament. The implications of ignoring the recommendations are significant and likely to lead to swift Ministerial action.

These matters are dealt with in more depth under the heading ‘Effect of an Investigation by the Ombudsman’ later in the paper.

POWERS DRAWN FROM THE ROYAL COMMISSION ACT 1917

Section 19 of the Act states that for the purposes of an investigation, the Ombudsman has the powers of a commission as defined in the Royal Commissions Act 1917 (the Royal Commissions Act) and the Royal Commissions Act applies as if the Ombudsman were a commission, and the subject matter of the investigation were set out in a commission of enquiry issued by the Governor under the Royal Commissions Act.

Section 10 of the Royal Commissions Act states that a Royal Commission has the power to:

- enter upon and inspect any land, building, place, or vessel, and inspect any goods and other things, the entry upon or inspection of which appears to them or him to be requisite;
- require, by summons, the attendance of any such persons that it thinks fit to call before them, and require answers or returns to such inquiries as it thinks fit to make;
- require, by summons, the production of, and inspect, any books, papers, documents or record;
- inspect any books, papers, documents and records produced before it, and retain them for such reasonable periods as it thinks fit, and to make copies of such matters therein as are relevant to the inquiry or take extracts of such matters; and
- examine any witnesses on oath, affirmation or declaration.

Clearly, these powers are extensive. Essentially, a commission, and the Ombudsman, are granted the powers analogous to a court or tribunal.

Documents subject to Legal Professional Privilege

Discussions between the Office of the Ombudsman and the LGA have highlighted a distinct dispute between us over whether documents subject to ‘legal professional privilege’ must be provided to the Ombudsman upon request.

Legal professional privilege is a legal rule that protects confidential communications passing between a lawyer and her or his client from being revealed, if they have been made for the dominant purpose of seeking legal advice, or for preparing for actual or contemplated
litigation. The privilege attaches to the Council which receives the legal advice, not to the lawyer who provided it. It is therefore open to a Council to ‘waive’ its privilege and provide the documents sought, although this should not be done lightly.

A Council may, for example, decide to waive privilege by sharing a legal advice with other Councils or State Agencies, including the Ombudsman. This should only be done after careful consideration and in a situation where the legal advice is not intended for use in litigation or does not relate to an industrial matter.

As discussed above, the Ombudsman Act and the Royal Commissions Act provide extensive powers to the Ombudsman to inspect books, papers, documents and records as part of any investigation into an administrative act of the Council.

However, in the view of the LGA (and its legal advisers), neither the Ombudsman Act, nor the Royal Commissions Act, contain an express provision to override a council’s claim of legal professional privilege, which the LGA believe is necessary to override the privilege. In the absence of such an express provision, the LGA does not believe that the Ombudsman has the power to compel the production of documents that are the subject of legal professional privilege.

The Ombudsman disagrees with the LGA’s view on this matter and says that he has advice from the Crown Solicitors Office, that he is obliged to accept, that the Ombudsman Act does override legal professional privilege, to the extent that councils are required to furnish him with their legal advice.

The Executive Director of the LGA has written to the Ombudsman in an attempt to resolve the dispute over the correct interpretation of the law on this point.

Nevertheless, as indicated earlier, it remains open to a Council to provide the documents if it is in the best interests of the Council to do so.

POWERS UNDER THE LOCAL GOVERNMENT ACT

As noted above, the Ombudsman’s powers in relation to the administrative acts of Local Government Councils are very broad, and almost every act, decision and function performed by a Council pursuant to the Local Government Act (or any other relevant Act, for that matter) could potentially be the subject of an investigation by the Ombudsman.

However, a number of sections of the Local Government Act have been enacted to explicitly grant to the Ombudsman powers over certain matters. These sections relate to:

• information from closed Council meetings under Part 3 and 4 of the Local Government Act; and

• Sections 187A and 187B of the Local Government Act in relation to the declaration of rates.

(i) Ombudsman’s power to investigate closed Council and Committee meetings

Sections 90 and 91 of the Local Government Act provide the power to Councils to exclude the public from meetings of Council or Council Committees under certain conditions, and to then prevent access to the minutes of such meetings.

The Local Government Act provides that such actions may be reviewed by the Ombudsman. Therefore, in addition to providing the Ombudsman with the power to conduct external reviews of decisions by Council in respect of requests for access to information, Section 93A
and 94 of the Local Government Act specifically empower the Ombudsman to carry out an investigation into closed Council or Committee meetings.

Section 93A states that the Ombudsman may, if it is considered to be in the public interest to do so, conduct a review of the practices and procedures (or any aspect of the practices or procedures) of one or more Councils or Council Committees under Parts 3 or 4 of the Local Government Act.

Section 94 specifically assigns the Ombudsman the role of investigating complaints where a Council has excluded the public from a Council meeting, or where a Council has refused to provide copies of documents provided to a Council meeting. The Ombudsman is able to carry out a review if, upon receipt of a complaint, it appears to the Ombudsman that a Council may have unreasonably excluded members of the public from its meetings or unreasonably prevented access to documents under Part 4 of the Local Government Act.

At the conclusion of a review under Sections 93A and 94 of the Local Government Act, the Ombudsman may prepare a report on any aspect of the review. A report may make recommendations to a Council or Councils. The Ombudsman must supply a copy of a report to the Minister for Local Government or any Council that was under review, or Council committee that was under review. The Ombudsman may also publish any report, a part of any report, or a summary of any report, in such a manner as the Ombudsman thinks fit.

The effect of an investigation by the Ombudsman and a recommendation in a report to Council could be that the information that was held confidentially is provided to the public. Where a Council chooses not to follow this recommendation it may find itself the subject of a Ministerial investigation as the Minister would receive the report provided to the Council by the Ombudsman.


Section 187A of the Local Government Act states that the Ombudsman may, if he considers it to be in the public interest to do so, conduct a review of the administrative practices and procedures relating to rating (or any such practices or procedures) of one or more Councils. The Ombudsman may, in carrying out a review under this section, exercise his powers subject to such modifications as may be necessary, or as may be prescribed. At the conclusion of a review, the Ombudsman may prepare a report on any aspect of the review.

Similarly, Section 187B of the Local Government Act states that the Ombudsman may, on receipt of a complaint or on his own initiative, carry out an investigation if it appears that a Council’s declaration of any rate or service charge may have an unfair or unreasonable impact on a particular rate payer. If, at the conclusion of an investigation, the Ombudsman makes an adverse finding against the Council, the Ombudsman must prepare a written report on the matter. The report may make recommendations to the Council. The Ombudsman must supply the Council with a copy of the report, and may also publish the report, a part of the report, or a summary of the report, in such manner as the Ombudsman thinks fit.

Section 187B of the Local Government Act also requires that if the report makes any recommendations as to the action that should be taken by the Council, the Council must, within two months after the receipt of the report, provide a written response to the Ombudsman and if relevant the person who made the complaint. Also, a Council may grant a rebate or omission of any rate or service charge or of any charge, find or interest, if the Ombudsman recommends that the Council do so on the grounds of special circumstances pertaining to a particular rate payer.
In summary, these sections of the Local Government Act broaden to an even further extent the powers of the Ombudsman in relation to the declaration of rates under the Local Government Act, and extend the requirements placed on Councils following an investigation by the Ombudsman.

**EFFECT OF AN INVESTIGATION BY THE OMBUDSMAN**

At the end of an investigation, the Ombudsman may prepare a report on his findings if the investigation finds that the administrative act:

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

Under Section 25(2) of the Ombudsman Act, if the Ombudsman is of the opinion that further specified action should be taken by the Council, then the Ombudsman must report this opinion and reasons for it back to the Council Mayor or Chairperson and provide a copy of the report to the Minister for Local Government. (Note that the Ombudsman Act mandates that the report must be made to the 'principal member of the council').

A report will be prepared where the Ombudsman is of the opinion that:

- the subject matter of the investigation should be referred back to the appropriate agency for further consideration; or
- action can be, and should be, taken to rectify, or mitigate or alter the effects of, the administrative act to which the investigation related; or
- the practice in accordance with which the administrative act was done should be varied; or
- any law in accordance with which or on the basis of which the action was taken should be amended or appealed; or
- the reason for any administrative act should be given; or
- any other steps should be taken.

The Ombudsman may make recommendations that the Ombudsman thinks fit.
Where the Ombudsman has made a finding under Section 25(2) of the Act and a recommendation has been made, the 'principal member of the Council' (Mayor or Chairperson) must, if requested, report to the Ombudsman within the specified time on what steps have been taken to give effect to the recommendation and, if no such steps have been taken, the reason for the inaction.

If it appears to the Ombudsman that appropriate steps have not been taken to give effect to the recommendation made, the Ombudsman may make a report on the matter (containing a copy of the earlier report and the recommendation) to the Premier. Where the Ombudsman provides a report to the Premier, the Ombudsman may forward copies of the report to the Speaker of the House of Assembly and the President of the Legislative Council with a request that the report be laid before their respective Houses.

Clearly, this would have an adverse effect on any Council which becomes the subject of a report to the Houses of Parliament. Therefore, it is certainly preferable to comply with any recommendations made by the Ombudsman to avoid any negative publicity that may be generated as a result of non-compliance.

Can a report be published?

Section 26 of the Ombudsman Act states that if the Ombudsman considers it to be in the public interest or in the interest of an agency to do so, the Ombudsman may have a report on an investigation published in such a manner as "the Ombudsman thinks fit".

The Ombudsman Act also requires the Ombudsman to inform a complainant of the result of an investigation. Section 27(2) of the Act states:

“If –

(a) the complaint is investigated; and
(b) the Ombudsman makes a recommendation in relation to the subject matter of the complaint; and
(c) the Ombudsman is of the opinion that reasonable steps have not been taken to implement the recommendation within a reasonable time,

the Ombudsman must inform the complainant of that opinion and may make any further comments in the matter that appear appropriate in the circumstances.”

Once a complainant is provided with a copy of a report made by the Ombudsman, there is no confidentiality attached, and it can potentially be published to the “world at large” (including the media).

Can the Ombudsman compel action?

Based on his powers under the Ombudsman Act, the Ombudsman does not have the power compel a Council to adopt any recommendations made. However, as noted above, the threat of negative publicity may lead an agency to follow any such recommendations.

The Ombudsman can stop a Council from proceeding with an administrative act for up to 45 days in certain situations - see section 19A of the Ombudsman Act.
Effect of a Ministerial Investigation – Section 272 of the Local Government Act 1999

Although under the Ombudsman Act the Ombudsman cannot compel action, the Minister for Local Government can under the Local Government Act.

Section 272 of the Local Government Act states:

“(1)(a) If the Minister for Local Government has reason to believe –

(i) that a council has –

(A) contravened or failed to comply with the provision of this or another Act; or

(B) failed to discharge a responsibility under this or another Act; or

(ii) that an irregularity has occurred in the conduct of the affairs of a council (in relation to matters arising out of this or another Act); or

(b) the Minister is empowered to act under this section on the basis of another provision of the Act,

the Minister may appoint an investigator or investigators to carry out an investigation and to report on the matter.”

An investigator may, for the purposes of an investigation:

- require a member or employee of the Council to answer, orally or in writing, questions put by the investigator to the best of the member's or the employee's knowledge, information and belief;

- require a person to whom questions are put to verify the answers to those questions by declaration;

- require a person to produce for examination by the investigator books, papers or other records relevant to the subject matter of the investigation; and

- retain books, paper or other records produced for such reasonable period as the investigator thinks fit and make copies of any of them or for any of their contents.

To refuse to comply with this requirement is an offence with a maximum penalty of $10,000. Further, a person is not excused from answering a question or producing books, papers or other records on the grounds that to do so might tend to incriminate a person or make the person liable to a penalty.

At the conclusion of an investigation under Section 272, the investigator or investigators must present a written report to the Minister of Local Government on the results of the investigation. A copy of the report must be supplied to the Council and any recommendations or orders made by the Minister compel a Council to comply.

Section 273 of the Local Government Act states that the Minister for Local Government may, on the basis of a report from the Ombudsman under the Act, take action. The Minister may take any of the following action:

- make recommendations to the Council;
• if the Minister considers:
  o that a Council has contravened or failed to comply with the provision of this or another Act; or
  o that a Council has failed to discharge a responsibility under this or another Act; or
  o that an irregularity has occurred in the conduct of the affairs of a Council (in relation to matter arising under this or another Act),

      may give directions to the Council to rectify the matter or to prevent a reoccurrence of the act, failure or irregularity.

• if the Minister considers there has been:
  o a serious contravention or failure on the part of the Council to comply with the provision of this or another Act;
  o a serious failure on the part of a Council to discharge a responsibility under this or another Act; or
  o a serious irregularity in the conduct of affairs of a Council (in relation to matters arising out of this or another Act);

      and accordingly that the Council should be declared as a “defaulting council” – may recommend to the Governor that the Council be declared to be a “defaulting council”.

Clearly, this would have very serious consequences for a Council if such findings were made by the Minister for Local Government.

SUMMARY

As public institutions, Councils rely on good public perceptions to maintain their legitimacy. It is not in the interests of individual Councils, or of the wider local government sector, for adverse reflections to be made against Local Government’s administrative and governance practices.

The office of the Ombudsman was created by the State Parliament to ensure that both State and Local Government bureaucracies apply good administrative practices and do not abuse their extensive powers over the citizens of South Australia. These objectives are likely to be shared by South Australian Local Government. Consequently, it is in the interests of Councils, their staff and their ratepayers for investigations by the Ombudsman to be met with full cooperation, and the conclusions of those investigations to be implemented speedily and fully.

The LGA intends to continue openly communicating with the Acting Ombudsman, Mr Ken MacPherson, and his staff, and with his successor, to ensure that our mutual objective of improving administrative practices within our level of government continues.