

# Practice Direction

## NSW Ombudsman Investigations

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### Introduction

This Practice Direction explains how the Ombudsman exercises the powers set out in the *Ombudsman Act 1974 (Act)* when conducting an investigation under that Act.

In an Ombudsman investigation:

- public authorities, service providers or employees of service providers may be required to provide documents or things or answer questions
- the Ombudsman may hold an inquiry exercising *Royal Commissions Act 1923 (RCA)* powers and summons public authorities, service providers and private individuals to provide documents or give evidence on oath or affirmation
- any person may also voluntarily provide documents or information.

Ombudsman investigations are conducted in the absence of the public.

You are receiving this Practice Direction because the Ombudsman (or a delegated officer) has issued you with one or more of the following:

- a Notice to produce documents<sup>1</sup>
- a Notice to provide a written statement of information<sup>2</sup>
- a Notice to provide an oral statement of information, and for that purpose to a specified time and place to give that statement (i.e. to attend an interview)<sup>3</sup>
- a Notice to produce things<sup>4</sup>
- a Notice of entry (to enter and inspect premises)<sup>5</sup>
- a Summons to attend to give evidence on oath or affirmation<sup>6</sup>
- a Summons to attend and produce documents<sup>7</sup>

## Producing documents to the Ombudsman

1. The Ombudsman may give a Notice requiring that documents be produced to the Ombudsman for the purposes of an Ombudsman investigation.<sup>8</sup>
2. A Notice may be given to:
  - a. any public authority<sup>9</sup> (which may be an entity or an individual)
  - b. any service provider<sup>10</sup> and any employee of a service provider.
3. A Notice may be given to any public authority or service provider (or employee), irrespective of whether that person's conduct is the subject of the investigation or is capable of being the subject of an Ombudsman investigation.<sup>11</sup>
4. The Notice will describe the documents that must be produced. 'Document' means any record of information, and includes:
  - a. anything on which there is writing, or
  - b. anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
  - c. anything from which sounds images or writings can be reproduced with or without the aid of anything else, or a map, plan, drawing or photograph.<sup>12</sup>

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<sup>1</sup> Under s18(1)(b) of the *Ombudsman Act 1974 (Act)*.

<sup>2</sup> Under s18(1)(a) of the Act.

<sup>3</sup> Under s18(1)(a) and 18(2)(a) of the Act.

<sup>4</sup> Under s18(1)(b) of the Act.

<sup>5</sup> Under s20 of the Act.

<sup>6</sup> Under s19(2) of the Act and *Royal Commissions Act 1923 s8*.

<sup>7</sup> Under s19(2) of the Act and *Royal Commissions Act 1923 s8*.

<sup>8</sup> Act s18 (sometimes referred to as a Section 18 Notice).

<sup>9</sup> 'Public authority' is defined in s5(1) of the Act. Under s246 of the *Crimes (Administration of Sentences) Act 1999*, the definition of public authority also extends to private managers of NSW correctional facilities.

<sup>10</sup> 'Service provider' is defined in s4(1) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

<sup>11</sup> For example, the conduct of some public authorities is excluded by schedule 1 of the Act such that it cannot be made the subject of investigation by the Ombudsman.

<sup>12</sup> *Interpretation Act 1987* Sch 4 (definition of 'document').

5. Documents described in the Notice must be produced if they are in the possession of the person served, or can be obtained by the person served (either unaided or by directing someone else to provide them with the documents or information). There are very few grounds on which someone can object to producing documents. This is explained in [Objections to providing material or evidence](#).
6. Where possible, documents and information should be collated by someone other than an individual:
  - a. whose conduct is material to the Ombudsman's investigation
  - b. who is or may reasonably be the subject of an Ombudsman investigation, or
  - c. who may reasonably be required to give evidence to the Ombudsman in an investigation.
7. When providing documents:
  - a. electronic documents must be provided in their native electronic format, and
  - b. original hard copy documents must be scanned and produced in a digital format, usually in searchable Portable Document Format, i.e. PDF or PDF/Abut where compliance with the above is not practicable, Ombudsman staff will assist in assessing the most appropriate format for production.

## Providing a written statement of information to the Ombudsman

8. The Ombudsman may give a Notice to a public authority, service provider or employee of a service provider requiring them to provide a written statement of information for the purposes of an Ombudsman investigation.<sup>13</sup>
9. A Notice may be given to:
  - a. any public authority<sup>14</sup> (which may be an entity or an individual)
  - b. any service provider<sup>15</sup> and any employee of a service provider.
10. A Notice may be given to any public authority or service provider (or employee), irrespective of whether that person's conduct is the subject of the investigation or is capable of being the subject of an Ombudsman investigation.<sup>16</sup>
11. The Notice will specify the matters the statement must cover.
12. There are very few grounds on which someone can object to providing information to the Ombudsman. This is explained in [Objections to providing material or evidence](#).
13. Someone who is required to provide a statement of information must not evade questions or resort to technicalities when providing information. If the Ombudsman is dissatisfied with a person's response, that person may:

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<sup>13</sup> Act s18 (sometimes referred to as a Section 18 Notice).

<sup>14</sup> 'Public authority' is defined in s5(1) of the Act. Under s 246 of the *Crimes (Administration of Sentences) Act 1999*, the definition of public authority also extends to private managers of NSW correctional facilities.

<sup>15</sup> 'Service provider' is defined in s4(1) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

<sup>16</sup> For example, the conduct of some public authorities is excluded by schedule 1 of the Act and cannot be made the subject of investigation by the Ombudsman.

- a. be required to provide an additional written statement in response to the original Notice
- b. be issued with a second Notice requiring further particulars
- c. be required to participate in an interview under s 18 of the Act (see Interviews), or
- d. be summoned under Section 19 of the Act to give evidence on oath or affirmation in an inquiry.<sup>17</sup>

## Interviews: providing an oral statement of information

14. The Ombudsman may give a Notice to a public authority, service provider or service provider employee requiring them to provide an oral statement of information for the purposes of an Ombudsman investigation.<sup>18</sup> The statement will be given in an interview with Ombudsman officers.
15. A Notice may be given to:
  - a. any public authority<sup>19</sup> (which may be an entity or an individual)
  - b. any service provider<sup>20</sup> and any employee of a service provider.
16. A Notice may be given to any public authority or service provider (or employee), irrespective of whether that person's conduct is the subject of the investigation or is capable of being the subject of an Ombudsman investigation.<sup>21</sup>
17. An individual may also voluntarily provide the Ombudsman with information in an interview for the purposes of an Ombudsman investigation.

### Attending an interview in response to a Notice

18. The Notice will indicate, in general terms, the information that will be sought in the interview,<sup>22</sup> but the Ombudsman is not required to provide a copy of questions to be asked in advance.
19. As far as possible, interview times and locations are arranged to minimise inconvenience to the person attending the interview. At any time during the interview, you may request a short break.
20. Information provided in an interview is not given on oath or affirmation. However, there are very few grounds on which someone can object to providing information sought in the interview. This is explained in [Objections to providing material or evidence](#). It is also an offence to wilfully make any false statement to or mislead, or attempt to mislead, the Ombudsman or an officer of the Ombudsman in the exercise of the Ombudsman's or officer's powers.<sup>23</sup>
21. Interviews will be audio recorded and may also be video recorded. You may request a copy of the recording or any transcript of the interview that is produced. However, there is no entitlement to a copy of the recording or transcript, and these will usually not be provided while the investigation is ongoing.

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<sup>17</sup> Act s19.

<sup>18</sup> Act s18.

<sup>19</sup> 'Public authority' is defined in s5(1) of the Act. Under s246 of the *Crimes (Administration of Sentences) Act 1999*, the definition of public authority also extends to private managers of NSW correctional facilities.

<sup>20</sup> 'Service provider' is defined in s4(1) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

<sup>21</sup> For example, the conduct of some public authorities is excluded by schedule 1 of the Act such that it cannot be made the subject of investigation by the Ombudsman.

<sup>22</sup> Act s18(2).

<sup>23</sup> Act s37(1)(c).

## Voluntary interviews

22. A person may also voluntarily attend an interview (that is, not in response to a Notice). In a voluntary interview, the person is not required to answer any questions, and may terminate the interview at any time.
23. Before the interview, a person being interviewed will be told about the purposes for which the information they provide may be used.
24. The Ombudsman will normally request that the person consent to the interview being recorded (audio and/or video). If the interview is recorded, the person being interviewed may request a copy of the recording or any transcript of the interview that is produced. However, there is no entitlement to a copy of the recording or transcript, and these will usually not be provided while the investigation is ongoing.

## Producing things to the Ombudsman

25. The Ombudsman may give a Notice requiring that things (other than documents or information) be produced to the Ombudsman for the purposes of an Ombudsman investigation.<sup>24</sup>
26. A Notice may be given to:
  - a. any public authority<sup>25</sup> (which may be an entity or an individual)
  - b. any service provider<sup>26</sup> and any employee of a service provider.
27. A Notice may be given to **any** public authority or service provider (or employee), irrespective of whether that person's conduct is the subject of the investigation or is capable of being the subject of an Ombudsman investigation.
28. The Notice will describe the things or class of things to be produced. In addition the power to require documents, the Ombudsman may require the production of any other item.
29. Things described in the Notice must be produced if they are in the possession of the person served, or can be obtained by the person served (either unaided or by directing someone else to provide them with the documents or information). There are very few grounds on which someone can object to producing things. This is explained in [Objections to providing material or evidence](#).
30. Things must be produced in accordance with the requirements specified in the Notice. Ombudsman staff will assist in facilitating the physical production of things.

## Entry on to premises

31. In the course of an investigation, the Ombudsman or an Ombudsman's officer may
  - a. Enter and inspect any premises occupied or used by a public authority as a public authority, and
  - b. Inspect and copy any document or thing in or on the premises.<sup>27</sup>

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<sup>24</sup> Act s18 (sometimes referred to as a Section 18 Notice).

<sup>25</sup> 'Public authority' is defined in s5(1) of the Act. Under s246 of the *Crimes (Administration of Sentences) Act 1999*, the definition of public authority also extends to private managers of NSW correctional facilities.

<sup>26</sup> 'Service provider' is defined in s4(1) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

<sup>27</sup> Act s20(1).

32. Public authorities including any employees must provide the Ombudsman with reasonable assistance and access to facilities necessary to enable the Ombudsman to exercise the powers of entry.<sup>28</sup> Reasonable assistance extends to physical acts and may include providing access to a locked safe, calling up information on a computer or providing access to printing or copying facilities.<sup>29</sup>
33. A Notice of entry may be given to:
  - a. any public authority<sup>30</sup> (which may be an entity or an individual)
  - b. any service provider<sup>31</sup> and any employee of a service provider.
34. A Notice may be given to any public authority or service provider (or employee), irrespective of whether that person's conduct is the subject of the investigation or is capable of being the subject of an Ombudsman investigation.<sup>32</sup>
35. The Notice may indicate the Ombudsman's officers with delegation to enter the premises for the purpose of the investigation. The public authority may request the Ombudsman officers identify themselves for the purpose of establishing their right to enter the premises.

## Inquiries and hearings

36. In the course of an investigation the Ombudsman may hold an inquiry. In an inquiry, the Ombudsman conducts hearings and exercises certain *Royal Commissions Act 1923 (RCA)* powers.
37. In an inquiry *any person*, including public authorities, service provider employees, and any other individuals, may be served with a Summons to attend to give evidence on oath or affirmation and/or produce documents in a hearing.<sup>33</sup> That person must attend on the date specified in the Summons unless or until they are excused by the Presiding Officer.
38. Hearings are held in the absence of the public and are presided over by a **Presiding Officer** (the Ombudsman or a Deputy or Assistant Ombudsman). In a hearing, a person is required to give evidence on oath or affirmation in response to questioning by the lawyer engaged to assist the inquiry (**Counsel Assisting**) or the Presiding Officer. The rules of evidence do not apply.
39. As far as possible, hearing dates and times are scheduled to minimise undue inconvenience. The Presiding Officer will arrange for breaks during the hearing day. Witnesses may also request short adjournments where appropriate. Every effort is made to complete a witness's hearing within a single day. While hearings usually do not continue past 5:00pm, the Presiding Officer may extend a hearing beyond this time to avoid someone needing to be recalled on a subsequent day.
40. There are very few grounds on which someone can object to producing documents or giving information to the Ombudsman. This is explained in [Objections to providing material or evidence](#).
41. Hearings are audio recorded and transcribed, and the transcript is used for the purposes of the investigation to which the hearing relates. A person required to give evidence in a hearing may

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<sup>28</sup> Act s20(2).

<sup>29</sup> *Australian Securities Commission v Kutzner* [1997] FCA 1453.

<sup>30</sup> 'Public authority' is defined in s5(1) of the Act. Under s246 of the *Crimes (Administration of Sentences) Act 1999*, the definition of public authority also extends to private managers of NSW correctional facilities.

<sup>31</sup> 'Service provider' is defined in s4(1) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

<sup>32</sup> For example, the conduct of some public authorities is excluded by schedule 1 of the Act such that it cannot be made the subject of investigation by the Ombudsman.

<sup>33</sup> Act s19 and RCA s8.

request a copy of the recording or any transcript created. However, there is no entitlement to either a copy of the recording or a transcript.

42. Hearings may also be video recorded.
43. The Ombudsman cannot pay a witness's legal costs of a hearing or order that anyone else pay those costs. The Ombudsman may determine that a witness be paid an amount for their non-legal costs, but that amount is limited to what a Crown witness subpoenaed to give evidence by the Crown would receive.<sup>34</sup>

## Objections to providing material or evidence

44. Ombudsman investigations are not court or tribunal proceedings. There are very few bases on which someone can object to providing the Ombudsman with material or evidence, as explained in the table below. All references to 'Act' are references to the *Ombudsman Act 1974*.

Objection	Public authority/service provider or employee of service provider	Private individual
<b>relevance</b>	No objection can be made on the ground of relevance. It is for the Ombudsman to determine what is or is not relevant to an investigation. <sup>35</sup>	
<b>legal professional privilege</b>	cannot be claimed – Act s21(3)	can be claimed – Act s21(2)
<b>self-incrimination</b>	cannot be claimed, but use immunity may apply – Act ss19, 21, 36 and RCA s11 <sup>36</sup>	can be claimed – Act s21(2) <sup>37</sup>
<b>Cabinet information</b>	The Ombudsman cannot require anyone to answer questions relating to Cabinet information or the confidential proceedings of Cabinet or any committee of Cabinet. Where an objection is made on this basis a certificate of the Secretary or General Counsel of the Cabinet Office must be provided. <sup>38</sup>	not applicable
<b>public interest immunity</b>	cannot be claimed – Act s21(3)	not applicable
<b>confidentiality<sup>39</sup></b>	cannot be claimed – Act s21	

<sup>34</sup> Act s19(3).

<sup>35</sup> See *MF1 v National Crime Authority* (1991) 33 FCR 444, 461-462 and *Ross v Costigan (No 2)* (1982) 41 ALR 337, 350-351.

<sup>36</sup> No immunity applies in proceedings for an offence committed under the Ombudsman Act or Royal Commissions Act (e.g. for providing false information to the Ombudsman in breach of Act s37).

<sup>37</sup> Other than in proceedings for an offence committed under the Ombudsman Act or Royal Commissions Act (eg for providing false information to the Ombudsman in breach of Act s37).

<sup>38</sup> Act s22(1),(2). 'Cabinet information' is defined by *Government Information (Public Access) Act 2009* Sch 1 clause 2. Information contained in a document is not Cabinet information if (a) public disclosure of the document has been approved by the Premier or Cabinet, or (b) 10 years have passed since the end of the calendar year in which the document came into existence.

<sup>39</sup> Arising out of a contract or an equitable obligation of confidence.

Objection	Public authority/service provider or employee of service provider	Private individual
secrecy/privacy - NSW law <sup>40</sup>	cannot be claimed – Act s21 <sup>41</sup>	
secrecy/privacy - non-NSW law	considered on case-by-case basis	

## Confidentiality

45. All Ombudsman investigations are held in the absence of the public.<sup>42</sup>
46. The Ombudsman and all Ombudsman officers are required to comply with the non-disclosure obligations set out in the Act<sup>43</sup> and the *Privacy and Personal Information Protection Act 1998* and *Health Records and Information Privacy Act 2002*.
47. The Act also contains other protections for people who provide assistance in Ombudsman investigations.<sup>44</sup>
48. If you have any questions about confidentiality and protections, please ask the Ombudsman contact officer you are dealing with at the time that you receive a Notice or Summons or other occasion when you are in contact with the Ombudsman's office.

## Non-disclosure directions

49. In some circumstances, someone who has received a Notice or Summons to provide material or give evidence may be given a non-disclosure Direction.<sup>45</sup> The scope of any Direction will vary depending on the investigation, but you may be directed not to disclose:
- the fact that you or anyone else has received a Notice or Summons to provide material or give evidence
  - any material or evidence that you have given to the Ombudsman, or
  - any information about the Notice or Summons that is likely to prejudice the investigation to which it relates.

If you are given a Direction, information about the scope of the Direction will be provided to you. You can also contact the Ombudsman contact officer (whose details will be given to you) to ask about the Direction.

<sup>40</sup> For example *Children and Young Persons (Care and Protection) Act 1998* s29.

<sup>41</sup> The only exception to this is contained in *Crime Commission Act 2012 (NSW)* s80.

<sup>42</sup> Act s17.

<sup>43</sup> See in particular Act s34.

<sup>44</sup> Act Part 4B.

<sup>45</sup> Act ss19A-19C.

## Legal advice and representation

50. In most cases, investigations are completed without anyone needing to obtain legal advice or representation. This includes:
- a. anyone whose conduct is being investigated by the Ombudsman, or
  - b. anyone who is assisting the Ombudsman by providing information or documents, or appearing in an inquiry
51. You may, but you are not required, to seek legal advice or legal representation. If you are considering whether to obtain legal advice or representation, note that:
- a. unlike court proceedings, legal representatives have no right to appear for or accompany their client to any Ombudsman interview or inquiry; the leave of the Ombudsman is required if you wish your legal representative to participate in an interview or inquiry
  - b. there are very few grounds on which anyone can object to providing the Ombudsman with information or evidence (see [Objections to providing material or evidence](#)), and
  - c. the Ombudsman has no power to pay anyone's legal costs or order anyone else to pay those costs.
52. If you engage a legal practitioner to represent you during an Ombudsman investigation, please ensure you provide the practitioner's details to the Ombudsman as soon as possible.

## Support persons

53. In exceptional circumstances, you may be granted leave to have a support person present at an interview or hearing. The role of the support person is to provide emotional support, not to answer questions directed to you or advise you during the interview or hearing.
54. Any request for a support person to accompany you to an interview or hearing must be made in writing at least three days before the date of the interview or hearing. When determining a request the Ombudsman will consider, among other things, whether:
- a. the support person is related to the investigation
  - b. there is any particular stress relating to the investigation that is affecting the witness
  - c. the witness is in vulnerable circumstances
  - d. the involvement of a support person will potentially prejudice the investigation.
55. Generally, other employees or officers of a public authority or service provider under investigation will not be considered appropriate support persons.

## Offences

56. It is an offence under the Act to:
- a. fail to comply with a lawful requirement, including a requirement to provide information or answer questions in a hearing or interview (except voluntary interviews),<sup>46</sup>

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<sup>46</sup> Act s37(1)(b).

- b. wilfully provide a false statement or attempt to mislead the Ombudsman or an officer of the Ombudsman,<sup>47</sup> or
- c. wilfully obstruct, hinder or resist the Ombudsman or an officer of the Ombudsman in the exercise of the Ombudsman's or officer's powers under this Act.

## Questions

57. If you have any questions about an Ombudsman investigation, a Notice or Summons you have received from the Ombudsman or what you are required to do, please contact the Ombudsman officer whose contact details have been provided to you, or email [legal@ombo.nsw.gov.au](mailto:legal@ombo.nsw.gov.au).



Paul Miller  
**NSW Ombudsman**  
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<sup>47</sup> Act s37(1).