

1975

AUSTRALIA

THE HOUSE OF REPRESENTATIVES

OMBUDSMAN BILL 1975

EXPLANATORY MEMORANDUM

(Circulated by the Attorney-General,
the Honourable Kep. Enderby, M.P., Q.C.)

Ombudsman Bill

Introduction

This Bill seeks to establish the office of Australian Ombudsman and 2 offices of Deputy Australian Ombudsmen.

2. The Committee on Administrative Discretions, chaired by Sir Henry Bland, proposed in its Interim Report that in accordance with the policy of the Government there should be established an Ombudsman-type process to review the exercise of administrative discretions by Departments and certain authorities. The nature of the Ombudsman's investigations and the extent of his powers were duly considered by the Bland Committee and the relevant parts of their Interim Report and Final Report have served as the basis for the preparation of the Ombudsman Bill.

3. The Ombudsman fulfills his role by investigating complaints that he receives from persons who have been affected by actions taken by officials in the course of their duties. He is also able to initiate inquiries himself. For the purposes of his investigation he is able to inspect departmental files and records and to interview officials and others who may be able to assist his inquiries. His investigation is aimed at establishing whether the administrative procedures relating to the matter under complaint were carried out in a proper manner. The Ombudsman does not usually conduct a formal hearing with argument from both sides to the question: he inquiries informally and in the manner that appears to him the most appropriate. At the end of his inquiries he makes

his report on the matter complained of, to the complainant and to the Department or authority concerned, together with any recommendations that he may wish to make for correction of any deficiencies discovered. A copy of the report is sent to the appropriate Minister.

4. The essential feature of the Ombudsman's work is that he investigates procedures taken by a department in dealing with the matter in issue and reports on their correctness. He does not act as an appeals body able to substitute his decision in the matter for that complained of. If he recommends some remedial action that is not in due course taken he is able to report further to Parliament. Considerable influence is thus exerted on a department or authority that does not respond sufficiently to correct an unsatisfactory situation revealed by the Ombudsman.

5. The Ombudsman Bill provides therefore for functions the Ombudsman to investigate and report on administrative actions taken by

- (a) Departments of the Australian Public Service (other than the five Parliamentary Departments) and of the Northern Territory Public Service; and
- (b) statutory authorities established by Acts of the Parliament or by Ordinances of the Australian Capital Territory or of the Northern Territory, except those declared by the regulations to be authorities to which the Act does not apply.

The courts and other bodies constituted by or including in their membership persons of judicial status are excluded.

PART I - PRELIMINARY

Clause 2 - Commencement.

6. Commencement of the Ombudsman Act will be by Proclamation after all necessary administrative arrangements - appointments, office, initial staff, etc. - for getting the Office into operation have been completed.

Clause 3 - Definition and amplification of certain terms used in the substantive clauses of the Bill.

7. Sub-clause (1) - Definitions. Particular definitions that might be noted are:

- (a) "authorised person": the Bill contemplates that the Ombudsman would be able to authorise another person, usually a staff member, to carry out certain activities on his behalf, for example, sub-clauses 8(5), (6), (7): hearing of submissions by a department or a person (including a representative thereof) to be referred to in a report by the Ombudsman;
- (b) "Department": the five Parliamentary Departments are not included in those that are to be subject to the Ombudsman's investigations. These Departments are regarded as serving the needs of the Parliament rather than carrying out the administrative functions of the Government. As the five Departments are controlled by one or both of the Presiding Officers of the Parliament and not by a Minister, it is inappropriate that

the Ombudsman should be able to investigate their actions;

(c) "enactment": this term is defined so as to include Acts of the Parliament, Ordinances of the mainland Territories and all regulations, by-laws, orders, etc. made under that legislation. The term appears in various clauses of the Bill, e.g. 6(2), 9(5), 10;

(d) "officer": is defined as widely as possible so as to refer to persons employed in departments or authorities and also members of or persons acting on behalf of such bodies, as may be appropriate;

(e) "prescribed authority": the Bill, in paragraph (a) of sub-clause 5(1) provides for the actions taken by prescribed authorities to be open to investigation by the Ombudsman. Where however, certain authorities discharge advisory or commercial functions, or other duties of a non-executive nature not involving contact with the public, it may be inappropriate for the Ombudsman to investigate their actions. Provision is made therefore for the regulations to declare that the Act does not apply to particular authorities.

8. Sub-clauses (3), (4). Where the Bill refers to action taken by a department or an authority, that reference is to include action by its officers whether or not the action is incidental to the functions of the department or authority or is within the officers' duties, or is taken under statutory powers.

9. Sub-clause (5). "Taking of action" is to include making a decision or a recommendation, and failing or refusing to take any action or make a decision or recommendation.

10. Sub-clause (6). Where the Bill refers to international relations of Australia it is to be clear that the reference is to relations between governments and international organisations.

11. Sub-clause (7) acknowledges the provisions of the Northern Territory Administration Act under which the Administrator in Council is established on a basis somewhat akin to the Governor-General in Council.

12. Sub-clauses (8), (9) establish specifically that administrative actions by the Commonwealth Police Force and those of the mainland Territories are subject to the Ombudsman's investigations.

PART II - POWERS AND DUTIES OF THE OMBUDSMAN

Clause 4 - Office Ombudsman.

13. This clause establishes the offices of Australian Ombudsman and of 2 Deputy Australian Ombudsmen. The roles of the Deputy Ombudsmen are explained later in clause 23.

14. Sub-clause (2) describes the functions of the Ombudsman.

Clause 5 - Functions of Ombudsman

15. Sub-clause (1) - Investigations: Subject to the other provisions of the Bill, the Ombudsman is required to investigate complaints made to him about action taken by a Department or prescribed authority, that relates to a matter of administration. He is also able to initiate inquiries himself.

16. These provisions are generally similar to those in other Ombudsman legislation, and the Bill deliberately does not define the phrase "matter of administration". This is because no definition has yet been formulated that would not unduly limit the Ombudsman's flexibility in identifying a particular complaint as properly relating to a matter of administration and so open to his investigation. The role of the Ombudsman is a developing one and it has not, evidently, been the experience elsewhere that the absence of a definition of the term is harmful.

17. Accordingly no specific directions are given in the Bill as to what is required for a complaint to relate to a "matter of administration". Later clauses and sub-clauses set out some areas in which the Ombudsman shall not carry out

investigations or provide for the Ombudsman to exercise a discretion as to whether he should or should not act or continue to act on a complaint.

18. Sub-clause (2). Those matters that the Ombudsman is not authorised to investigate are:-

- (a) action by a Minister (who in the exercise of his portfolio is already answerable to and examinable in the Parliament);
- (b),(c) action by a judge, or by a magistrate or coroner of the Australian Capital Territory or Northern Territory;
- (d) matters concerning employment in the Australian or Northern Territory Public Service or in a prescribed authority. The areas of employer/employee relationships are traditionally excluded from the jurisdiction of an Ombudsman and were recommended by the Bland Committee for exclusion from investigation. In most cases there are existing appeal or other review opportunities for the examination of complaints;
- (e) action that the Defence Force Ombudsman (to be established under separate legislation) may investigate; or
- (f) consistently with (d), action taken with respect to an appointment to a statutory office outside the Public Service or the service of a prescribed authority.

19. Sub-clause (3) makes it clear that if a person has a complaint against police conduct, he may complain initially to the Police (as is now the case), and then, if he is still aggrieved, to the Ombudsman as to the latter's handling of the complaint. In any cases of that nature, there can be no claim that the police investigation of the complaint is a matter of employment and so excluded by paragraph (d) of sub-clause (2) from investigation by the Ombudsman.

Clause 6 - Discretion not to investigate certain complaints

20. Sub-clause (1) set out specific instances in which the Ombudsman himself may decide not to investigate or to discontinue an investigation of a complaint, viz:-

- (a) if the complainant was aware of the action complained of more than 12 months before he complained;
- (b) if complaint is frivolous or vexatious or is not made in good faith, or if the complainant does not have a sufficient interest in the matter to justify his making the complaint, and there are no special reasons justifying investigations. Thus, even though the Ombudsman may consider that a complaint may be made by a person whom he considers does not have a sufficient interest in or connection with the matter, he may consider that special reasons do justify his undertaking an investigation; or

- (c) if in all the circumstances investigation or further investigation is unnecessary.

The decision on all these matters is entirely within the hands of the Ombudsman alone. It is essential that the Ombudsman be given sufficient flexibility to enable him to decide, in the light of all aspects of the particular matter, what is the best course for him to take. It may be, for instance, that a Department, having become aware of his actual or intended investigation, makes its own enquiries and corrects the grievance complained of. Under (c) above, it may be the most appropriate course for the Ombudsman simply to go no further, if the complainant is now satisfied and he has no suggestion of any basic malpractice in the Department concerned.

21. Similarly, under (b) he could decide not to follow up a complaint where he was satisfied that the complainant was not sufficiently connected with the matter in issue.

22. A flexible basis of operation for the Ombudsman should ensure the most satisfactory use of his offices and the greatest attention on his part to matters of substantial merit.

23. Sub-clauses (2), (3) - recognise that the Ombudsman should act only when all other available avenues of appeal have reasonably been followed.

24. Sub-clause (2) precludes the Ombudsman from investigating a matter where the complainant has exercised a right of appeal to a court or tribunal for review of his case, unless the Ombudsman considers that it is reasonable for him to investigate.

25. Sub-clause (3) deals with the case in which a complainant had not exercised his right of appeal.

26. Sub-clause (4). Investigations by the Ombudsman may involve action taken in the course of giving effect to a decision of the Cabinet, a Cabinet Committee, a Minister or of the Administrator-in-Council of the Northern Territory. In such cases the Ombudsman shall, if he is of the opinion that the Department did not act improperly, cease to investigate the matter. These provisions recognise that the Cabinet, a Minister or the Administrator-in-Council may require that certain action be taken or its decision be implemented in a certain way. The Ombudsman does not go beyond the point of being satisfied that in carrying out that requirement the Department has acted properly. This is consistent with the principle that the Ombudsman does not investigate acts of Ministers.

Clause 7 - Complaints.

27. Complaints to the Ombudsman are to be made in writing. This is not to say of course that a person will not be able to approach the Ombudsman or his staff personally and outline in discussions the matter in issue. But at an appropriate stage the details of the complaint will need to be reduced to writing for the Ombudsman to be sure that the complainant has recorded all aspects as fully as he can and has given a full account of his side of the matter.

Clause 8 - Investigations.

28. This clause deals with the manner in which the Ombudsman will be required to conduct his investigations on receipt of a complaint concerning the actions of a Department or authority.

29. Sub-clause (1). Before commencing his investigation, the Ombudsman is to inform the Minister administering the particular department concerned in the complaint; in the case of a statutory authority he is to inform the Minister administering the legislation under which the authority is created. The principal officer of the department or authority is also to be informed. Both the terms "responsible Minister" and "principal officer" are defined in sub-clause 3(1) so as to indicate in a particular matter the appropriate action required of the Ombudsman.

30. Sub-clause (2) - (4). Investigations are to be conducted in private, and, subject to the other provisions of the Bill, in such a manner as the Ombudsman thinks fit according to the particular circumstances of the matter. He may obtain such information and make such enquiries as are necessary, and is not bound to allow the complainant or any other person the opportunity to appear before him in the course of his investigations.

31. The principles of the Ombudsman's operations are that he proceeds by informal and personal inquiry into a complaint, and by discussions or correspondence with departments or other sources as necessary. Formal public hearings would usually be inappropriate and would discourage many people from coming forward with a complaint.

32. Sub-clauses (5) - (7). These clauses require the Ombudsman, before he makes a report critical of a department, authority or person, to give an opportunity for the head of the department or authority, or the person affected, to appear

(in person or by a representative) before the Ombudsman and make submissions on the matter that is the subject of the report. Provision is included for the Ombudsman to authorise another person e.g. a staff member, to conduct these hearings.

33. Sub-clauses (8), (9). It would be open to the Ombudsman to discuss any matter relevant to the investigation with the Minister concerned. A Minister may request the Ombudsman to consult with him on relevant matters that come within the operation of sub-clauses 15(1) or (2) (examples of administrative deficiencies requiring a remedy), before the Ombudsman forms a final opinion on those matters.

34. Sub-clause (10). If the Ombudsman considers that his investigations reveal some misconduct or breach of duty he may, if he believes the circumstances justify his doing so, bring the matter to the notice of the principal officer of the department or authority. If that officer is the one considered to be at fault, the notice is to go to the responsible Minister.

Clause 9

35. This clause enables the Ombudsman, for the purposes of his enquiries, to require persons who may be able to give relevant information, to answer questions and produce documents.

36. Sub-clause (1) requires the Ombudsman to give a notice in writing to the person from whom information is required, specifying the relevant information or documents required and the period within which the person must comply.

37. Sub-clause (2) enables the Ombudsman to require the complainant or other person or body of persons for whom he has complained, or to an officer of a department or authority to

attend and answer relevant questions. If he wishes to require any other person to give information, the Ombudsman must first obtain the approval of the Minister administering the Ombudsman Act.

38. Sub-clause (3) enables a Minister to certify that the disclosure of information relating to a matter under investigation by the Ombudsman would be contrary to the public interest for any of the reasons set out in paragraphs (a) - (d) of the sub-clause. On receipt of the Minister's certificate in those terms the Ombudsman is not entitled to require production of documents, answers to questions or access to information concerning the matter specified in the certificate.

39. Sub-clauses (4), (5). A person is not excused from giving relevant information or documents on the grounds that to do so would contravene some other legislation be contrary to the public interest, incriminate him or, make him liable to a penalty. But he is not liable to any penalty for providing information etc. in accordance with the Bill and his answers to questions can be used against him only in prosecutions for breaches of the secrecy provisions of the Bill (see clause 35). Apart from the protection afforded by these provisions and subject to the other provisions of the Bill, a person attending before the Ombudsman is in the same position as to liabilities and protection generally as a witness before the High Court.

Clause 10 - Delays in exercising statutory powers.

40. This clause seeks to establish a procedure whereby a person who experiences delay in a department or authority making a decision under statutory powers may be able in appropriate cases to circumvent that delay and bring the matters before the

Administrative Appeals Tribunal for decision. That body is being established by separate legislation. Its function will be to hear appeals against decisions taken under statutory powers, where the relevant statute provides for appeals to lie to the Tribunal.

41. A person may complain to the Ombudsman of delay by a department or authority in taking a decision in the exercise of its statutory powers. The Ombudsman shall investigate the reasons for the delay as generally provided in the Bill. If the matter is one in which the legislation provides for an appeal to lie to the Tribunal, the Ombudsman, if he considers the delay to be unreasonable, may issue a certificate to that effect. The issue of that certificate will then enable an application to be made to the Administrative Appeals Tribunal as if the department had decided the matter against that person and he had appealed to the Tribunal in the ordinary way.

42. This scheme would not operate where the legislation provides that a decision under a statutory power must be taken within a specified or prescribed period. The Administrative Appeals Tribunal Bill itself deals with the failure to decide a matter within that period and in those cases it is not necessary to involve the Ombudsman at all.

43. The clause applies of course only where the legislation under which the decision in question may be taken provides for the Tribunal to hear appeals against decisions of that nature. If the Ombudsman receives a complaint of a delay in a matter not subject to appeal to the Tribunal then his ordinary powers of investigation provided elsewhere in the Bill would enable him to investigate the complaint in the usual way.

Clause 11 - Reference of question to the Administrative Appeals Tribunal.

44. The Bland Committee considered that on occasions the Ombudsman may in the course of his investigations into a matter, require some question of administrative principle to be considered by the Administrative Appeals Tribunal for its advice to departments and to the Ombudsman himself. The clause provides therefore for the Ombudsman to recommend to the principal officer of a department or authority that a specified question should be referred to the Tribunal for its consideration and advice. The principal officer concerned shall then refer the question to the Tribunal.

45. The question would probably arise during the Ombudsman's enquiries into a complaint, and the advice sought would probably assist him in deciding whether or not the procedures or principles followed in the matter complained of were properly based.

46. The Appeals Tribunal legislation contains corresponding provisions enabling the Tribunal to give advice on a question referred to it under this clause.

Clause 12 - Information to be given to complainant and department or authority.

47. When he receives a complaint the Ombudsman is required unless for some reason he decides not to do so (see clause 6); to investigate the matter according to the provisions of the Bill.

48. This clause requires the Ombudsman, where he does not investigate or complete an investigation into a complaint for any reason, to inform the complainant and department or

authority concerned in writing, furnishing the reasons why he did not investigate or complete the investigation.

49. Where he does investigate a complaint, the Ombudsman is to provide both the complainant and the department or authority concerned with particulars of the results of his inquiries. This information would be given in the manner and at the time that the Ombudsman considers appropriate.

50. If the Ombudsman considers that adequate and appropriate action in accordance with his report and recommendations is not taken by a department or authority within a reasonable time after receiving his report, the Ombudsman shall inform the complainant of the recommendations made and may add any comments he thinks fit.

Clause 14 - Entry onto premises.

51. Under sub-clause (1) an authorised person (as defined in clause 3 and in sub-clause 14(5)) may enter any place occupied by a Department or authority and carry on an investigation.

52. This power of entry does not however extend to places that have been declared under certain legislation specified in sub-clause (2), to which entry is controlled for defence purposes. Where the Ombudsman seeks entry to one of those places for the purposes of an investigation, the Minister administering the Act which relates to the place may approve his entry and may impose conditions as to his entry and conduct within the place.

53. Before an authorised person enters the premises of a Department or authority, he shall inform the principal officer concerned. Inspection of documents on those premises is to be undertaken by arrangement with the principal officer.

Clause 13 - Power to examine witnesses.

54. Where under clause 9 the Ombudsman requires a person to attend before him in order to provide information or answer questions relevant to his inquiries, the Ombudsman may administer an oath or affirmation to that person. He may then examine the person on oath or affirmation.

Clause 15 - Reports by Ombudsman

55. This clause applies in cases where having completed his investigations into a complaint the Ombudsman believes that the action complained of was defective for any of the several reasons set out in sub-clause (1). The various provisions seek to ensure that when the Ombudsman ascertains that serious short-comings have occurred in the action he has been investigating, he will report the matter to the department or authority concerned and to the responsible Minister, pointing out the remedial action that he considers should be taken.

56. Sub-clause (2) requires the Ombudsman to report accordingly to the department or authority concerned where he considers that further steps as indicated should be taken in order to correct the particular defect revealed in his investigation into the complaint. He is to include in his report the reasons for the opinions he has reached on the corrective action required and may also include any recommendations he wishes to make, for example, as to

improvements that should be made in a department's procedures or operations to prevent a recurrence. He may require the department or authority to inform him within a specified time of the action that it proposes to take concerning the remedial action proposed and any recommendations made by the Ombudsman in his report.

57. Where the Ombudsman makes a report under sub-clause (2) the department or authority may make any comments it desires on the report. The Ombudsman is required to send to the Minister concerned a copy of his report made under sub-clause (2).

Clause 16 - Reports to the Prime Minister

58. This clause provides some further sanctions in the event of a department or authority failing to correct a situation reported to it, and to its Minister, by the Ombudsman.

59. If the Ombudsman considers that the department or authority has not, within a reasonable time after receiving his report, taken action adequate and appropriate to the circumstances, he may inform the Prime Minister in writing of the situation. A copy of his report to the department or authority and of any comments made by it on the report are also to be sent to the Prime Minister. In deciding whether to inform the Prime Minister under this clause, the Ombudsman is required to consider any comments that the department or authority may have made to him on receipt of his report.

Clause 17 - Special reports to Parliament

60. It is also open to the Ombudsman, where under clause 16 he has informed the Prime Minister of his opinions

concerning departmental action on his report of investigations made, to forward to the Parliamentary Presiding Officers for presentation to the respective Houses, copies of his report together with copies of departmental comments on the report.

Clause 18 - Reports relating to the Northern Territory

61. This clause recognises the requirement that the Northern Territory Legislative Assembly, as a body exercising legislative power under the Northern Territory (Administration) Act, be informed concerning reports made to Parliament by the Ombudsman on action taken under legislation of the Northern Territory.

62. Where under clause 17 the Ombudsman has made a report to the Parliament concerning his investigation of action taken under legislation of the Northern Territory, he is to forward a copy of the report to the President of the Legislative Assembly for presentation to that Assembly.

63. Where the Ombudsman investigates action taken under the Northern Territory Local Government Ordinance, by Councils established under that Ordinance or by Council officers or employees, he shall report in the usual way to the department or authority concerned. If the Ombudsman considers that adequate and appropriate steps have not been taken within a reasonable time in regard to matters or recommendations included in his report, he may inform the Minister for the Northern Territory accordingly. Copies of the Ombudsman's initial report on the action in question and of any comments made by the department or authority concerned are also to be sent to the Minister. The Ombudsman is required to consider the comments made on his report in deciding whether to inform

the Minister for the Northern Territory. If he decides to do so, he may send a copy of his report and the comments made on it to the President of the Legislative Assembly for presentation to that Assembly.

Clause 19 - Annual Reports.

64. Apart from the special reports that may be made under clauses 17 and 18, the Ombudsman is required to submit annual reports as soon as possible after the close of each financial year.

65. One report is to be submitted to the Minister administering the Act for presentation to the Parliament. The Minister is to arrange for the Ombudsman's report to be laid before each House of Parliament within 15 sitting days of their receipt by him.

66. A report is to be made to the Minister for the Capital Territory for presentation to the Legislative Assembly for that Territory, with respect to the Ombudsman's operations during the previous financial year, in regard to complaints concerning action taken by a department or authority in that Territory. Similarly, a report is to be sent to the Minister for the Northern Territory in regard to complaints concerning actions in that Territory. Each Minister will be required to see that the report is laid before the particular Assembly within 15 sitting days of his receiving it.

67. The report made by the Ombudsman to the Parliament is to include references to his operations in regard to the Australian Capital Territory and to the Northern Territory. The Parliament will therefore receive an account covering all the Ombudsman's areas of operations, and the Territory

Assemblies will have before them reports concerning actions taken in their respective Territories.

58. The first reports to be made by the Ombudsman are to be submitted as soon as practicable after 30 June 1975, and are to relate to the period between the commencement of the Ombudsman Act and that date.

59. Sub-clause (7) applies the provisions of sub-clause 3(5) to the annual reports that the Ombudsman makes under clause 19. Sub-clause 8(5) requires the Ombudsman, where he intends to make a report on a matter that may be critical of a department, authority or person to give beforehand an opportunity for the principal officer or person concerned to make submissions concerning the matter to the Ombudsman.

PART III - CONDITIONS OF SERVICE AND STAFF

Clause 20 - Definition

70. This clause defines the term "Ombudsman" as used in the clauses in Division 1 of Part III to mean both the Australian Ombudsman or a Deputy Australian Ombudsman, as appropriate.

Clause 21 - Appointments

71. Appointment of an Ombudsman is to be made by the Governor-General.

72. The terms and conditions under which an Ombudsman holds office, other than those for which the Bill provides, are to be as determined by the Governor-General. Those terms and conditions dealt with in the Act are as follows:

Clause 22 - Tenure of office

24 - salary and allowances

25 - leave of absence

26 - resignation

27 - 28 - termination, suspension and removal

30 - superannuation

32 - preservation of rights of member of
the Australian Public Service appointed
as Ombudsman.

Clause 22 - Tenure of appointment

73. An Ombudsman ceases to hold office when he attains the age of 65 years. Subject to later provisions as to resignation, retirement and removal from office, an appointment as Australian Ombudsman or his Deputy is a career appointment to the common retirement age of 65 years.

74. A person who has attained the age of 65 years shall not be appointed as an Ombudsman.

Clause 23 - Deputy Ombudsmen

75. This clause enables each of the two Deputy Ombudsmen to be designated by the Minister as the Deputy Ombudsman for either the Australian Capital Territory or the Northern Territory. Each would then act in regard to the Territory for which he is designated as if he were the Australian Ombudsman. The residents of each of those Territories would then have access to a Deputy Ombudsman available full-time in that Territory and able to exercise in regard to that Territory all the powers of the Ombudsman as set out in the Bill, except the power to make special reports to the Parliament under clause 17 and to the Northern Territory Legislative Assembly under sub-clause 18(5).

76. The power of the Ombudsman to make these special reports is, in the circumstances in which they may be made, of compelling influence over departments and authorities that do not act to remedy deficiencies in their administration that have been pointed out to them by the Ombudsman. It is not desired to weaken the highly persuasive effect of this power by enabling anyone other than the Ombudsman himself to make special reports, after all other steps open to the Deputy Ombudsmen to correct a situation have been taken.

77. Sub-clause (4) makes it clear that even though the Deputy Ombudsmen have been designated for each of the two Territories the Ombudsman himself is still able to carry out all his functions and exercise all his powers in those Territories.

Clause 24 - Salaries and Allowances

78. The salary and any allowance payable to an Ombudsman shall be as are determined by the Remuneration Tribunal; if there is no determination by the Tribunal then remuneration may be set by the regulations. Travelling allowances and any other allowances due may be prescribed in the regulations. These provisions of the clause are to have effect subject to the Remuneration Tribunals Act 1973-1974, under which that Tribunal may determine salaries and allowances for the Ombudsmen, being holders of public offices within the terms of that Act.

Clause 25 - Leave of Absence

79. Provision is made for the Minister to grant an Ombudsman leave of absence on such terms and conditions, including as to salary, as determined at the time.

Clause 26 - Resignation

80. An Ombudsman may resign by delivering his written resignation to the Governor-General.

Clause 27 - Retirement for Invalidity

81. The Governor-General may, with the consent of an Ombudsman, retire him from office, for incapacity. Other provisions of the Bill provide for an Ombudsman's entitlements on retirement.

Clause 28 - Suspension and Removal from Office

82. As an officer occupying a position of independence of operation involving investigation of administrative actions

of departments and authorities, it is appropriate that the Ombudsman be afforded a high degree of security in his appointment. The clause therefore provides for his removal for incapacity only on an address presented to the Governor-General by each House of the Parliament in the same session of the Parliament.

83. There is further provision for suspension of an Ombudsman by the Governor-General for misbehaviour or incapacity. In such a case the Minister is to arrange for a statement of the grounds of suspension to be laid before each House within 7 sitting days of the suspension. Within 15 sitting days of the statement being laid, either House may resolve that the Ombudsman should be removed from office. If both Houses so resolve, the Governor-General is required to remove the Ombudsman from office. If at the end of the 15 sitting days, a House has not passed such a resolution the suspension terminates and the Ombudsman would then be free to return to duty. Normal salary and allowances are to be paid during any period of suspension.

84. In the event that an Ombudsman becomes bankrupt or does any of the acts as set out in sub-clause (7) that normally require removal of a statutory office-holder from office, the Governor-General shall remove him from office.

85. An Ombudsman may not be suspended or removed in any other way.

Clause 29 - Acting Appointments

86. The clause provides for the Governor-General to appoint a person to act in the office of Australian Ombudsman

or in an office of Deputy Australian Ombudsman during absences or suspension of the office-holder or a vacancy in the office, and to terminate an acting appointment at any time.

87. An acting appointment during a vacancy in an office of Ombudsman is not to continue after 12 months from the occurrence of the vacancy. It is not desired that an acting appointment would continue indefinitely and a period of 12 months from the time the vacancy occurs would be a reasonable period in which to make a substantive appointment to the vacant office.

88. If a Deputy Ombudsman is appointed to act as Australian Ombudsman, his office as Deputy is deemed to be vacant during that appointment. It would be possible therefore for an acting Deputy to be appointed, keeping all the statutory offices occupied.

89. If an acting appointment as an Ombudsman is made for reasons other than a vacancy (e.g. absence of the occupant on leave for illness etc.) and that office becomes vacant during the period of the acting appointment, the person acting in the office may continue to act until the Governor-General otherwise directs, the vacancy is filled or the usual period of 12 months from the occurrence of the vacancy expires, whichever first occurs.

90. Terms and conditions for acting appointments are to be as determined by the Minister. Provisions in the Bill as to leave of absence and resignations also apply to acting appointments.

91. A person appointed under this clause to act in an office has all the powers and functions of that office as provided in the Bill. The clause does not permit any challenge to the validity of any act done by a person acting in an office, for the reason that the statutory basis for his appointment did not exist or that his appointment had ceased to have effect. Thus no claim can be made that the acts of an acting Ombudsman are invalid because the person normally holding that office is now available or that he had not vacated the office.

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Clause 30 - Superannuation

92. This clause sets out provisions consistent with those of the Superannuation Act to ensure that an Ombudsman is able to contribute to the Superannuation Fund and gain pension rights on his retirement under clause 27 or removal under clause 28 for incapacity.

Clause 31 - Staff

93. The staff of the Australian Ombudsman are to be employed under the Public Service Act and the Ombudsman is to be given the powers of a Permanent Head under that Act in relation to his staff.

Clause 32 - Preservation of rights

94. If a serving officer of the Public Service or a person to whom the Officers' Rights Declaration Act applies is appointed as an Ombudsman or is employed on the staff of the Ombudsman, he is to retain all his existing and accruing rights.

PART IV - MISCELLANEOUS

Clause 33 - No review of acts of Ombudsman

95. Apart from the jurisdiction vested by the Constitution in the High Court, the acts of the Ombudsman or of a Deputy Ombudsman in relation to an investigation under the Bill may be challenged in the courts only on the ground that the acts in question are not authorised by the Act. No liability attaches to an Ombudsman or person acting within his direction or authority for acts done in good faith in the exercise of powers or functions under the Act.

Clause 34 - Delegation

96. The Ombudsman may delegate to a Deputy, a staff member, or with the consent of the Minister, another person, any of his powers except those powers of making reports under certain clauses. It is considered essential that the Ombudsman, in order to maintain consistency in standards of reports made and the influence that a report by his office should command, must himself retain the power of reporting.

Clause 35 - Secrecy provisions

97. Sub-clause (2). All Ombudsmen, staff and delegates are to be strictly bound to maintain and preserve secrecy, both during and after the period of duty under the Act, in regard to all information acquired during that period.

98. Sub-clause (3). The Ombudsman may however disclose in a report made under the Act those matters that he considers

should be disclosed in order to set out his conclusions and recommendations in the report.

99. Sub-clauses (4), (5). A Minister may certify to the Ombudsman that disclosure of information or documents concerning specified matters would be prejudicial to Australia's defence or security or otherwise contrary to the public interest. In such a case the Ombudsman and his officers cannot disclose to any person information or contents of documents concerning any of the matters so specified by the Minister. The Ombudsman and his officers are still of course required to divulge or communicate any information of that nature if required to do so under the other provisions of the Bill.

100. Sub-clause (6). This sub-clause permits the Ombudsman to provide information on a matter arising under a State Act or under a joint Australia/State undertaking, to an Ombudsman or equivalent officer of that State. The information however cannot include matters in respect of which a Minister has given a certificate under sub-clause (4).

101. Sub-clause (7). The Ombudsman, a Deputy or a member of his staff or a delegate of the Ombudsman cannot be compelled in a court or quasi-judicial proceedings to disclose information disclosed to or obtained by him under the provisions of the Bill.

Clause 36 - Offences

102. Offences established under the Bill deal only with refusal or failure without reasonable excuse of a person to

attend, to be sworn or make an affirmation or to answer a question or produce a document or record, when required to do so under the Bill. Other offences are obstructing, resisting etc. without lawful excuse the Ombudsman or other person in performing his functions under the Act or knowingly to provide false information or statements.

Clause 37 - Regulations

103. This clause enables the Governor-General to make regulations required in order to carry out or give effect to the Bill.