

**MEMORANDUM OF UNDERSTANDING BETWEEN THE
NSW OMBUDSMAN
AND
THE OFFICE OF LOCAL GOVERNMENT**

1. Purpose

- 1.1 This Memorandum of Understanding (“MOU”) sets out the arrangements for liaison between the Office of Local Government (“the Office”) and the NSW Ombudsman (“the Ombudsman”) concerning the sharing of information, referral of complaints and other operational matters.
- 1.2 The MOU acknowledges the preparedness of the Office and the Ombudsman, in the public interest, to share with each other on an ongoing basis and as far as is legal and practicable, information in each agency’s possession relevant to matters within the jurisdiction of the other.

2. Complaint Referral Arrangement

- 2.1 Part 6 of the *Ombudsman Act 1974* permits two or more relevant agencies, including the Office and the Ombudsman, to enter into arrangements for the referral of complaints among themselves. Any such referrals have to be made in accordance with a Complaint Referral Arrangement entered into between the agencies. This Part of the MOU constitutes a Complaint Referral Arrangement for the purpose of s.42(1) of the *Ombudsman Act*.

Notification of complaints

- 2.2 Each agency will upon request and where reasonably practicable, provide the other with statistical details on the number of local government complaints received during a given period, the issues complained of, which councils such complaints relate to and, as far as practicable, how they were disposed of.
- 2.3 The Ombudsman and Office will notify each other of matters which come to the attention of each other relating to specific areas of complaint, or particular councils of interest, as identified and agreed to between them. All such matters will be notified orally and/or in writing during periodic liaison meetings and otherwise on an ad hoc basis, as the need arises.

Consultation

- 2.4 Given that the jurisdiction of each agency overlaps in relation to pecuniary interest allegations and may overlap in relation to councillor misconduct, without fettering their statutory discretions or limiting the circumstances when they will consult, each agency undertakes to consult in the following circumstances:
- the Ombudsman will consult with the Office before commencing any formal investigation into a matter that primarily concerns breaches of the pecuniary interest provisions of the *Local Government Act 1993*;

- subject to relevant legislative amendments establishing the jurisdiction of the Chief Executive, Local Government, the Ombudsman will consult with the Office before commencing any formal investigation into a matter that primarily concerns the misconduct of a councillor as defined in the *Local Government Act 1993*; and
- the Office will consult with the Ombudsman before commencing any formal investigation or proactive strategy that primarily concerns conduct that involves maladministration within the jurisdiction of the Ombudsman, other than matters involving pecuniary interest breaches and councillor misconduct.

Circumstances in which a complaint may be referred

2.5 A complaint may be referred by one agency to the other if it appears to the referring agency to be within, or partly within, the receiving agency's jurisdiction.

- For that reason, the Office agrees to receive the following complaints that may be referred to it:
 - the application of a council's code of conduct;
 - compliance and performance against guidelines issued pursuant to s.23A of the *Local Government Act 1993*;
 - a Council's financial management and performance, including rating policies;
 - compliance and performance against swimming pools legislation;
 - compliance and performance against companion animals legislation;
 - public land management.
- For that reason, the Ombudsman agrees to receive the following complaints that may be referred to it:
 - relating to regulation, enforcement and compliance;
 - relating to management of a particular complaint by a council;
 - quality and performance of complaint management systems;
 - decisions by councils regarding unreasonable conduct by a complainant.

2.6 A complaint may be referred by one agency to the other due to special circumstances such as a potential conflict of interest or a perception of bias particularly in cases where an officer is required to exercise a degree of discretion in assessing and managing the complaint.

- Specifically, complaints received by the Office about councillor misconduct, political donations and breaches of the pecuniary interest provisions of the Local Government Act 1993 relating to Shoalhaven City Council may be referred to the NSW Ombudsman following an initial assessment. Many members of the Office reside in the Shoalhaven local government area and may potentially have difficulty in dealing with some complaints that are made about, or referred from, Shoalhaven City Council. Misconduct matters, political donations matters and matters relating to breaches of the pecuniary interest provisions of the Local Government Act 1993 require an officer to exercise a degree of discretion in assessing and managing the complaint. It is agreed that where such a potential conflict of interest or perception of bias could arise, that will impact on the Office's capacity to assess, investigate or determine a complaint, the Office will refer the complaint to the Ombudsman.

Consent of receiving agency and complainant

2.7 The prior consent (either oral or written) of the receiving agency must be obtained before a complaint is referred to that agency.

- 2.8 The express consent of the complainant is to be obtained by an agency before a complaint may be referred to the other agency (s.42(4)). The express consent can be given orally (either over the telephone or face to face) or in writing (in correspondence, by facsimile, or by email). Where consent is given orally, a written record is to be made and retained on the relevant file.

Information to accompany a referred complaint

- 2.9 Subject to the Information Sharing Arrangements set out in Part 3 below, the information to accompany a referred complaint is to include:

- copies of all documentation held by the referring agency that relates to the complaint, or part of the complaint, being referred;
- advice on whether any parts of the complaint being referred are also being referred to any other agency for attention;
- advice on whether the referring agency intends to continue to deal with the complaint, or any particular part of the complaint.

- 2.10 Documents obtained from any party in the course of conciliation/mediation proceedings will not be disclosed without the consent of the party that provided the documents.

Information to be provided to the complainant

- 2.11 At or about the time a complaint is or is to be referred, the referring agency is to send to the complainant the following information, in writing:

- confirmation of any oral consent to the referral;
- the name and contact details of the receiving agency;
- whether the referring agency intends to continue to deal with part or all of the complaint and if not, a notice of decline or discontinuation.

- 2.12 On receipt of a referred complaint, the receiving agency is to give the complainant the following information, in writing:

- confirmation of receipt of the referred complaint, or part of the complaint;
- relevant contact details;
- information as to the complaints process operated by the receiving agency.

- 2.13 Sections 2.6, 2.7, 2.8, 2.10 and 2.11 of this MOU do not apply to referrals made by the Ombudsman to the Chief Executive, Local Government pursuant to a statutory referral power under the *Local Government Act 1993* or the *Public Interest Disclosures Act 1994*.

3. Information Sharing Arrangement

- 3.1 Part 6 of the *Ombudsman Act 1974* permits two or more relevant agencies, including the Office and the Ombudsman, to enter into arrangements for the sharing of information held by them. Any such sharing has to be made in accordance with an Information Sharing Arrangement entered into between the parties. This Part of the

MOU constitutes an Information Sharing Arrangement for the purposes of s.43(1) of the *Ombudsman Act*.

Circumstances in which information can be shared

- 3.2 In this MOU, “disclosing agency” means the agency holding the information and that is referring or intending to disclose part or all of the information to the other agency.
- 3.3 Each agency is authorised to disclose information to the other agency in the following circumstances:
- where one agency requests the disclosure of information reasonably necessary to assist that agency to carry out its functions relating to a matter within its jurisdiction;
 - where one agency is referring a complaint to the other agency pursuant to this MOU;
 - where the disclosing agency becomes aware that the other agency has received a complaint and the information held by the disclosing agency would assist the other agency to carry out its functions;
 - where it is reasonably necessary to share information, regularly or in appropriate circumstances, in order for one or both of the agencies to carry out its or their functions in an efficient manner.
- 3.4 Where a disclosing agency has (or should have) reason to suspect that certain information is or includes “sensitive personal information” (as defined in s.41(1)) about a complainant, the agency must not disclose the information without the complainant's express consent (which can either be oral or in writing) (s.43(6)).

Confidentiality of information provided

- 3.5 It is acknowledged that confidentiality is to be maintained within the statutory framework that exists for each agency.

Attendance at investigations or hearings

- 3.6 One agency may authorise the other agency to be present during an investigation or hearing conducted by the agency:
- where both agencies are conducting concurrent investigations into or otherwise reviewing related matters, being either related aspects of the same complaint or of different complaints;
 - where both agencies are investigating part or all of a complaint referred by one agency to the other pursuant to this MOU;
 - where a disclosing agency becomes aware that the other agency has received a complaint and the information held by the disclosing agency would assist the other agency to carry out its functions;

and in each case the authorising agency believes such presence will not prejudice its investigation or hearing.

4. Liaison

- 4.1 There will be ongoing liaison between the agencies at a number of levels and for a variety of purposes. Such liaison may include provision of information about breaches of the pecuniary interest provisions of the *Local Government Act 1993*, the misconduct of councillors, maladministration and intended operational responses or advice on proactive strategies and education issues being considered by the respective agencies.
- 4.2 A liaison committee of senior staff of the Ombudsman and the Office will meet regularly (preferably at least four (4) times per year), to consider:
- (1) any issues in relation to current complaint files or investigations
 - (2) current projects of mutual interest to the agencies
 - (3) other matters or activities which could involve an overlap in jurisdiction or give rise to duplication of effort by the agencies.
- 4.3 Case officers of both agencies will liaise as necessary and appropriate in relation to particular files, areas of activity, or persons or organisations the subject of interest.
- 4.4 The Ombudsman and the Chief Executive, Local Government will keep each other briefed in areas of joint interest.

5. Review

- 5.1 The MOU may be reviewed at the request of either agency but in any event shall be reviewed no later than 24 months from the date of the MOU.
- 5.2 It is intended that the terms of the MOU will continue to apply, even at expiry, until the reviewed MOU is ratified.

6. Public availability

Copies of this MOU are to be available for public inspection at the offices of the Office and the Ombudsman during their ordinary hours. A copy will also be available on the Office's website.



John McMillan
NSW Acting Ombudsman



Tim Hurst
Acting Chief Executive, Office of Local Government

Date: 21 November 2016 Date: 23/2/16