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16 AUG 2012

The Coordinator-General

Mr Ray Hopper MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Mr Hopper

Thank you for your letter of 16 July 2012 calling for submissions on the Strategic Review of the Office of the Queensland Ombudsman (QOO).

At the outset I am keen to state my support for the role of an independent and active QOO that ensures accountability of Government agencies by investigating complaints and improving administrative decision making of agencies through its training and advisory programs.

I would like to raise a number of issues in relation to the reviewer's recommendations and the proposed legislative changes that the reviewer supported in principle. I would also like to provide comment about past dealings with the QOO, especially involving the Office of the Coordinator-General (OCG) and the investigations by the QOO involving the Brisbane Airport Link project. These dealings were prior to my appointment as Coordinator-General earlier this year.

It is unfortunate that the reviewer did not meet with the former Director-General of the Department of Employment and Economic Development and the Coordinator-General in conducting his review as the Brisbane Airport Link issue would have been a significant ongoing matter at the time.

1 Recommendation 23

The Investigation Teams should continue to focus on the timely investigation of complaints, mindful of minimising a legalistic approach and keeping in mind the need for proportionality in the efforts and resources applied to resolving complaints.

The OCG supports this recommendation.

The OCG accepts that the Ombudsman has an important function of investigating the administrative actions of agencies when a complaint is made. However, the OCG also supports the view of the reviewer that care must be taken by the QOO not to be seen as an advocate for the complainant nor to encourage greater use of the QOO rather than the proper channels available within an agency. I am advised by Senior Officers within the OCG and the department that, in their experience, the QOO has appeared to step over this line and undertaken an investigation that was both time and resource intensive and very technical without regard to the best outcomes in terms of better administrative decision making.

The Department of Infrastructure and Planning (the predecessor to the department) and the Office of the Coordinator-General were the subject of an investigation by the QOO into complaints about night time surface work on the Brisbane Airport Link project. It is useful to outline a brief chronology of the investigation:

- The investigation was initiated after a complaint received by the Ombudsman in June 2010.
- Following a preliminary meeting between the QOO and the department in July 2010, the department made written submissions about the complaint.
- The QOO decided to commence an investigation in August 2010.
- On 5 January 2011, the QOO sent its Proposed Report to the department for its response. The Proposed Report contained 40 proposed opinions and 28 proposed recommendations and was 172 pages long. In addition it attached an opinion from Senior Counsel and a detailed technical report from a noise consultant.
- The department was required to provide any submissions on the Proposed Report by 31 January, however, due to the flooding events which occurred in Brisbane that month, the Department was given an extension until 14 February 2011 for its response.
- The department and the Coordinator-General submitted a joint detailed response to the Proposed Report on 14 February 2011.
- The Ombudsman provided his final report in June 2011.

The department (including the OCG) welcomed the opportunity to identify and implement improvements to the administrative practices of the department and the Office of the Coordinator-General. There were valuable lessons to be learnt from the Airport Link project and the handling of complaints from the project and the report had the potential to assist with the ongoing compliance issues being encountered in this project and for the conditioning and enforcement of conditions in future projects.

However, the department (including the OCG) had concerns about the way in which the investigation was conducted. These include:

- The amount of resources the investigation consumed both in the department, the Office of the Coordinator-General, the Department of Environment and Resource Management and in the QOO. As noted above, the QOO engaged its own noise consultant and Senior Counsel. The department's response to the Proposed Report alone consumed considerable time and resources involving three legal officers and two directors for an intensive period of activity at a time when the State was recovering from the floods of January 2011 and had other priorities.

- The Proposed Report had an adversarial tone, quoted selectively from correspondence and transcripts of interviews and included opinions and recommendations on matters which appeared to be outside the original scope of the investigation and on which the department had not been asked to provide material.
- The Ombudsman invited the department to attend a preliminary meeting with the Ombudsman on 9 July 2010. The department was advised the day before that the meeting would be taped. The Ombudsman appeared to rely on transcripts from that meeting (for which the department had little preparation) rather than the written submissions provided by the department after the meeting.
- The final report of the Ombudsman was provided some 12 months after the complaint was received by the Ombudsman's Office. The final report was some 270 pages long and contained some very detailed and technical analysis of the legal and noise issues surrounding the project. The report contained some very specific opinions and recommendations on how the noise conditions should have been drafted and should be enforced, however, not all of these recommendations were workable in practice. While there were some lessons to be learnt from these recommendations for the future conditioning of such projects, many of these lessons had already been implemented by the department. It is also highly unlikely this type of project or conditioning will arise again.
- The report contained little in the way of recommendations on how to better handle complaints. This was deferred to a second investigation which commenced in mid 2011. Departmental records were examined by the QOO in September 2011, however, the Department has not heard any further about the progress of this investigation. The department would be keen for the QOO to act in a timelier manner and keep agencies better informed of the progress of matters.

The OCG's view is that the QOO has a useful role in helping agencies to make better decisions and to work with them to put in place better systems and learn from their past mistakes. However, it is not an efficient or effective use of resources to (with the benefit of hindsight) unduly question and investigate every action taken by a department or to criticise departmental officers who are generally trying to do their best in difficult circumstances. The department and the Office of the Coordinator-General have implemented some of the recommendations made by the QOO, however, it is felt this outcome could have been achieved without such an expensive and time consuming investigation.

The OCG supports the view of the reviewer at page 2 of the report where the reviewer notes that the QOO has an important role to play in the overall accountability processes of Government. The reviewer goes on to say "while [the Ombudsman's] role is important, it must also be mindful of the fact that agencies make many thousands of good decisions every day and that those that for various reasons find their way to the Ombudsman's Office for review on a complaint basis, are a very small part of the service delivery process."

Departments must be allowed to deliver services and perform their functions without their resources being diverted unreasonably.

2 Suggested Amendments to the Ombudsman Act 2001

(a) Jurisdiction over legal advisors

An amendment is proposed to Section 16 (2) (b) to clarify that the Ombudsman has jurisdiction to investigate administrative actions of a legal advisor to the State, except where the legal advisor is acting for the State in a legal proceedings.

This amendment is not supported.

The need for this amendment is not clear. Legal advisors provide legal advice. They generally do not take administrative actions. The State requires its lawyers to provide frank and forthright advice and this advice can already be obtained by the QOO under its current powers.

(b) Information disclosure and legal privilege

An amendment is proposed to Section 45 to provide that the Ombudsman may disclose legally privileged material when reporting on the results of an investigation if the QOO considers that there are compelling public interest reasons favouring disclosures.

This amendment is not supported.

It is acknowledged that it is appropriate for the QOO to have access to legal advice obtained by an agency so the QOO can see the role the advice has played in the agency's actions. However, the proposed amendment cuts across the fundamental right of the State to preserve privilege in legal advice it has obtained. It is the State's privilege and the decision as to whether the advice should be made public is the right of the State. It is also noted that the decision as to whether legal professional privilege can be waived in legal advice provided to the State rests with the Attorney-General as the first law officer of the State.

The reason given for the amendment argues that it is difficult for the QOO to meaningfully discuss the action taken by an agency in reliance on legal advice when the advice itself cannot be disclosed. We disagree with this argument. A report by the QOO does not need to descend into the detail of setting out legal advice an agency has obtained. It should be sufficient for the report to simply say the agency took legal advice and then certain actions were taken.

This issue arose in the Airport Link investigation referred to above. The QOO asked the department to provide the legal advices it had obtained both from its in-house lawyers and from its external lawyers. While s45 prevented the department from refusing to provide the advices on the ground of legal professional privilege, the section does not then protect the documents so produced. The department sought to protect its privilege by expressly stating that it was not waiving privilege in providing the legal advices to the QOO. The department also requested that the QOO not refer to the advices in its report.

There is a high risk that any waiver of privilege by the publication of a legal advice would adversely impact on the legitimate interests of the State. In the case of the Airport Link project, the release of the advice may have impacted on the ability of the Coordinator-General to take enforcement action in relation to the project.

It is submitted that section 45 should instead be amended to make it clear that when legal advice is provided to the QOO under the Act, legal professional privilege is not waived.

(c) Ombudsman may issue direction in relation to an administrative act

A new Section 23A is proposed that gives the QOO authority to direct an agency to refrain from performing an administrative act for a specified period.

This amendment is not supported.

The proposed amendment appears to allow the QOO to make a direction where the Ombudsman is satisfied that the act is likely to prejudice an investigation or a *proposed* investigation or the effect or implementation of a recommendation that the QOO *might* make as a result of an investigation or proposed investigation (our emphasis).

This appears to be providing the QOO with a broad, coercive power even where an investigation has not actually been commenced or a recommendation has not actually been made. It is noted that, currently, the QOO only has the power to make recommendations and cannot force an agency to adopt the recommendation. This amendment represents a big step up in the power of the QOO to interfere with an agency's functions and has the effect of allowing the QOO to stop an agency from making a decision or taking a step that the agency may be required to take by legislation.

Yours sincerely



Barry Broe
Coordinator-General