

The South Australian Ombudsman and Local Government

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Introduction

In late 2008, the South Australian Ombudsman raised numerous concerns regarding the manner in which local government was exercising its regulatory powers and functions. These concerns related primarily to the general inspectorate employed by local government, that is, those officers responsible for the basic enforcement functions of councils such as animal management and the use of roads.

Recent experiences in South Australia

Between September and December 2008, the South Australian Ombudsman raised a number of concerns about the operation of the local government sector through his reports to the Economic and Finance Committee of the South Australian Parliament.

Concerns raised related to the practices and protocols adopted by local government in South Australia, and included issues regarding councils' understanding of their enforcement role and responsibilities in light of relevant legislative requirements, training provided to authorised officers (or an apparent lack thereof), and levels of cooperation with the Ombudsman's office during investigations. The Ombudsman expressed concern that councils as public authorities, and more particularly authorised officers as the persons responsible for carrying out the enforcement functions of councils, lacked appropriate policies, procedures and training to ensure that their responsibilities as public officers were carried out in a manner that was consistent with their legislative duties.

The Ombudsman also raised significant concerns regarding the processes employed by councils in issuing expiation notices. The Ombudsman was concerned that authorised officers were issuing expiation notices without having first collected and considered proper evidence in respect of alleged offences and without a full understanding of the rationale behind issuing expiation notices. The Ombudsman expressed the view that authorised officers were issuing expiation notices for inappropriate purposes, such as to appease 'difficult' complainants or to penalise 'difficult' suspects.

The Ombudsman also raised concerns about the way in which councils were managing the impounding and disposal of vehicles which were left on roads or public places for longer than 24 hours. The Ombudsman highlighted one particular set of circumstances where a vehicle was impounded and subsequently disposed of without a council following proper legislative processes. In that instance, some substantial loss was suffered by the owner of the vehicle because of that failure on the part of the relevant council.

Powers of the South Australian Ombudsman

During the course of the investigations undertaken by the Ombudsman and his reports to the Economic and Finance Committee of the South Australian Parliament, questions arose as to the power of the Ombudsman to conduct these investigations and make these reports in the first instance. There was some concern that the Ombudsman might have been acting beyond power.

However Section 13 of the *Ombudsman Act 1972* (the **Ombudsman Act**) gives the Ombudsman the power to investigate 'any administrative act'. Such an investigation can be undertaken either upon receipt of a complaint from a member of the public, on the referral of a complaint from Parliament, or on the Ombudsman's own initiative.

A specific complaint is therefore not necessary to enliven the Ombudsman's power to investigate an 'administrative act'.

The Ombudsman Act defines 'administrative act' as 'an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency'. A council is 'an agency to which this Act applies' for the purposes of the Ombudsman Act and accordingly most of the day to day functions and acts carried out by council officers and their decisions will be 'administrative acts' and subject to investigation by the Ombudsman.

Any investigations undertaken by the Ombudsman must fall into the categories set out by the Ombudsman Act, namely:

- undertaking preliminary investigations for the purpose of determining whether a full investigation ought to be commenced;
- carrying out full investigations into an administrative act; and
- conducting general reviews of the administrative practices of an agency to which the Act applies.

However, if the Ombudsman is considering undertaking some form of investigation upon receipt of a complaint, such a complaint cannot be entertained (and therefore lead to an investigation) unless it is made by a person or persons directly affected by the administrative act to which the complaint relates.

Further, the Ombudsman may refuse to entertain a complaint where:

- a matter raised in the complaint is trivial;
- the complaint is frivolous or vexatious;
- the complaint is not made in good faith;
- the complaint has previously had a remedy by way of legal proceedings; or

- the complaint is more appropriately dealt with by a right of appeal, reference or review to a court, tribunal, or the council itself.

It is important to note that the Ombudsman has discretion as to whether a complaint will be entertained in the above circumstances and, in the experience of local government in South Australia, it has been rare for the Ombudsman to refuse to entertain a complaint on such grounds.

Upon completion of an investigation, the Ombudsman may make a broad range of findings, including that the relevant administrative act was 'contrary to law', that it was 'unreasonable' or that it was 'wrong'.

If the Ombudsman decides that the complaint against the administrative act is justified, the Ombudsman can make recommendations to a council which are aimed at rectifying the situation giving rise to the complaint. If those recommendations are ignored, the Ombudsman can report that failure to the Minister, the Premier and Parliament.

The Ombudsman does not have the power to compel a council to take specified action.

Response of local government in South Australia

As a result of the concerns raised by the Ombudsman, the Local Government Association of South Australia put in place a multi-faceted response program. The response included the following steps.

1. A suite of model guidelines and standard operating procedures are being developed to underpin the exercise of statutory powers which fall within the jurisdiction of council officers. These model procedures are being developed in close liaison with councils, the Dog and Cat Management Board and the Authorised Persons Association.
2. A good governance assessment program is being developed which relates specifically to the manner in which regulatory services are undertaken by councils. The program is designed to include a self-assessment tool for councils to enable them to assess whether their internal processes and procedures comply with best practice.
3. A variety of information papers have been developed, including a paper that outlines the roles and functions of the Ombudsman.

4. A greater focus has been placed on induction processes for new regulatory staff and continued training for existing regulatory staff. The Local Government Association has scheduled a series of new training programs across the regulatory service areas with the aim of developing skills and professionalism among the regulatory staff that make administrative decisions, or exercise statutory powers. These programs include specialised courses in animal management, public officer duties, and broader regulatory services training. The Local Government Association has been instrumental in encouraging councils to provide new regulatory staff with proper induction training to ensure that they have a greater understanding of their role, functions and powers in the enforcement of various pieces of legislation administered by local government.
5. A series of model protocols has been developed to enable councils to respond in a timely and appropriate manner to both preliminary and full investigations initiated by the Ombudsman.

Summary

The recent experience of local government in South Australia demonstrates the importance of proper administrative procedures, training arrangements, and organisational controls being employed throughout the local government sector. The focus on continuous improvement and best practice by the sector will go a long way to ensuring that recent events are not repeated.