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Dear Committee

**Actions I intend to take following a recent inquiry into regional health administration**

I am writing to inform members of the committee of actions that I am taking, and propose to take, following a recent Parliamentary inquiry into regional health administration.

Earlier this year the Legislative Council Portfolio Committee No. 2 tabled a report on *health outcomes and access to health and hospital services in rural, regional and remote New South Wales* (the report).

The committee made a number of recommendations to Government, which it has responded to.

A recommendation in the report (41) was to establish a 'health administration ombudsman'. The Government's response, noting this recommendation, is consistent with the fact that my office, being the state's broad-based parliamentary ombudsman, already has the requisite statutory functions proposed of a health administration ombudsman.

However, as you know the jurisdiction of my office is broad and the resources available to it are limited. This has meant that, although we have the necessary functions of a health administration ombudsman (as we do of a 'public education ombudsman', a 'local councils ombudsman', a 'public housing ombudsman', a 'community services ombudsman', and so on), it is no doubt the case that there is more that could be done both to increase our visibility and accessibility, and to undertake appropriate investigatory actions where maladministration is suspected.

Recent funding enhancements provided to my office as part of the 2022/23 budget process, although not specifically allocated for matters of health administration, should provide some scope for my office to enhance its efforts in this domain.

In the attached paper, I set out the key actions that my office is, or is intending to take, to enhance its efforts and impact in respect of its 'health administration ombudsman' role.

As you will see in the paper, one action I will be taking is to submit advice to Treasury in the next budget cycle as to the funding that would be required if a focused and visible health administration unit were to be established within my office. As you are aware, similar units already exist in my office that specialise in the monitoring of Aboriginal Programs and Community Services.

Like those other units, such a unit would be managed by a dedicated Deputy Ombudsman and would work with existing related units within my office (including the complaints assessments unit, child death reviews unit, and public interest disclosures unit). No legislative amendments would be required to establish such a unit, noting (as indicated above) that my office already has the requisite statutory functions.

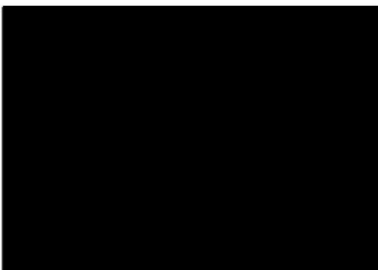
The decision whether such a specialised unit for our oversight of health administration is warranted and should be funded is of course a matter for the Parliament.

Regardless of whether that proposal is supported, the attached paper sets out other action (not requiring additional funding) that my office can and is taking to address some of the concerns raised in the recent inquiry.

Of course, any ombudsman is constrained not only by resources, but also (and appropriately) by the inherent nature of being an external, independent complaint-handling and oversight body. For that reason, it is appropriate that the recent committee's recommendations regarding workplace cultural matters within the health system have been directed to NSW Health and its affiliated districts as the internal managers and system owners.

Although we did not appear before the LC Portfolio Committee No 2 in relation to its recent inquiry, I have taken the opportunity to also forward a copy of this letter, and the attached paper, to that Committee for its information.

Yours sincerely



Paul Miller  
NSW Ombudsman



# NSW Ombudsman: Health administration

## Purpose

The purpose of this paper is to inform the government and the Ombudsman's parliamentary oversight committee of the actions the NSW Ombudsman intends to take following a recent parliamentary committee inquiry into regional health administration.

## Background

### **A Parliamentary committee had recommended the establishment of a health administration ombudsman**

The Legislative Council Portfolio Committee No. 2 (the **Committee**), in its report on *Health outcomes and access to health and hospital services in rural, regional and remote New South Wales*, recommended the establishment of a 'health administration ombudsman' (Recommendation 41):

That the NSW Government establish an independent office of the Health Administration Ombudsman to receive and review concerns about the administrative conduct of management of Local Health Districts and NSW Health from staff, doctors, patients, carers and the public. The Health Administration Ombudsman is to be empowered to review administrative decisions of NSW Health and Local Health District management, including but not limited to, alleged coverups of medical errors or deaths, false or misleading data, inaccurate communications and/or media reporting, Visiting Medical Officer accreditation decisions, staff blacklisting, and bullying or harassment of whistle-blowers. Additionally, the Health Administration Ombudsman is to provide an annual report to Parliament and the public.

The Committee's report also recommended certain actions by NSW Health and rural and regional Local Health Districts (LHDs), including to commission an independent review of workplace culture, implement complaints training for staff and especially managers, and review and enhance whistle-blower protections to ensure staff feel comfortable speaking up (Recommendation 40).

### **The NSW Ombudsman already has the statutory functions of a health administration ombudsman**

The statutory role and functions of the NSW Ombudsman are already consistent with the role and function that has been proposed of a health administration ombudsman (**Attachment A**).<sup>1</sup>

On 31 May 2022, the NSW Ombudsman wrote to the Government about recommendation 41, noting the Ombudsman's existing jurisdiction and functions with respect to health administration, but that, in the

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<sup>1</sup> The Ombudsman was not asked to appear before the Committee. The Committee did not reference the NSW Ombudsman in its report. The NSW Ombudsman wrote to the Committee during the course of its inquiry in 2021 to inform the Committee about the relevance of the *Public Interest Disclosures Act 1994* to the matters being considered in the inquiry.



context of constrained resources, it is likely the Ombudsman is not investigating all matters that warrant further scrutiny.

### **The NSW Ombudsman has other functions relevant to NSW public health organisations**

The traditional 'ombudsman' role is to receive and handle complaints, together with discretion to undertake formal investigation where serious or systemic maladministration is suspected.

As well as that function, the NSW Ombudsman has other statutory functions that can also relate to public health organisations. The Ombudsman:

- Offers training and resources to improve agencies' own capability in complaint handling.
- Oversees the *Public Interest Disclosures Act*, which includes providing advice, guidance and training; as well as having statutory powers to monitor and audit the exercise of functions and compliance with the Act.
- Registers and conducts research regarding the deaths of all children in NSW in its role as convenor of the NSW Child Death Review Team, as well as reviewing the deaths of particular children who have died in circumstances of, or suspicious of, abuse or neglect. This work frequently includes examination of the role of health organisations in preventing child deaths. In 2022, the Ombudsman is monitoring four CDRT recommendations made to NSW Health, and is also investigating the conduct of an LHD in relation to the death of a child.

Under amendments recently enacted in 2022, the Ombudsman has been given additional functions which could also have relevance to the health sector –

- Reviewing the complaint handling systems of public authorities.
- Referring matters raised in complaints to an organisation for its investigation.

### **The Government has said it will not establish a separate health administration ombudsman, but will consider other action to address the concerns of the committee**

The Government's response was to "note" recommendation 41 and to "support in principle" recommendation 40. It has said it will not establish a new health administration ombudsman.

## **Issues**

### **There are likely matters that warrant investigation by the NSW Ombudsman that are not investigated due to constrained resources**

In the 2021/22 financial year, the Ombudsman received 250 actionable complaints about Local Health Districts (*LHDs*) and 221 actionable complaints about other health agencies, including Ministry of Health (100), the HCCC (67) and NSW Ambulance (12).

An actionable complaint is one that is within the jurisdiction of the Ombudsman to receive and, if necessary, investigate.

The primary purpose of an Ombudsman investigation is to determine if administrative conduct of a kind referred to in s 26 of the *Ombudsman Act* has occurred – this includes conduct that is contrary to law, unreasonable, discriminatory, or otherwise wrong. Recommendations for correction and/or systemic improvement can also be made following an investigation.

The Ombudsman may commence an investigation following a complaint or on own-motion.



The Ombudsman's decision whether to formally investigate is discretionary. Most complaints do not result in a formal investigation, and this is often appropriate.<sup>2</sup> However, resource constraints have resulted in the Ombudsman needing to apply a high threshold for a formal investigation response.

### **Recent funding enhancements for Ombudsman functions may assist, but will not resolve resource constraints**

Through the recent budget process, the Ombudsman received some additional funding to its budget. This funding is to cover the predicted cost of some new statutory functions (such as the functions conferred by the recently enacted *Mandatory Disease Testing Act 2022*) and the replacement of aged technology. It also included some funding to increase staffing levels for some existing functions, including complaint handling and investigation, which had been chronically under-resourced.

We envisage this funding will, once utilised (following recruitment and onboarding) and operationalised, result in an improved overall capacity to respond to complaints with active inquiry and investigation. In addition, we are:

- refreshing our delivery of training for external agencies
- reviewing and enhancing our outreach and communications strategy to promote our complaint services and related support.

The improved capacity in these areas should extend to the health sector. However, the scope of the Ombudsman's jurisdiction is extensive, and even with the recent enhancements resources are constrained, and face competing priorities.

### **Understanding administrative vs purely clinical issues is often complex**

The Ombudsman has jurisdiction to receive complaints about conduct 'relating to a matter of administration'.

Although the Ombudsman Act does not expressly define 'administration', it is likely that conduct of a purely clinical nature (for example, a decision by a particular doctor to prescribe a certain treatment to a particular patient) would not be considered administrative in nature.

However, just because conduct is by a clinician, or requires the exercise of clinical judgment, does not mean that it is necessary not also 'of an administrative nature' (eg, a decision whether a report should be made of child at risk of serious harm). There may also be complexities arising from a single complaint that raises both administrative and clinical issues.

### **It is possible that maladministration complaints are not being appropriately identified if they arise in the context of a workplace grievance or incident report**

In practice, if a matter is raised internally by a health worker as a workplace grievance or as a clinical incident report, the extent to which that matter may also involve or include a maladministration *complaint* (including potentially a Public Interest Disclosure (*PID*)) may not be recognised.

This means that maladministration complaints and PIDs may not always be being identified, recorded and dealt with or referred to appropriate complaint channels – or reported to external bodies, such as the Ombudsman. The Ombudsman has previously observed that the number of PIDs reported by LHDs annually is low relative to other agencies with similar sized workforces.

<sup>2</sup> Apart from resourcing issues, the Ombudsman may decide not to undertake formal investigation if the complaint has not been raised by the complainant internally in the first instance, or if a satisfactory resolution of the substance of the complaint can be achieved through informal inquiries or conciliation.



## **Protections for whistle-blowers in the health system are not consistent, depending on the concern that is being reported**

Public health workers who report concerns or wrongdoing are subject to different whistle-blower protections, depending on what and to whom they report.

A disclosure of serious maladministration to the Ombudsman is a public interest disclosure (PID) under the PID Act. The PID protections will be further strengthened from October 2023, when the PID Act 2022 commences.

However, even under the new Act, a disclosure that is 'merely' about a clinical incident or failure or a risk to health and safety (to any agency) will not be protected as a PID. (It would be a PID only if it also discloses serious maladministration or corrupt conduct, such as an attempt to unlawfully cover up such an incident, failure or risk).

The NSW Ombudsman has previously suggested that public officials who report 'serious risks to public health and safety' should have equivalent protections as whistle-blowers under the PID Act (whether those protections are included in the PID Act itself or in other health specific legislation).

The government has indicated it will seek advice from the PID Steering Committee on this issue only after the new PID Act 2022 commences in October 2023.

## **The Ombudsman has new and changed functions that will intersect with the health system**

As noted above, whistleblower protections will be strengthened from October 2023, when the PID Act 2022 commences. In light of the extent of changes, the Ombudsman is undertaking a complete revision of PID guidance for public authorities, and is also developing new and targeted training and education resources. Health organisations have been identified as a priority for the roll-out of training and education.

Following legislative amendment in 2022, the Ombudsman now has new powers to:

- **review and report on the complaint handling systems of public authorities.** This new function will enhance our existing complaint handling function by allowing us to be more proactive and more constructively assist public authorities to ensure they have adequate and effective complaint handling mechanisms in place.
- **refer any complaint we receive about a public authority back to that public authority for investigation.** We will also have the ability to then monitor the handling of the complaint by the public authority.

The Ombudsman has not received additional funding in respect of these powers. However, there may be opportunity to leverage these functions to support improvement in health administration – for example, identifying health organisations as the subject of a future pro-active complaint-handling system review.

## **The Ombudsman could, with appropriate funding, establish a focused unit within the office**

The health system is large and complex and geographically dispersed. Even with the increase to the Ombudsman's budget in 22/23, the resources necessary to fulfil what was likely envisaged by the Committee by its recommendation for a 'health administration ombudsman' – including in terms of visibility and accessibility – will remain constrained.

In addition, while the Ombudsman's concern is administration, it is necessary to understand the context in which administrative decisions are being made. For example, in examining an allegation that a serious risk to health and safety has been covered up or not properly investigated, it may be necessary to have internal expert capacity in order to provide some understanding of that risk, its nature and extent.

If there is a desire for greater visibility, accessibility, and intensity of the Ombudsman's focus on matters in the health administration sector, then consideration could be given (with additional resources) to the appointment of a dedicated Deputy Ombudsman and associated unit with the Ombudsman's office. The role would support enhanced capacity, expertise, effort and focus in respect of the Ombudsman's existing functions in respect of the health sector (including in terms of conducting maladministration investigations and monitoring).

Such a unit would not be stand-alone, but would work alongside and support the other existing Ombudsman units performing relevant functions, including the complaints assessment unit, inquiries and resolution unit, child death reviews, and PID units. It would operate in a similar way to the existing Aboriginal Programs Branch, and Community Services Monitoring Unit, which both have an associated statutory officer (Deputy Ombudsman, Aboriginal Programs and Deputy Ombudsman/Community Services Commissioner).

Note that this would not involve any new or expanded statutory functions being conferred on the Ombudsman. Nor would it involve the creation of any new agency or office. Rather, the proposal is simply for an organisational sub-unit within the Ombudsman's office, with executive-level leadership, to support the exercise of the Ombudsman's already *existing* statutory functions in respect of the health administration sector.

## Intended actions

In summary, the NSW Ombudsman has identified the actions in the table below that we propose to take in response to the issues above.

The Ombudsman is also of course happy to provide any other advice or assistance it can to NSW Health relevant to these or related issues – in a manner that:

- remains consistent with its status and role as an independent integrity agency, and
- recognises that responsibility for the management and culture of NSW Health and its partner agencies is properly the responsibility of NSW Health.



### Proposed actions by the NSW Ombudsman: Health administration

Issue	Gap	Actions	Existing/ Planned/New	Resourcing
1. The statutory functions of the NSW Ombudsman	No gap	None necessary.	New	Budget bid – 2023/24
2. Visibility, awareness and accessibility of NSW Ombudsman	Limited visibility – no active engagement/awareness raising in health system	<p>2A. Engage with NSW Health to include Ombudsman awareness-raising material in onboarding and staff training materials</p> <p>2B. Offer to assist NSW Health/HCCC to develop awareness/cultural ('speak up') campaign and collateral</p> <p>2C. Submit budget bid in 23/24 to fund a Deputy Ombudsman (and associated unit) to focus on the Ombudsman's existing functions in respect of the health administration sector, including to lead awareness campaign and sector/regional engagement</p> <p>2D. Subject to funding, conduct regional visits and engagement with LHDs and workers.</p> <p>2E. Explicitly consider health administration when developing new website and digital complaint tools</p>	New	Within existing
3. Complaint allocation and referral (between HCCC and Ombo)	Referrals may not always be timely; there may be potential failures to identify all complaints (or parts of complaints) that should be referred	3A. Agree revised MoU between HCC/Ombo	In progress	Within existing
		3B. Publish and promote MoU	Planned	Within existing



<p>4. Ombudsman investigations of maladministration</p>	<p>Matters raised in complaints that warrant investigation not always investigated by the Ombudsman due to limited resources</p>	<p>Planned</p>	<p>Within existing</p>
<p>3C. Ensure awareness training to HCCC and Ombo staff on identifying referrals, timeliness and process</p>		<p>Planned</p>	<p>Within existing</p>
<p>4A. Utilise the additional funding for staff that has been provided from the 22/23 budget to increase investigations (including related to the health sector, where identified)</p>		<p>Planned</p>	<p>Within existing</p>
<p>4B. Submit budget bid to fund a Deputy Ombudsman (and associated unit) to focus on the Ombudsman's existing functions in respect of the health administration sector, including to focus on health administration investigations of allegations of serious/systemic maladministration</p>		<p>New</p>	<p>Budget bid – 2023/24</p>
<p>4C. Submit a budget bid to fund a Deputy Ombudsman (and associated unit) to focus on the Ombudsman's existing functions in respect of the health administration sector, including to focus on pro-active monitoring of health administration</p>	<p>There is limited own-motion and pro-active monitoring by Ombudsman of potential maladministration in health system (ie responsive only if a 'complaint' is made)</p>	<p>New</p>	<p>Budget bid – 2023/24</p>
<p>4D. Identify resourcing needs for experts to support health administration complaint-handling/investigations and submit budget bid as required</p>	<p>Limited specialist clinical and other expertise to support Ombudsman investigations (nb: there is existing provision in Ombo Act for experts to be engaged)</p>	<p>New</p>	<p>Budget bid – 2023/24</p>
<p>5A. Ask PID Steering Committee (in consultation with HCCC) to consider and advise government on the proposal raised by the Ombo to provide equivalent protections to health disclosures as apply to other PIDs</p>	<p>Inconsistent protection for whistle-blowers who report clinical incidents/failures or other risks to public health/safety</p>	<p>Planned</p>	<p>Within existing</p>
<p>5B. Ensure new guidance, advice and training associated with new PID Act 2022 clearly sets out the need to identify when 'incident reports'/'grievances' may also be or include a PID</p>	<p>There may be potential failures to identify PIDs where a disclosure is received as a grievance or a clinical incident report (but where it in fact includes allegations of maladministration or other serious wrongdoing eg, a failure to properly deal with or to cover up an incident)</p>	<p>Planned</p>	<p>Withing existing</p>

6. Related Ombudsman functions	Potential to leverage related functions not realised due to resourcing constraints	Planned	Within existing
5C. Consider LHDs as the subject for future 'Public Interest disclosures' audit		Planned	Within existing
6A. Consider one or more LHD as the subject for future 'review of complaint-handling system'		New	Within existing (but following completion of current review of DCJ child protection complaint handling system in 2023)
6B. Consider end-to-end review of the health system complaints system for a review (would require additional funding)		New	Budget bid – 2023/24



## Attachment A

Proposed Health Administration Ombudsman	NSW Ombudsman
an independent office	<p><b>Consistent.</b></p> <p>The NSW Ombudsman is a separate statutory office. Staff are employed by the Ombudsman in an office which is a 'separate agency' under GSE Act and a 'separate GSF agency' under the GSF Act.</p> <p>The NSW Ombudsman is structurally and operationally independent of government, is not subject to direction and control by a Minister, and reports directly to Parliament.</p>
to receive and review concerns about the administrative conduct	<p><b>Consistent.</b></p> <p>The NSW Ombudsman receives complaints about 'conduct', which is defined to mean any action or inaction 'of an administrative nature'.</p> <p>NB: The NSW Ombudsman also has the power to take action, including to investigate, such conduct on its own motion.</p>
of management of Local Health Districts and NSW Health	<p><b>Consistent.</b></p> <p>LHDs and NSW Health, and their staff, are 'public authorities' subject to the jurisdiction of the NSW Ombudsman.</p>
from staff, doctors, patients, carers and the public	<p><b>Consistent.</b></p> <p>Complaints can be made to the NSW Ombudsman by 'any person'.</p> <p>NB: Complaints received from public officials may also be 'public interest disclosures' under the <i>Public Interest Disclosures Act 1994</i>.</p>
empowered to review administrative decisions	<p><b>Consistent.</b></p> <p>The NSW Ombudsman can 'investigate' conduct (including decisions) of an administrative nature and may make findings of 'administrative wrong conduct' under s 26 <i>Ombudsman Act 1974</i>, including if a decision was made that was:</p> <ul style="list-style-type: none"> <li>- unlawful</li> <li>- unreasonable</li> <li>- unjust</li> <li>- made for an improper purpose</li> <li>- discriminatory</li> <li>- otherwise wrong.</li> </ul> <p>The NSW Ombudsman can recommend corrective action be taken, including that a different decision be made.</p> <p>NB: The NSW Ombudsman cannot simply substitute its own decision or make a binding determination as to what the decision should be. That is, it is not a tribunal (like NCAT) and does not conduct a full merits review. There is no right to 'review'; rather, the Ombudsman has discretion whether to</p>

	<p>'investigate' a complaint. The Ombudsman considers whether there has been 'wrong administrative conduct' and makes (non-binding) findings and recommendations only. However, this limitation is inherent in the concept of an 'ombudsman', and presumably would also be the case with a specialised Health Administration Ombudsman.</p>
of NSW Health and Local Health District management	<p><b>Consistent.</b></p> <p>As noted above, NSW Health and LHDs, and their staff, are public authorities subject to the jurisdiction of the NSW Ombudsman</p>
including but not limited to, alleged coverups of medical errors or deaths	<p><b>Consistent.</b></p> <p>The 'cover up' of medical errors or deaths would be wrong administrative conduct under s 26 of the <i>Ombudsman Act 1974</i>.</p> <p>NB: A wilful 'cover up' would also likely constitute corrupt conduct and be reportable to the ICAC under s 11 <i>ICAC Act</i>.</p>
false or misleading data, inaccurate communications and/or media reporting,	<p><b>Consistent.</b></p> <p>The provision of false data/information would be wrong administrative conduct under s 26 of the <i>Ombudsman Act 1974</i>.</p> <p>NB: The wilful provision of false information may also constitute corrupt conduct and be reportable to the ICAC under s 11 <i>ICAC Act</i>.</p>
Visiting Medical Officer accreditation decisions, staff blacklisting and bullying or harassment of whistle-blowers	<p><b>Consistent.</b></p> <p>It appears that the matters of concern to the Parliamentary Committee would come within the Ombudsman's jurisdiction, noting:</p> <ul style="list-style-type: none"> <li>- again, there must be a reasonable suspicion of wrong administrative conduct (ie., there is no automatic right to 'review' any decision)</li> <li>- conduct that relates (merely) to the appointment of a particular person as an officer/employee or that (merely) affects a particular person in their capacity as an officer/employee is excluded (cl 12 Sch 1 <i>Ombudsman Act</i>); for example, the Ombudsman cannot investigate matters that are simply 'employment/industrial disputes'. (The policy justification for this is that these matters are the concern of the Industrial Relations Commission).</li> <li>- bullying/harassment in reprisal for a PID is not excluded from the Ombudsman's jurisdiction (so the NSW Ombudsman can investigate), even if it otherwise would be excluded as an employment/industrial matter. NB: PID reprisal (including by way of bullying) is also likely to constitute corrupt conduct and so be referred to ICAC under s 11 <i>ICAC Act</i>.</li> </ul> <p><i>NB: There may be a question as to whether the Parliamentary Committee's reference to 'whistleblower' may have been intended to be broader than those who are protected under the Public Interest Disclosures Act 1994. (see section ## below).</i></p>
is to provide an annual report to Parliament and the public	<p><b>Consistent.</b></p> <p>The NSW Ombudsman is required to table an Annual Report (as well as a separate 'public interest disclosures' annual report).</p>



	<p>The Ombudsman can also make a special report to Parliament on any matter relevant to its functions at any time.</p> <p>There is no specific requirement to report in detail on complaints/investigations relating to Health, although in practice the Ombudsman does report on the number of complaints received (broken down by LHD) as well as on any formal investigations undertaken.</p> <p>(Compare, for example, s 76 <i>Public Interest Disclosures Act 2022</i> which will require specific details about PIDs to be included in the Ombudsman's annual report).</p>
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