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Legal Affairs and Community Safety Committee  
Parliament House  
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Strategic Review of the  
Office of the Qld  
Ombudsman  
Submission 006

Dear Sir/Madam

### **SUBMISSION – STRATEGIC REVIEW OF THE OFFICE OF THE QUEENSLAND OMBUDSMAN**

On behalf of The University of Queensland, I wish to make this submission to the Review Committee of the Strategic Review of the Office of the Queensland Ombudsman.

The University acknowledges the efforts of the Office of the Queensland Ombudsman in improving administrative decision-making in Queensland departments and agencies and the University is generally supportive of the recommendations made by Mr Henry Smerdon AM on the review of the Queensland Ombudsman. However, there are concerns with a number of recommendations of the Strategic Review that may undermine the independence of the Queensland Ombudsman. These in turn may unnecessarily impact on the operations of departments and agencies. This submission is limited to those recommendations that are of concern to the University.

1. **Recommendation 12** – *Consideration should be given to amending the Ombudsman Act 2001 to provide the necessary power and authority for the Ombudsman to develop and set appropriate complaint management standards governing complaint management systems and for the monitoring thereof.*

It is commonly accepted that an Ombudsman is an ‘agent’ or ‘representative’ of the parliament<sup>1</sup> whose role is to ensure the integrity of executive decision-making. The *Ombudsman Act 2001* provides that the Ombudsman is an officer of parliament, with the functions of investigating administrative actions or administrative practices and procedures of agencies and departments<sup>2</sup>.

In providing the Ombudsman with the power to develop complaint management standards may undermine the independence of the Ombudsman and conflict with the Ombudsman’s duties to the parliament. The executive is responsible for the daily administration of the government, which includes the setting of standards for complaints management. To implement this recommendation would result in the Ombudsman, being an officer of the parliament, carrying out an executive function of the government.

<sup>1</sup> Lane and Young, 2001, *Administrative Law in Queensland*, Lawbrook Co, NSW

<sup>2</sup> See sections 11 and 12 of the *Ombudsman Act 2001*.

The University is of the view that the current system, whereby the Public Service Commission issues directives with respect to complaints management systems, is effective in prescribing the minimum standards for a complaints management system in the Queensland public service. The Ombudsman has a clear and separate role in auditing agencies and departments for compliance with those standards, a role which reflects its functions while maintaining its independence. Furthermore, the Ombudsman has the power to report to Parliament if he considers the existing public service directive is inadequate or ineffective in managing complaints.

2. **Recommendation 29** – *The proposal by the Ombudsman for amendments to section 54 of the Ombudsman Act 2001 to allow publication of reports administratively in appropriate circumstances is supported by the Committee*

The proposal to publish a report administratively is a significant power; it has the potential to impact not only on the executive (departments and agencies) but also on the wider community. There is a real risk that the power to administratively publish reports of investigations will result in the politicisation of the Ombudsman's office.

This broad power to administratively publish reports is not required for the Ombudsman to carry out the functions of the Office. The University considers the current section 54 of the *Ombudsman Act 2001* provides adequate checks and balances associated with the publication of Ombudsman's reports. Under this section, the Ombudsman may request the Speaker to authorise the Ombudsman to publish, in the public interest, various reports. It is also noted that other jurisdictions in Australia contain checks and balances similar to those currently existing in Queensland regarding the publication of Ombudsman reports (Attachment A).

It is worth noting that the Strategic Review considered it was an untenable situation to prevent the Ombudsman from publishing a report (except through the Speaker) administratively, but to require the Ombudsman to release the report under the *Right to Information Act 2009* (RTI Act). It should not be forgotten that access under the RTI Act is subject to the application of various tests to ensure the protection of the rights and privileges of individuals and other entities. Given the nature and type of investigations conducted by the Ombudsman, it is quite possible that reports may contain exempt information. In this regard, the Legal Affairs and Community Safety Committee should give little weight to this argument in determining whether or not to amend section 54 of the *Ombudsman Act 2001*.

3. **Recommendation 56** – *The proposals by the Ombudsman for various amendments to the Ombudsman Act 2001 as outlined in Attachment D are endorsed in principle*

The University has serious concerns with the proposal to amend section 45 of the *Ombudsman Act 2001* to provide that, if the Ombudsman considers that there are compelling public interest reasons favouring disclosure, the Ombudsman may disclose privileged material when reporting on the results of an investigation.

As the Legal Affairs and Community Safety Committee would be well aware that:

*The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.<sup>3</sup>*

The University supports the views of the Australian Law Reform Commission<sup>4</sup> that the “doctrine of client legal privilege is a fundamental principle of the common law providing an essential protection to clients, enabling them to communicate fully and frankly with their lawyers and those who may lawfully provide legal services.” The erosion of this doctrine, as recommended in the Review, would significantly impact on the parties who hold the privilege and have the sole right to waive that privilege

I would like to thank you for the opportunity to make this submission and look forward to the outcome of the Strategic Review of the Office of the Queensland Ombudsman.

Please do not hesitate to contact Mr Mark Croucher, Director Legal Office, on 3346 7875 if you have any questions or require further information.

Yours sincerely



Maurie McNarn, AO

**Executive Director (Operations) and University Secretary**

<sup>3</sup> *Grant v Downs* (1976) 135 CLR 674, 685

<sup>4</sup> ALRC Discussion Paper 73, *Client Legal Privilege and Federal Investigatory Bodies*

Jurisdiction	Provisions relating to use of and disclosure of legal professional privilege	Reporting powers of the Ombudsman
Ombudsman New South Wales	<p>Section 18 of the <i>Ombudsman Act 1974</i> provides:</p> <p><b>18 Public authority to give information etc</b></p> <p>(1) <i>For the purposes of an investigation under this Act, the Ombudsman may require a public authority:</i></p> <p>(a) <i>to give the Ombudsman a statement of information,</i></p> <p>(b) <i>to produce to the Ombudsman any document or other thing, or</i></p> <p>(c) <i>to give the Ombudsman a copy of any document.</i></p> <p>(2) <i>A requirement under this section must be in writing, must specify or describe the information, document or thing required, and must fix a time and specify a place for compliance.</i></p> <p>This extends to the provision of documents subject to LPP.</p>	<p>Section 26 of the <i>Ombudsman Act 1974</i> provides the Ombudsman with power to make a report, including the making of recommendations, arising out of an investigation. The Ombudsman must provide a copy of the report to the responsible Minister, the head of the public authority and in some cases the Premier's Department.</p> <p>If the Ombudsman is not satisfied that sufficient steps have been taken in due time in consequence of a report, the Ombudsman may make a report to the Presiding Officer of each House of Parliament and also provide a copy of the report to the responsible Minister (s.27). There is an obligation on the Minister to make a statement to the House of Parliament in which the Minister sits in response to the report.</p> <p>The Ombudsman can make a special report to the presiding officer of each House of parliament at any time under s.31. Ombudsman can make a recommendation that the report be made public.</p>
Ombudsman SA	<p>Power to compel documents subject to LPP (s.20 of <i>Ombudsman Act 1972</i>), but does not appear to have power to waive privilege in documents.</p>	<p>Sections 25(5) and (6) of the <i>Ombudsman Act 1972</i> provides:</p> <p>(5) <i>If it appears to the Ombudsman that appropriate steps have not been taken to give effect to a recommendation made under this section, the Ombudsman may make a report on the matter (containing a copy of the earlier report and the recommendation) to the Premier.</i></p> <p>(6) <i>Where the Ombudsman reports to the Premier under subsection (5), the Ombudsman may forward copies of the report to the Speaker of the House of Assembly and the President of the Legislative Council with a request that they be laid before their respective Houses.</i></p> <p>Section 26 of the <i>Ombudsman Act 1972</i> provides:</p> <p><i>If the Ombudsman considers it to be in the public interest</i></p>

		<i>or the interests of an agency to which this Act applies to do so, the Ombudsman may have a report on an investigation published in such manner as the Ombudsman thinks fit.</i>
Victorian Ombudsman	<p>Section 18 of the <i>Ombudsman Act 1973</i> provides:</p> <p><i>(4) The Crown shall not, in relation to an investigation under this Act, be entitled to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.</i></p> <p><i>(5) Subject to subsections (3) and (4) a person shall not be compelled for the purposes of an investigation under this Act to produce any document or give any evidence which he could not be compelled to produce or give in proceedings before a court.</i></p>	Section 25 of the <i>Ombudsman Act 1975</i> provides that the Ombudsman may at any time make a report to Parliament on any matter arising in connection with the performance of their functions.
Ombudsman Western Australia	<p>Section 20 of the <i>Parliamentary Commissioner Act 1971</i> provides:</p> <p><i>(2B) The Crown or any authority to which this Act applies is not entitled in relation to any such investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.</i></p> <p><i>(3) Subject to subsections (2A) and (2B), a person is not compelled for the purposes of an investigation under this Act to give any evidence or produce any document that he could not be compelled to give or produce in proceedings before a court.</i></p>	Section 27 of the <i>Parliamentary Commissioner Act 1971</i> provides that the Commissioner may at any time lay before each House of Parliament a report on any matter arising in connection with the exercise of his functions. If neither House of Parliament is sitting at the time when the Commissioner wishes to lay a report, the Commissioner may — <ul style="list-style-type: none"> <li>(a) send copies of the report to the Clerks of both Houses of Parliament; and</li> <li>(b) make the report available to the public.</li> </ul>
Australian Capital Territory Ombudsman	Under section 11 of the <i>Ombudsman Act 1989</i> , the Ombudsman has power to require documents, including documents subject to LPP	Section 18 of the <i>Ombudsman Act 1989</i> imposes obligations on the Ombudsman to report investigation findings to the relevant department or agency, and to send a copy of the final report to the relevant Minister. Also, power to make special reports to the Legislative Assembly under section 20.

Ombudsman Tasmania	<p>Section 24 of the <i>Ombudsman Act 1978</i> provides:</p> <p>(2) <i>The Crown shall not be entitled to prevent or obstruct records from being produced, or evidence from being given, for the purpose of an investigation under this Act notwithstanding that it would be so entitled if the investigation were a legal proceeding held before a court.</i></p> <p>(3) <i>A person is not excused from giving information, or producing a record or answering a question, when required to do so under this Act on the ground that to do so would disclose legal advice furnished to a government department or other authority to which this Act applies.</i></p>	<p>Section 28 of the <i>Ombudsman Act 1978</i> enables the Ombudsman to make a report to the principal officer of the relevant agency. Where it appears to the Ombudsman that no appropriate steps have been taken within a reasonable time after he has made a report or recommendation he may, after considering the written comments (if any) made by or on behalf of the principal officer to whom the report or recommendation was made, send to the Premier and the responsible Minister a copy of the report or recommendation together with a copy of any such comments.</p> <p>Where a copy of any report, recommendation, or comments has been sent to the Premier, the Ombudsman may, if he thinks fit, lay before each House of Parliament a report on the matters to which the report, recommendation, or comments relate.</p>
Ombudsman NT	<p>Section 52 of the <i>Ombudsman Act</i> gives the Ombudsman power to require the production of a document or written statement. The Act does enable the principal officer to ask the Ombudsman not to disclose the document to anyone else without the principal officer's approval. The ombudsman may refuse the request</p>	<p>Act more complicated than others due to it covering conduct of Police. Requirement under section 153 and 154 that Ombudsman may give the Minister a report relating to a particular investigation case. The Minister must then table that report in the Legislative Assembly.</p>
Commonwealth Ombudsman	<p>Section 9 of the <i>Ombudsman Act 1976</i> contains power for the Ombudsman to compel a person to provide documents/information, including documents that are subject to LPP</p>	<p>Obligations under section 15 of the <i>Ombudsman Act 1976</i> for the Ombudsman to provide a copy of the investigation report to the principal officer of the relevant agency. A copy of that report is also to be provided to the relevant Minister.</p> <p>The Ombudsman may inform the Prime Minister in cases where agencies have not acted on recommendations of investigation reports. Also, additional obligations arise to report to the House of Reps/Senate.</p>