

Attachment 2 – Additional contextual information

The NSW Ombudsman is an oversight agency that is independent of the NSW Government and reports directly to the NSW Parliament. Under the *Ombudsman Act 1974 (NSW)*, any person has a legal right to complain to us about the conduct of many (but not all) NSW public authorities.

People can complain to us about the conduct of NSW Government Departments and agencies, including NSW Health and the Department of Communities and Justice.

They generally cannot complain to us about the conduct of the NSW Police Force or its officers. Nor can they complain to us about the conduct of Commonwealth authorities. When someone contacts us wishing to complain about the conduct of a person or body not within our jurisdiction, we seek to assist and/or redirect them wherever possible.

The NSW Ombudsman has received complaints relating to hotel quarantine and related actions in NSW

The NSW Ombudsman's office has received a number of complaints and enquiries relating to hotel quarantine and related actions in NSW, as detailed in Attachment 1.

While the number of complaints we have received has not been voluminous, that number will not capture the full extent of likely complaints

The complaints received by us will not reflect the full level or nature of likely complaint about hotel quarantine and related matters. This is because:

- (a) The NSW Ombudsman has a limited jurisdiction, and many complaints in NSW relating to hotel quarantine and related matters are likely to be ones that we would not receive and handle.
- (b) It has been challenging to determine the right avenues (internal and external) for making and resolving a complaint.
- (c) Initially, those subject to hotel quarantine in NSW were not informed by those detaining them of their right to complain to us, or to other relevant oversight bodies.
- (d) The NSW Ombudsman's Office itself has been disrupted by COVID 19, and while we maintained a front-line complaints-handling service throughout, our accessibility may have been impacted.

Each of these factors is expanded upon below.

The NSW Ombudsman has a limited jurisdiction, and many complaints in NSW relating to hotel quarantine and related matters are likely to be ones that we would not receive and handle

As noted above, the NSW Ombudsman does not have jurisdiction to receive and handle complaints about all of the persons and bodies involved in hotel quarantine and related actions.

In particular, the NSW Ombudsman has no jurisdiction to receive complaints about the conduct of a Minister. As the Public Health Orders that gave effect to the quarantining arrangements were made by the NSW Minister for Health, any complaints about the making of those Orders or the terms in which they were made are not complaints that we are able to receive and handle.

Nor does the NSW Ombudsman have jurisdiction to receive complaints about the NSW Police Force and its officers. That is particularly relevant in the New South Wales context, as those subject to mandatory quarantining upon arrival into New South Wales (whether from overseas or, more recently, from Victoria) have been effectively placed, by relevant Public Health Orders, under the control and direction of the NSW Police Commissioner.

Similarly, the exclusion of the NSW Police Force from our jurisdiction means that we cannot receive and handle complaints about enforcement of Public Health Orders by the NSW Police Commissioner or officers, including their use of discretion.

Even for bodies that are generally within our complaints jurisdiction, complaints about certain conduct by those bodies may not be within our jurisdiction (for example, complaints of alleged violations of privacy, which are dealt with by the NSW Privacy Commissioner). And even when both the relevant body and the relevant conduct is within our jurisdiction, the complaint may still be one that is better made or referred to another body (for example, complaints about clinical management or care, which are dealt with by the Health Care Complaints Commission).

It has been challenging to determine the right avenues (internal and external) for making and resolving a complaint in respect of any particular conduct or issue

On 17 March 2020, the NSW Ombudsman wrote to our Parliamentary oversight committee and to the NSW Government highlighting the importance of continued independent oversight in the event that public agencies may be called on to exercise extraordinary powers in response to the spread of COVID 19.¹

In that letter, the NSW Ombudsman wrote:

“[T]he role and ability of the Ombudsman to continue to oversight the actions of Government agencies in real time and to ensure they remain transparent and accountable may, in some respects, become more acute [during the Covid-19 pandemic]. This is particularly so in circumstances where some Government agencies may be exercising additional powers over individual citizens.

¹ Letter sent by email from the NSW Ombudsman, Michael Barnes, to the Chair, Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, the Premier of New South Wales, and the Special Minister of State dated 17 March 2020.

It is especially important that the arrangements and treatment of those in detention are lawful, fair, transparent and accountable. This applies both to those who are in existing correctional centres and youth justice facilities, as well as to those who may in future face a deprivation of liberty through quarantining or other coercive restrictions. The right of individuals to complain to an independent and impartial body should also be respected.

...

To the extent that the NSW Government or its agencies move to introduce or exercise special powers or restrictions over other citizens, we will also be seeking to ensure that any individuals affected have access to our services.”

We first became aware that mandatory quarantining was introduced a week later as a result of media articles.

Through our own inquiries we became aware that the Commonwealth had made certain directions relating to COVID 19, that one hotel (the Swissotel Sydney) had been declared a “Human Health Response Zone”² pursuant to the *Biosecurity Security Act 2015 (Cth)*, and that Commonwealth personnel appeared to have some role in the quarantine regime.³

Our office contacted the NSW Law Enforcement Conduct Commission and the office of the Commonwealth Ombudsman, both of whom had been similarly uninformed of the nature of the arrangements.

We commenced initial discussions with the Commonwealth Ombudsman about whether it may be possible for one or other of us to delegate powers to the other, to enable a single point of contact and complaint for those in quarantine, irrespective of whether the complaint concerned conduct of State or Commonwealth agencies. At that stage it was still not clear which agencies were involved and their respective roles.

On 30 March 2020, the Ombudsman wrote again to the NSW Government seeking clarity as to the precise legal basis of the quarantine arrangements and seeking confirmation as to whether those in quarantine had been provided with information about their rights to complain to relevant independent oversight bodies.⁴ In that letter, the Ombudsman said:

“I understand from media reports that individuals have now been transported by officers of the NSW Police Force to the Covid-19 Quarantine Zones and are being kept continuously isolated in their rooms apparently for a period of 14 days.

I have spoken to the Commonwealth Ombudsman about this matter. At this stage, neither he nor I has received any advice from our respective Governments as to the precise legal basis under which those individuals are being held in the Covid-19

² [Biosecurity \(Human Health Response Zone\) \(Swissotel Sydney\) Determination 2020](#), 25 March 2020, repealed 30 April 2020.

³ See eg. SMH, “Residents not told cruise ship passengers would be quarantined in hotel” 26 March 2020, <<https://www.smh.com.au/national/nsw/residents-not-told-cruise-passengers-would-be-quarantined-in-hotel-below-20200326-p54e7v.html>>; Prime Minister, Media Release, “Update on coronavirus measures” 27 March 2020 <<https://www.pm.gov.au/media/update-coronavirus-measures-270320>>.

⁴ Letter sent by email from the NSW Ombudsman, Michael Barnes, to the Secretary and the General Counsel, Department of Premier and Cabinet dated 30 March 2020.

Quarantine Zones, or the respective roles of Commonwealth and State public authorities within them.

Accordingly, it is unclear whether, and the extent to which, either or both of us may have jurisdiction in respect of the administration of those Quarantine Zones and of the conduct of public authorities and officials within them.

Nor is it clear whether those being held in the zones have been informed of, and given the ability to exercise, their right to complain to a relevant independent oversight body (whichever that might be). At this stage, it does not appear that any individual being held in the Covid-19 Quarantine Zone has attempted to contact my office.

The detention and enforced isolation of Australian citizens by the State, outside the ordinary processes of the criminal justice system, is an extraordinary measure only available during periods of extraordinary emergency. I appreciate that we are currently in such a time.

However, that does not obviate the need for external oversight. Indeed, in the absence of normal judicial processes, the need for such oversight may be more acute.”

In the meantime, a number of NSW Public Health Orders were made and media reports appeared indicating that different quarantining hotels were now being established under NSW legislation.

Again, the NSW Ombudsman received no briefing, notification or other information regarding the legal framework, designation or location of particular hotels, number of persons quarantined, roles of NSW agencies and Commonwealth personnel, details of any internal or external complaint avenues, or any other proposed oversight arrangements in place to ensure appropriate transparency and accountability.

In the days and weeks that followed, the NSW Ombudsman took steps to identify and then engage with relevant government officials across various agencies to ascertain the legal status of the different quarantine hotels.

On 3 April 2020, the Ombudsman wrote directly to NSW Health seeking to understand its role in relation to designated quarantine facilities, and to obtain any related guidance, process and procedural documents, as well as details of what information was being provided to those in quarantine.⁵

By this time, our office had begun to receive a small number of complaints about treatment in quarantine. At that time, none of the agencies complained about had provided us with relevant contact details or information about their internal complaint resolution mechanisms to assist us to manage and resolve such complaints.

On 9 April 2020, the Department of Premier and Cabinet responded to acknowledge our earlier letter of 30 March 2020.⁶ The letter noted the gazettal of Public Health Orders and

⁵ Letter sent by email from NSW Ombudsman, Michael Barnes, to the Secretary NSW Health on 3 April 2020. NSW Health responded on 24 April 2020: Letter sent by email from the General Counsel NSW Health, to the NSW Ombudsman on 24 April 2020.

⁶ Letter sent by email from the General Counsel, Department of Premier and Cabinet to the NSW Ombudsman on 9 April 2020.

referred our correspondence to NSW Health and the NSW Police Force to provide us with further information.

The Ombudsman proceeded to seek engagement with relevant officers in NSW Health, NSW Police Force, the Department of Communities and Justice, and Treasury, all of whom were fully co-operative and willing to provide information to us, but none of whom appeared to have a clear understanding themselves of the totality of the arrangements being put in place or the precise roles and responsibility of other agencies.

Through that engagement we became aware that there were, in fact, two categories of 'quarantine facility' operating in New South Wales – those for persons with COVID 19 but not in need of in-hospital treatment (the 'Health hotels') and those for persons required to be quarantined under Public Health Orders upon entry to New South Wales (the 'Police hotels').

Nevertheless, even now there remain elements of the quarantining regime that are opaque to us. This includes the question of which Government agency is responsible for the conduct of hotel staff and other contracted personnel (including security staff). This is particularly relevant to us, as we generally have no direct jurisdiction to receive complaints about the conduct of private sector staff,⁷ but may do so if the complaint is (in effect) a complaint about the conduct of a relevant public agency – for example, in relation to its procurement and management of the services of those staff, or in its own handling of a complaint about those staff.

There is also some confusion in the advice provided to us by different agencies. For example, the NSW Police Force has told us that NSW Health is responsible for the health services provided at the 'Police hotels', while NSW Health has written to us stating that "NSW Health does not provide services at the [NSW Police Force co-ordinated] quarantine facilities".⁸

Initially, those subject to hotel quarantine in NSW were not informed by those detaining them of their right to complain to us or to other relevant oversight bodies

The right to complain to an independent external oversight body such as the Ombudsman is meaningful only if people are aware of that right and how they can exercise it.

It is apparent that, when the quarantining arrangements were first established, no information was provided to those being detained in quarantine as to their external avenues of complaint.

Such information is available, in very general terms, in the public domain (for example, on the Ombudsman's website). However, given the circumstances described above and the lack of transparency surrounding the roles and actions of particular agencies, even we have had significant difficulty in determining our own jurisdiction to receive and respond to various complaints from those in quarantine. It would be surprising to expect those

⁷ In some cases the NSW Ombudsman has been given statutory functions to oversight and receive complaints about private sector bodies and their staff, including privately-managed correctional facilities and community service providers that are funded by the Department of Communities and Justice.

⁸ Above n 5.

being held in quarantine to know their complaint rights unless they are explicitly informed.

On 7 April 2020, the Ombudsman wrote again to the NSW Government specifically to ensure that those being held in quarantine were being informed of their complaint rights.⁹ That letter stated:

“It is important that there be independent external oversight of the conduct of public officials in respect of the detention of Australian citizens by the State.

For the reasons detailed below, in my view, those responsible for detaining the incoming quarantined travellers must take reasonable steps to advise them of their right to make a complaint to my office if they wish to.

I would be grateful if you could nominate someone from within your department [Department of Premier and Cabinet] or NSW Health with whom we can discuss the discharge of that statutory responsibility.

My office has received a small number of contacts from or on behalf of persons being kept in the hotels who wish to complain about their treatment. I am aware from media reports, however, of numerous concerns being raised by or on behalf of the detained individuals. It appears that the lack of complaints being received by my office may reflect the fact that the people concerned have not been informed of their right to complain to the Ombudsman in respect of this matter.

The NSW Ombudsman does not have any jurisdiction to handle complaints from any person in relation to the making of the NSW Quarantine Order by the Minister or in the relation to the conduct of the NSW Commissioner of Police or any other member of the NSW Police Force in executing the Order. The Law Enforcement Conduct Commission has jurisdiction in relation to complaints against police officers. The Acting Chief Commissioner [of the LECC] has assured me his staff stand ready to discharge their statutory responsibilities in relation to such matters.

I do, however, have jurisdiction to handle complaints about the conduct of other NSW public officials. This includes health or biosecurity officials of NSW Health. It also includes staff of the Department of Communities and Justice, for example in respect of the discharge of child protection responsibilities.

I would be grateful if you could please take steps to ensure that all detainees in the quarantine hotels are informed of their right to complain to the NSW Ombudsman in respect of those matters, and that they are provided with the means of doing so. Could you please let me know when that has been done.”

The letter drew attention to section 12(3) of the Ombudsman Act 1974 (NSW), which provides that:

“Where a person is detained by, or in the custody of, a public authority and informs the public authority or another person having superintendence over him or her that he or she wishes to make a complaint to the Ombudsman, the public authority or other person so informed shall –

- (a) take all steps necessary to facilitate the making of the complaint, and*
- (b) send immediately to the Ombudsman, unopened, any written matter addressed to the Ombudsman.”*

⁹ Letter sent by email from the NSW Ombudsman, Michael Barnes, to the Secretary and the General Counsel, Department of Premier and Cabinet dated 7 April 2020.

Following subsequent contact with officials in NSW Health and NSW Police Force, the information sheets those agencies were providing to new arrivals in quarantine were amended to include an explicit reference to their right to complain to the NSW Ombudsman (we well as to the Law Enforcement Conduct Commission, where the complaint concerned the NSW Police Force).

In this regard, we should emphasise that the officials with whom we spoke were universally accommodating of our requests, and willing to assist us to the best of their knowledge and ability. There is no suggestion that relevant information was intentionally not disclosed to those being held in quarantine; it appears instead that the need to inform those being detained of their rights had simply not previously been considered.

The NSW Ombudsman's office itself has been disrupted by COVID 19, and while we maintained a front-line complaints handling service throughout, our accessibility was impacted.

During all of this, the NSW Ombudsman's Office was, like all workplaces, also being impacted by the COVID 19 pandemic.

On 18 March 2020, as a result of a confirmed case of COVID 19 in our building and an inability at that time to undertake any tracing to determine possible contact with our staff (in lifts, common areas, lobby cafes, etc) we made the decision to close our office for 14 days. This decision was made to address the risk that one of our staff may have come into contact with the infected person and been infected as a result; if that were the case, closure of the office to staff would mitigate the risk of further spread. (Thankfully, no staff of the NSW Ombudsman's Office has been diagnosed with COVID 19.)

Before the two weeks concluded, however, the public health guidance had shifted significantly, and based on that advice staff continued to work from home.

While our office has since re-opened to staff on a highly restricted basis and subject to COVID-safe protocols, the NSW Ombudsman's Office is continuing to operate on the basis that staff are encouraged to work from home if they can.

The impact of moving from entirely office-based to a remote-working environment has been significant. The NSW Ombudsman is a small agency that lacked the resources and infrastructure necessary to support broad-scale remote-working. It has taken considerable effort and investment, particularly in IT enhancements, to enable our services to be provided at scale under these new working conditions. This effort and investment continues.

Nevertheless, throughout the entire period we have been able to maintain an essential front line complaints-handling service.

On 5 April 2020 the Ombudsman posted a message to stakeholders and the public on our website. That message is annexed in full at the end of this Attachment.

As noted in the Ombudsman's public message, although our accessibility and service levels have been considerably impacted by COVID 19, priority was given to maintaining services for those people who may be particularly vulnerable in the current circumstances, and within that category we prioritised those complaints that raise serious

concerns requiring rapid response. That included complaints received from those being detained in corrective centres, youth justice centres and quarantine facilities.

Even so, however, it is possible that some who might otherwise have wished to complain to us who did not do so because of the limitations on our service provision during this period. For example, for some time following our office shut-down, any person wishing to make a complaint by phone (other than from the dedicated phone line provided to detainees in all correctional facilities and youth justice centres) was required to leave a voicemail message for staff to later assess, triage and subsequently call back.¹⁰

¹⁰ This arrangement was put in place to protect staff privacy, to manage work health and safety obligations to staff working in isolation from their homes, and to ensure complaints could be triaged for prioritisation based on urgency and vulnerability. Subsequent enhancements in technology now support alternative arrangements.

Annexure: Public message from the NSW Ombudsman published 5 April 2020

<https://www.ombo.nsw.gov.au/covid-19/nsw-ombudsman-covid-19-message>

Message to stakeholders and the public from the NSW Ombudsman

A public health emergency of the kind we now face calls for exceptional, even unprecedented, measures.

Yet the rule of law, norms of reasoned decision-making, and respect for human rights do not become optional, even in times of crisis. Adherence to those core values is not inconsistent with the taking of necessary measures. Indeed it is complementary as it helps to engender the trust, co-operation, and in some cases sacrifice, that will be needed for those measures to be effective.

Nor does Government accountability cease during times of emergency.

Particularly where extraordinary powers are conferred on Government officials to deal rapidly and flexibly with a crisis in the absence of usual mechanisms of Parliamentary oversight, the role of Parliament's 'watchdog' agencies in assuring continued accountability may become even more acute.

Our focus during this crisis

In light of the disruptions to our own services at this time, over the last week or so my office has had to more rigorously prioritise our work. We apologise to members of the public and our stakeholders who may be impacted by delay and disruption.

However, our primary focus has been maintaining our services for those people who may be particularly vulnerable at the present time, and within that category we are prioritising those complaints that raise serious concerns requiring rapid response.

Supporting vulnerable people

It is clearly imperative that rapid and broad-scale action be taken to contain the spread of COVID-19, and achieving that objective is in the interest of all of us.

However, in both the design of measures toward that objective, and especially in their practical implementation, careful regard must be given to those in our community who are particularly vulnerable.

There are those who may be especially vulnerable to the virus itself. We know, for example, that those who are already being held in detention, those accommodated in group homes and institutional settings, including the aged and people with a disability, as well as our First Nations communities, may be more vulnerable to this viral contagion.

Viruses like COVID-19 spread especially quickly in closed spaces, as recent outbreaks on cruise ships have demonstrated. The risk is greater the more crowded such spaces are. Other pre-existing conditions that might increase the risks associated with contracting COVID-19 may also be more prevalent among these populations. It is appropriate that these special vulnerabilities be taken into account when deciding what measures should be taken to protect these communities.

There are also those more vulnerable to the actions that are being taken to combat the pandemic.

If people in group homes, residential facilities or detention centres are not being visited as frequently or at all by family members, volunteers, official community visitors and so on, this will reduce both informal and formal oversight against potential abuse or neglect.

Social distancing requirements will see families increasingly confined together at close quarters, in circumstances that may be increasingly pressured by the emotional impacts of social isolation, health anxiety, job loss and financial distress. The demands on public agencies and community service providers responding to homelessness, domestic violence, and child protection needs can, sadly, be expected to increase. And this may happen at the same time as their own services are being severely disrupted by the pandemic.

The full extent of these impacts may be hidden until well after the pandemic has passed. It is imperative that such matters be considered now, when designing and especially when implementing measures to combat contagion. It is also essential that relevant agencies and service providers continue to be supported to reach out and respond to the needs of those who may face collateral harm from the measures being taken to address COVID-19.

Maintaining an external complaint avenue

The NSW Ombudsman's complaints service will continue to operate throughout this current emergency.

We are, however, carefully triaging the contacts we receive. This means that vulnerable complainants raising serious concerns that need urgent attention are being dealt with first.

In an emergency, public confidence is more important than ever, and the continued provision of an external avenue of complaint can assist to maintain that confidence. It can provide a credible and independent source of information and assurance to affected individuals that actions are both lawful and reasonable. Of course, it can also provide a mechanism for addressing concerns if that is not the case.

We thank all complainants, and all members of the public, for their patience as we work to maintain our services during this challenging time.

Information for the public and our stakeholders

On this website is some detailed practical information for the public, as well as public agencies and other stakeholders, regarding how they can continue to access our services.

Please note, however, that the NSW Ombudsman has a limited legal jurisdiction, and we can only receive complaints about the certain conduct of NSW public authorities and of community service providers that are funded by the NSW Government. The information below includes contact details for other Ombudsman and oversight bodies, which may be able to receive complaints and answer your queries about other matters.

As this situation remains fluid and is evolving rapidly, we will continue to update the information below on our website.

Michael Barnes
NSW Ombudsman