

NSW Ombudsman response to the Productivity Commission's draft report *Access to Justice Arrangements*

June 2014

Introduction

The NSW Ombudsman is an independent and impartial organisation, working in the public interest. The Ombudsman performs a wide range of functions under various pieces of legislation, with the primary being the *Ombudsman Act 1974*, the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS CRAM Act), and the *Police Act 1990*. The Ombudsman is an officer of the Parliament, and is independent of government.

The Ombudsman Act establishes a mechanism for the resolution of disputes as an alternative to the court process. The NSW Ombudsman's office was initially established as a cheaper, more accessible and less formal avenue for people to resolve their grievances and disputes with NSW public sector agencies. Prior to this, legal and/or political action were the only means potentially available to aggrieved citizens. This office now provides an avenue for the resolution of many thousands of complaints and disputes each year involving NSW state and local government agencies as well as thousands of non-government community service providers.

Changing roles and responsibilities

The roles and responsibilities of the NSW Ombudsman have grown considerably over the last twenty years. In addition to handling complaints, conducting own motion inquiries and investigations under the Ombudsman Act, CS CRAM Act and Police Act, we now have a range of specialised functions. The common factor in all is that they are aimed at improving the level of service provided to the community, as well as ensuring government agencies and non government organisations providing certain services are acting in the public interest. Our office is now responsible for:

- Reviewing the implementation and use of legislation providing new and often extraordinary powers to the NSW Police Force and other agencies. The Ombudsman is required to report to the relevant Minister at the end of a specified period. The Minister must then table the report in Parliament.
- Hearing appeals from people refused access to or removed from the witness protection program.
- Monitoring controlled operations conducted by law enforcement bodies in NSW - controlled operations are activities that would otherwise be illegal, for example drug dealing.

- Auditing the records of law enforcement bodies that are authorised to carry out surveillance, for example telecommunication interception, listening devices, etc.
- Reviewing the causes and patterns of deaths of certain children and of people with a disability who die in care.
- Overseeing the operation of the *Public Interest Disclosures Act 1994*, including monitoring and auditing compliance, and providing guidance, advice and training.
- Providing training for officials in frontline complaint handling, dealing with unreasonable conduct by complainants and the management of public interest disclosures.

The Ombudsman is also the convener of the NSW Child Death Review Team (CDRT), and our office provides the support and assistance the CDRT needs to perform its research and information collection and analysis functions. This allows the CDRT to work with staff in our reviewable death area, as well as providing our reviewable death staff with valuable information and the ability to draw on the expertise of the Team.

Oversight responsibilities

There are two areas of our work that are different to the traditional role of an Ombudsman, but have over time become an important part of our core work. We are responsible for overseeing and scrutinising the handling of complaints about the conduct of police, as well as workplace child protection allegations.

Under Part 8A of the Police Act, the NSW Police Force (NSWPF) is primarily responsible for investigating complaints made about the conduct of its staff. This includes conducting investigations in a timely and effective manner, taking appropriate management action to address the conduct of a police officer, improving service delivery, and striving to address and/or resolve the concerns of complainants.

We oversee these investigations, and ensure they are thorough and appropriate. The complaints we oversee usually involve serious misconduct, and can include allegations of criminal or corrupt conduct, or indicate a lack of integrity by police. Complaints about less serious conduct are handled by the NSWPF. Our office is required to audit the records relating to these less serious matters to ensure they are being handled appropriately.

We also oversee the handling of allegations of a child protection nature against employees by designated government and non-government agencies or of other public authorities. Part 3A of the Ombudsman Act requires the relevant government and non-government agencies – including non-government schools, approved children’s services and agencies providing substitute residential care – to notify the Ombudsman of any reportable allegations or convictions involving their employees within 30 days of becoming aware of them.

The Ombudsman oversees how agencies investigate and respond to these allegations, as well as scrutinising the systems that agencies have in place to prevent this type of conduct and to respond to allegations against their employees. Reportable conduct includes:

- sexual offences and sexual misconduct involving a child
- physical assault of a child
- neglect and ill-treatment of a child, and
- behaviour causing psychological harm to a child.

The breadth of the office's jurisdiction also presents new opportunities to ensure members of the community are being treated fairly and justly, and also to ensure government agencies and other involved organisations are responding appropriately to situations where people, and particularly children, may be at risk of harm. This is important, as children and young people are often reluctant or unable to raise issues themselves.

Our office will soon begin a third oversight function. In May, the Disability Inclusion Bill 2014 was introduced into Parliament. The Bill will amend the Ombudsman Act to create a notification scheme, similar to that under Part 3A, relating to incidents of serious sexual or physical abuse, neglect or ill-treatment, and fraud in government-provided or government-funded accommodation services and centre-based respite for people with a disability.

“Low value” disputes

The Commission suggests at page 278 that one of the ways in which Ombudsman promote access to justice is by providing “a mechanism for resolving low value disputes.” While this is true in some cases, and is no doubt important, it is not a complete description of the role performed by my office when dealing with complaints.

In most cases, my office's first response to a complaint, particularly one relating to a “low value dispute”, is to recommend the complainant first raise the issue with the relevant agency or service provider. This gives the agency or provider the opportunity to resolve the matter themselves. This is quicker than involving our office, and can help to improve the response to similar issues in the future. It can also help to maintain important ongoing relationships between service providers and the public, which is particularly important for essential services like housing. If this process is unsuccessful in resolving the matter, the complainant can then return to our office.

Section 25(3) of the CS CRAM Act makes our ability to refer matter back to an agency explicit for a complaint received under that Act. Referral of a complaint for local resolution places the responsibility for resolving the problems with the relevant agency and the complainant. This can enhance the relationship between the parties in dispute, minimise negative outcomes for the complainant, and improve an agency's capacity to effectively manage future complaints.

Such referral decisions are not taken lightly and will usually only be considered after initial inquiries have been made and our staff have spoken with relatively senior representatives of the agency, as well as the complainant. In some cases we have encouraged the agency and/or the complainant to use the mediation services of their nearest community justice centre. Where a referral for local resolution is made under s25(3), the CS CRAM Act also requires the service provider to report to the Ombudsman on the outcome of the referral. This can give confidence

to the complainant that their complaint will be dealt with fairly and remind the agency that they need to deal with the matter appropriately.

In some cases it may not be appropriate to refer a complainant back to the agency or service provider. This may be as a result of the circumstances of the individual who approaches us or the nature or urgency of their complaint. In these situations we will get involved at the first instance. The following case study is a good example of this.

Case study

A single father living with his two autistic sons complained of difficulty getting significant maintenance issues fixed in his Housing NSW property. The floor throughout was rotted from water damage and weakened by white ants. The only bathroom in the house also needed significant and urgent work. He was particularly worried about the floor, as one of his sons could not understand that they should tread carefully on the areas that were weakened.

A Land and Housing Corporation contractor started the repair work approximately two months before the father contacted us, but never came back. Calls to the Housing NSW maintenance line did not resolve the issue. We contacted the Land and Housing Corporation, and an area director inspected the property within 48 hours. As a result, he raised additional orders to the already approved works as the bathroom was found to be in a very poor condition. All works to the property were completed five weeks after the father first contacted our office.

It is also important to note that the ‘value’ of a complaint is dependent on the circumstances of the individual involved. The complaints we deal with in correctional facilities are a good example of this. Many relate to what may be viewed as relatively mundane issues, such as access to appropriate food, blankets, shoes and toiletries. For the inmates, however, these are an essential and very important part of their life.

Information request 9.1

Given the difficulty in estimating the individual costs of the various functions of some Ombudsman and complaint mechanisms, the Commission seeks feedback on whether the estimates it has derived can be further refined. The Commission also seeks feedback on the costs of Ombudsman undertaking systemic reviews.

The funding allocated to the NSW Ombudsman provides for all of the discrete functions listed earlier in this response, in addition to complaint work, own motion investigations, systemic reviews and awareness activities. With this in mind, it is not clear how the Commission has reached the cost per complaint number for our office in figure 9.2 at page 290.

The note accompanying the earlier figure 9.1 states that:

... organisations identified as ombudsman for their complaints services but who actually have a wide range of other regulatory responsibilities, such as the Australian Competition and Consumer Commission, have been excluded from this data, because it is not possible to separate out the cost of their complaints functions.

The continuing expansion and development of our office presents a similar challenge, and as a result the figures represented in figure 9.2 are not an accurate reflection of how the NSW Ombudsman uses its resources.

While it is difficult to provide a per complaint cost for all of the complaint work performed by our office, we are able to provide an estimate based on the work of our Public Administration Division, or PAD. This is the area of the office that performs a “traditional” Parliamentary Ombudsman function in responding to complaints about government agencies. This does not include complaints about agencies and service providers in the community services and disability sectors. This is a logical approach, as this section of the office’s jurisdiction is comparable to the work performed by other Australian Parliamentary Ombudsman.

In 2012-2013, the PAD dealt with 3866 formal matters. Formal matters are usually written complaints, and can include complaints about agencies or organisations that are within our jurisdiction, but the complaint is about conduct that is not. Action taken can range from providing advice and referral services in relation to matters outside jurisdiction through to conducting a formal investigation and making findings and recommendations. We calculate the average cost incurred by this area of our office per formal complaint was approximately \$884 (including salaries and a percentage of rent and other on-costs).

Our office also provides some complainants with an opportunity to have their case reviewed. These reviews are conducted by another staff member of the same or a higher grade than the staff member who dealt with the initial complaint. Once the review is completed, the reviewer’s decision is considered by the Ombudsman. The complainant will then receive a letter from the Ombudsman outlining the outcome of the review. Staff conducting these reviews consider the matter very carefully, and will either agree with the initial decision, make additional inquiries, reopen the complaint, or in some cases come to a different conclusion. As I am sure you can understand, this often takes the same or a similar amount of time and resources as dealing with the initial complaint.

As the Committee notes in its paper, Ombudsman can often provide quick and informal solutions to problems. Informal matters include our telephone calls, visits to our office, and inquiries our staff deal with when they are working out in the community. In many cases, our staff are able to give people quick advice or refer them to another appropriate body. This is often extremely valuable advice, and can have a very positive impact on those receiving it.

If formal complaints, informal complaints and reviews finalised in 2012-2013 by the PAD are combined, they add up to a total of 29,471 contacts. This would mean the cost per contact would be approximately \$116.

Given the breadth of issues addressed by our systemic reviews, it is difficult to provide an appropriate estimate of the cost of completing such inquiries and investigations. For example, the office is currently undertaking a particularly large scale, high profile and complex investigation into allegations of improper conduct by officers of the NSW Police, the NSW Crime Commission and the Police Integrity Commission. This involves a far greater allocation of funding and resources than, for example, our recent investigation into the application of disability support provisions to students sitting for their Higher School Certificate. In addition, it is important to note that the work of our office on systemic issues does not cease with a final report. We continue to monitor the agencies and systems involved in delivering the relevant service to ensure there is an improvement to service delivery.

Draft recommendation 9.1

Governments and industry should raise the profile of Ombudsman services in Australia. This should include:

- **more prominent publishing of which Ombudsman are available and what matters they deal with**

The comments of the Telecommunications Industry Ombudsman and the Australian and New Zealand Ombudsman Association included at page 286 of the paper rightly identify the importance of working to actively raise community awareness of the role of Ombudsman offices, particularly among those who are the most vulnerable. There is no question Ombudsman offices could all do more to raise the recognition for their offices. As noted in the paper, the challenge, particularly for Parliamentary Ombudsman, is allocating the funding to do so at a time when efficiency measures across government are reducing the funding available to all government agencies.

Our office has worked hard to find methods of engaging effectively with a broad range of groups within the community. This includes providing guidance materials on topics such as our role and the various central aspects of good administration in a broad range of community languages. Last year, the Deaf Society NSW helped us to develop an Auslan version of our Know Your Rights resource, which is aimed at raising awareness and understanding among those receiving community services.

Staff from the various areas of our office also attend a wide range of community events and activities, including community fairs and meetings, and large scale events, such as the annual conference of the Association of Children's Welfare Agencies and the POSSABLE IDEAS expo. Our Aboriginal Unit travel across NSW meeting with and speaking to Aboriginal communities. We have developed strong, ongoing relationships with many communities, and these relationships have meant we are able to help to quickly and informally overcome difficulties and challenges when they arise.

One way of raising the profile of Ombudsman offices and other available avenues of complaint would be to establish a single point of initial contact for anyone wishing to complain about government or raise their concerns about possible misconduct or corruption. This would create an easily recognisable contact point for everyone in the community. Those wanting to

complain or seek advice and assistance would not need to have a detailed understanding of the complaint and oversight system in their jurisdiction. Rather, this single contact point would act as a 'triage' station, referring complaints and information to the relevant body, who could then make contact with the complainant and take any appropriate action. It is important to note that this contact point would not subsume the roles of the various oversight and integrity bodies, who would all maintain their independence and particular roles and responsibilities.

In 1999, our office and several other integrity agencies put forward a proposal to the then Department of Public Works and NSW Treasury to relocate each of the various integrity agencies operating in NSW to shared premises. The agencies believed it would benefit the public and reduce overheads by sharing facilities such as hearing rooms, interview rooms and corporate support. The proposal was not supported by NSW Treasury at that time.

A further proposal in 2001 for a 'one stop shop' enjoyed strong support from NSW government complaint handling and watchdog agencies and the government. The concept was to establish a central service to receive, assess and refer complaints and inquiries about NSW government agencies, some non-government services, officials, health and legal professionals.

Significant work went into the design of the service which would be accessible by telephone, email, post and the web. The proposal was developed by staff from our office under the direction of a steering committee comprised of the heads of the proposed member agencies. A draft bill was prepared, together with a detailed scoping document and budget. Negotiations were well advanced with the then Office of Information Technology (OIT) and NSW Treasury, who confirmed recurrent funding would be provided for the service. OIT approved the proposed IT expenditure and provided an additional grant with the service to be operational by December 2002. Unfortunately the proposal did not proceed, as our office was not granted the necessary extension to our capital expenditure authorisation.

In light of the recent focus, both here in NSW and elsewhere, on the importance of making any service provided to the public as simple and seamless as possible, it would seem to be a logical time to revisit this suggestion. The recent creation of Service NSW would provide a useful guide, as the preparation and development would surely have dealt with many of the potential difficulties and challenges in setting up a 'one stop shop'.

- **the requirement on service providers to inform customers about avenues for dispute resolution**

A number of NSW government agencies include information about our office and when people should approach us on their websites and in relevant publications. Others also have copies of our fact sheets available in their front offices. We will continue to encourage others to do the same, and feel that introducing such a requirement is worth considering.

- **information being made available to providers of referral and legal assistance services.**

Our office has regular contact with a range of referral and legal assistance services. These bodies often submit complaints on behalf of their clients, particularly in our policing jurisdiction. The various organisations providing referral and legal assistance services

operating in NSW regularly provide detailed submissions to our legislative reviews of new police powers, and we seek their views and experiences when completing relevant systemic project work. We believe this contact means these bodies have a good understanding of our role, when they or their clients should approach us, and what to expect when they do so.

Draft recommendation 9.2

Governments should rationalise the Ombudsman services they fund to improve the efficiency of these services, especially by reducing unnecessary costs

This section of the draft report focuses, to a large extent, on industry Ombudsman operating in a range of jurisdictions. However, the risks of proliferation of oversight and integrity bodies are equally relevant to Parliamentary Ombudsman. The NSW Ombudsman has spoken on a number of occasions about the inherent risks in the creation of new bodies to perform roles that could sit within an existing Ombudsman. Doing so creates a heightened risk of unnecessary duplication, as well as increasing the risk of members of the community not knowing which body to approach. This can lead to double handing, or in the worst cases to matters “falling through the cracks” and failing to be addressed.

It can also take a very long time for newly created bodies to raise their profile and gain a level of community understanding, acceptance and trust. Any newly created agency will need to spend a great deal of time dealing with the operational challenges of a new office (staffing, information technology, premises). Providing appropriate additional roles to existing offices means the new function can begin far sooner, and raising awareness is an easier prospect.

Draft recommendation 9.3

In order to promote the effectiveness of government Ombudsman:

- **government agencies should be required to contribute to the cost of complaints lodged against them**

While this recommendation relates to government agencies, the discussion in the draft report refers to Ombudsman dealing with various industries, such as private health insurance, aged care, groceries, franchising, horticulture and petroleum. There are a number of reasons why requiring government agencies to “pay by the complaint” may not be an appropriate means of improving the financial situation of Parliamentary Ombudsman or the effectiveness of government agency complaint handling.

Unlike many industry Ombudsman, Parliamentary Ombudsman receive funding from the government in their State or Territory. This means they do not have to identify an alternative funding stream. If complaint numbers increase a great deal, an Ombudsman can seek additional funding to support their work. If there is one or more agency largely responsible for this rise, it would seem logical for the Ombudsman to first attempt to resolve this with the agency or agencies involved. If this is unsuccessful, the Ombudsman could then choose to move to a public report outlining the deficiencies in the relevant agencies’ systems resulting in the spike in complaints.

It is also important to consider whether such a system would be equitable. Private companies providing services in industries such as energy, water, telecommunications and banking are looking to generate a profit for their shareholders. Requiring them to pay for the complaints made against them will reduce their profit, thus providing an incentive to provide better customer service. Government agencies are not looking to make a profit, but rather to use the finite resources they have to provide essential services to the community. This is always one of our office's considerations when we interact with agencies. While offices such as ours would benefit from a system where agencies pay for the number of complaints made against them, ultimately the money would have to be taken away from the very services we are looking to improve.

Finally, there is a risk that introducing such a system may stigmatise complaints. We have worked for many years with government agencies to encourage them to recognise that complaints are not a bad thing. Receiving a complaint is an opportunity to look closely at how you do your work, consider what you could do better, and work to maintain or in some cases repair a relationship with the complainant. Having effective complaint handling systems in place is an essential part of doing business, particularly for government agencies. This is reflected in our contribution as part of a working party set up to review and develop a new Australian Standard in complaint handling. There should not be an additional cost involved in dealing with our office, as this may create an overly negative and possibly combative mindset to complaints.

- **Ombudsman should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how these agencies have responded**

It is important for Parliamentary Ombudsman to report on the work of their offices. This helps to raise public awareness of what they do, as well as ensuring agencies know the Ombudsman will report publicly when it is in the public interest to do so. The NSW Ombudsman is required under section 30 of the Ombudsman Act to prepare a public report of the Ombudsman's work and activities for the preceding 12 months. Our office uses this report to raise significant issues arising from our work and provide updates on agency implementation of our recommendations. We also include case studies outlining examples of systemic issues that have lead to an unnecessary dispute, and how the agency has responded. The following are some examples from our 2012-2013 annual report.

Case study

Police had attended a property – after the complainant called 000 for an ambulance – due to a police caution note that had incorrectly been linked to the complainant’s address. Following her complaint to the Ambulance Service, the complainant was told about the error. However, a new caution note was then placed on the address.

As a result of our inquiries, we identified that the Ambulance Service had failed to address an error in its system which meant police caution notes could become attached to the wrong property. We also felt there was insubstantial evidence from police to justify the second caution note. The Ambulance Service advised us the technical error was now being investigated and gave an undertaking to review all caution notes on their database to ensure they are current and justifiable. They also introduced new procedures for creating caution notes and handling complaints.

Case study

The sister of a man with a psychiatric disability and acquired brain injury complained to us about the adequacy of Ageing Disability and Home Care’s (ADHC) actions to support her brother. The complainant told us her brother has been living in the mental health unit of his local hospital for six months, despite not having an acute mental illness. She raised concerns about the adequacy of ADHC’s actions to secure supported accommodation for her brother and his access to appropriate disability and clinical support – including behaviour intervention and brain injury services. The complainant advised that her brother had been allocated a funding package, but alleged that it was unsuitable to his needs and was consequently unable to be used.

We facilitated a meeting between ADHC and the complainant to try and resolve the complaint. During the meeting, ADHC agreed to provide appropriate recurrent funding to the complainant’s brother and to source interim accommodation for him while searching for a long-term placement. They also agreed to comprehensively assess the man’s needs and develop a communication protocol to make sure he had a contact person available when needed.

The complainant recently contacted us again to complain that a number of the agreed actions had not been realised, and her brother was again living in a mental health unit. We are continuing to work with the complainant and ADHC to resolve this complaint.

The second example above is an individual case highlighting the need to improve accommodation and support for people with a psychiatric disability. This is a systemic issue our office investigated and reported on publicly in November 2012. The final report can be accessed at our website.

- **Government Ombudsman should be subject to performance benchmarking.**

Parliamentary Ombudsman around Australia have markedly different roles and responsibilities, and legislative and practice variations. This can mean that it is very difficult to develop meaningful points of comparison to gauge our performance against one another. The Australasian Ombudsmen have made several attempts to develop meaningful common performance measures but with little success despite their best efforts.

This does not mean that individual offices should not develop and report against performance measures and indicators. This is an essential part of any organisation. It can help senior management to monitor how the organisation is working, and ensure it is meeting its core responsibilities. For Parliamentary Ombudsman, this information is also useful in providing Parliament with a level of confidence in what the office is achieving.

Our office began a project several years ago to develop a set of standard key performance indicators (KPIs). As our work involves a range of jurisdictions, each with its own statutory scheme, one of the challenges for us was to develop meaningful measures to capture the impact and effectiveness of what we do across the office. An important early step taken to try and address this challenge was a review of the terminology used throughout our office, to ensure that similar functions and work steps could be named consistently across all our business areas. This resulted in us grouping our general Ombudsman and our community services complaint jurisdiction as “complaints and investigations”; our child related employment and police jurisdictions as “oversight”; and our various review and audit functions as “scrutiny”.

We have adopted a two stage implementation process for the KPI project. Stage one has been completed and concerns those functions that are managed in our case management system, Resolve, namely our complaint, investigation and oversight functions. The project involved significant changes to how we collect and record data in Resolve.

We monitor and report our performance against these KPIs, with senior staff receiving reports monthly. We are currently reviewing the stage one KPIs to evaluate the ongoing relevance of the measures and set benchmarks where these are yet to be determined. This may mean some are not included as key performance indicators, but will rather be used to provide trend data to our senior officers.

Stage two of the KPI project has commenced, and involves the non-complaint “scrutiny” areas of our work. This has been more challenging, but we are hopeful to have this stage completed soon.

Despite the difference among Parliamentary Ombudsmen, the core principles that drive our work are the same. We are all independent and impartial, and we all work in the public interest. To ensure we are able to share information and initiatives, the Australasian Ombudsmen meet once a year, with the Deputy Ombudsman meeting twice a year. These meetings can also lead to important joint initiatives, such as the joint Parliamentary Ombudsman Managing Unreasonable Complainant Conduct Practice Manual, now in its second edition. The guidance and training that has stemmed from this project have also helped public and private

organisations to develop effective approaches to unreasonable complainant conduct, which frees up resources to respond to other complaints and requests for assistance.

While it is challenging to develop meaningful benchmarks across offices, there are always opportunities to learn from one another. Our office and the Victorian Ombudsman have undertaken reciprocal peer reviews of our complaint handling processes. This project stemmed from discussions at a Deputy Ombudsman meeting. The review was confined to our office's PAD and did not include the Human Services or Police and Compliance Branches. This was because the jurisdictional responsibilities of the PAD and those of the Victorian Ombudsman are similar.

A senior officer from our office reviewed the Victorian Ombudsman's complaint handling processes in July 2011 and provided a report including a number of recommendations. A staff member from the Victorian Ombudsman then did the same in September 2011. This was a particularly worthwhile exercise, and we hope to work with the other Australian and New Zealand Ombudsman offices to develop a program for similar reviews. This will, of course, be reliant on identifying the requisite funding.

Chapter 8 Alternative Dispute Resolution

The Commission notes concerns regarding the lack of transparency in alternative dispute resolution (ADR) processes and outcomes may limit the identification and resolution of systemic legal issues. We employ a range of strategies to ensure systemic issues are not overlooked and the public interest is protected. Some occur at the pre-screening and preparation stages, while others rely on our own personnel and their role within the process.

- We have developed criteria to identify those complaints most appropriate for formal conciliation.
- Where a matter raises systemic issues as well as individual concerns, we may gain the parties' agreement for systemic issues to be pursued separately with the agency, leaving the conciliation or mediation to focus on resolving the particular concerns of the aggrieved person.
- The standard agreements to conciliate / mediate have express exceptions on mediator confidentiality such as where possible serious maladministration or misconduct may be indicated.

We generally use two Ombudsman officers in such processes, with one principally employed to facilitate the process, and the other who represents the Ombudsman's perspective on the matters at hand. The other officer will usually have had carriage of the matter prior to the mediation, knows the facts, relevant policy and public interest considerations. This increases the likelihood that any agreements reached will also address systemic concerns that may have been identified during the process and can reduce concerns of power imbalances. We have found the parties are generally appreciative of the input of our staff either in general or private sessions during the process.

While ADR processes are less expensive than traditional court processes, we have found the time required preparing for and conducting a formal conciliation or mediation under s13A of the Ombudsman Act can be significant when compared with the time involved in handling most complaints received. It is similar to the time taken by staff to deal with complex written inquiries, although completed in a much shorter timeframe. It is clearly less costly than our formal investigations using our Royal Commission powers. Because of this, we utilise s13A processes only in limited circumstances where our usual dispute resolution processes are unlikely to achieve satisfactory outcomes and/or the resources and time required for formal investigation make it inappropriate. Such circumstances include the involvement of multiple parties, and the need to restore confidence and/or the relationship of the parties.

All our complaint handling and investigative staff are trained in people management and dispute resolution skills and techniques. Where we decide to utilise the formal conciliation powers under s13A of our Act, we require at least one of the involved staff to be trained and eligible for national accreditation.

Draft Recommendation 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

We support the continued reform of court and tribunal processes to facilitate the use of alternative dispute resolution in appropriate cases in a way that encourages a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute.

Any jurisdiction looking to introduce a fee structure to ensure parties fully consider alternative mechanisms for resolution before and throughout litigation will need to do so carefully. Without safeguards, this may create additional pressure on the less financially able party to accept a less than reasonable settlement option.

Draft Recommendation 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

Our office encourages government agencies to address concerns and complaints early and fairly. We recognise the importance of all government agencies, including local governments, developing and publicising dispute resolution management plans. We have placed

considerable effort on assisting agencies develop appropriate complaint handling processes and systems.¹

The power of apologies in resolving disputes is well recognised in alternative dispute resolution. My office has long promoted the giving of appropriate apologies in relevant circumstances. In 2001 we sought and obtained statutory protection for apologies, which were incorporated into the *Civil Liabilities Act 2002*. These provisions allow agencies and individuals, in most circumstances, to give what are referred to as ‘full’ apologies (i.e. apologies that admit responsibility) without prejudicing their legal position in any related legal proceedings. We have also produced a guidance document, Apologies A Practical Guide, to assist agencies and individuals understand how to respond appropriately and effectively to situations where they are responsible for harm caused. Such themes have also been the subject of various speeches presented by our senior staff. Chris Wheeler, Deputy Ombudsman spoke last year at the National Administrative Law Conference in Canberra on open disclosure and apologies.

In our experience many lawyers and dispute resolution professionals remain unaware of this protection and the potential benefit it provides. We have found some agencies are much more open to pursuing mutually acceptable resolution than others. Even within agencies, we can receive a more willing response from some sections than others. We generally experience greater resistance to providing full information and if needed, apologies, from the legal section than from the actual area responsible for the conduct complained of.

We note the Commission’s observation at page p 263 of the draft report:

Stakeholders have also indicated anecdotally that local government are more keen to resolve disputes through litigation than through alternative mechanisms.

It often appears that where litigation is threatened, many local government agencies consider themselves unable to take any steps which may potentially impact upon their insurance coverage. Given the financial difficulties faced by many local councils, any suggestion of losing such coverage is a risk they feel unable to take. Matters will quickly be referred to solicitors who have traditionally seen their role as defending against litigation rather than looking at ways to resolve the dispute. It has also been our experience that Councils are often willing to allow a matter to go to the relevant Court or Tribunal for determination to avoid Council making a politically difficult decision.

¹ For more detailed information of our work in this area, see our brochure [Complaint handling: research, resources and training](#)