

# Animal management and the Ombudsman

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## THE OMBUDSMAN

So who and what is an Ombudsman? The word 'Ombudsman' is a word of Swedish origin, meaning 'protector or defender of citizens' rights'.

Ombudsmen were appointed progressively in each Australian state and territory from 1972-1979. Of course in Australia there are also private sector Ombudsmen representing citizens rights in spheres such as banking, telecommunications, insurance, electricity and traineeships.

In Queensland, the first Queensland Ombudsman was appointed in 1974 to investigate complaints about the administrative actions of government departments and authorities. The current Queensland Ombudsman is Mr David Bevan.

## WHAT DOES AN OMBUDSMAN DO?

The term Ombudsman has become synonymous with entities that provide independent and impartial review of decisions by public or private organisations which affect the interests of people. There is also an expectation that an Ombudsman can do something about a decision if it is found to be unfair or wrong. In simple terms, an Ombudsman is a watchdog for the people.

The Queensland Ombudsman has stated his mission to the promotion of high standards of administrative practice in Queensland's public sector agencies for the benefit of the community.

To achieve this stated mission, the Ombudsman utilises a dual role. As you are all probably aware, the first of these roles is to investigate complaints about the administrative actions and decisions of Queensland's state and local government agencies or their staff. The second is to improve the quality of decision-making and administrative practices of government agencies. These roles have been given to the Ombudsman by the Parliament via legislation, being the *Ombudsman Act 2001*. Today, I will be focusing on the investigative role of the Ombudsman.

## INVESTIGATIVE JURISDICTION OF THE OMBUDSMAN

The jurisdiction of the Ombudsman is also defined in the *Ombudsman Act 2001*. Section 14 of the Act provides that the Ombudsman may investigate administrative actions of agencies. An agency is defined to include local governments.

**So what is an administrative action?** The Act states that an administrative action is any action about a matter of administration, and includes:

- (a) a decision and an act,
- (b) a failure to make a decision or do an act, including a failure to provide a written statement of reasons for a decision,

- (c) the formulation of a proposal or intention, and
- (d) the making of a recommendation.

As you can see the definitions provided in the Ombudsman Act are quite broad. So, in practical terms what does this mean in relation to animal management officers in local governments? This means that decisions you make, particularly those made under your Council's Animal Control Local Law, could be the subject of a review by the Ombudsman.

It is important to note that the Ombudsman investigates the actual merits of decisions, not just the decision making process.

## HOW WILL YOU KNOW?

How will you know if someone complains to the Ombudsman about one of your decisions?

Basically, if the Ombudsman inquires into one of your decisions or actions it will be on the basis that on the face of the complaint received, it appears that you have, on behalf of your Council, acted unfairly or improperly in certain respects including:

- being unreasonable,
- being discriminatory,
- acting contrary to law,
- making a decision or taking an action:-
  - for an improper purpose,
  - on irrelevant grounds,
  - wholly or partly on a mistake of fact or law, or
  - simply being wrong.

If any of your decisions are the subject of a complaint and the Ombudsman is of the preliminary view that the complaint warrants intervention an investigator from the Ombudsman's office will contact the Council in the first instance to outline and discuss the nature of the complaint issues. For each Council in Queensland, an officer has been nominated by the Council to act as the liaison officer for the Ombudsman's office. It is this person who is contacted (usually by phone or email) in the first instance by the investigator.

At this point the investigator is usually seeking a general outline of the facts and the basis for Council's decision. The investigator may also be seeking copies of documents. The liaison officer may then contact you to find out this information to pass to the investigator or, direct the investigator to speak to you directly.

It is important to note that the Ombudsman sees his office as one of last resort. Therefore, unless the matter appears to be of a serious nature, the Ombudsman will not take a matter up until the person has first raised the matter with the chief executive officer of the relevant local government.

The Ombudsman believes a local government about which a complaint is made should be given an opportunity to respond to the complaint before he intervenes.

If the Ombudsman investigates a complaint and forms the view that the action or decision was wrong, he will make recommendations to the local government to correct the decision. The focus of the Ombudsman is on resolving the matter of complaint and trying to ensure that the local government's processes are improved for the future. He is not seeking to place blame on individual officers.

As I said, the Ombudsman makes recommendations only. He does not have the power to direct a local government. However, he is not without teeth. He does have the power to report to the Parliament if a Council refuses to follow his recommendations. But history shows there is rarely a need to use this power. No Council or CEO wants to see their name emblazoned across a public report saying they failed to cooperate with an Ombudsman's investigation, or failed to implement a recommendation for better administrative practice.

### OMBUDSMAN'S POWERS

The Ombudsman Act gives the Ombudsman a number of powers. These include:

Power to require a person to:

- provide an oral or written statement,
- provide documents of a stated kind,
- create a document,
- attend to produce documents for examination.

Power to:

- enter public premises,
- inspect and copy records,
- require reasonable assistance,
- prohibit publication of information.

A local government is not entitled to claim privilege to try to refuse providing information or documents to the Ombudsman.

### TYPES OF INVESTIGATIONS

The Ombudsman Act refers to three different types of investigations which can be conducted the Ombudsman:

#### Preliminary inquiry

Preliminary inquiries are made by the Ombudsman's office to determine whether an investigation is necessary. The principal officer of the local government, that is the ceo, must give the Ombudsman reasonable help in the conduct of a preliminary inquiry.

#### Informal investigation

The Ombudsman Act basically specifies that an investigation which is not using the formal powers under the Act is an informal investigation. It is the policy of the Ombudsman that informal resolution be attempted wherever possible provided it is consistent with the basic goals of the office to:

- provide administrative justice to Queenslanders, and
- improve the quality of public administration in Queensland.

The Ombudsman's investigators have authority to attempt to resolve matters quickly and informally if they can achieve a reasonable outcome.

The essence of informal resolution is to try to resolve matters without using compulsory powers under the Act or asking local governments to prepare exhaustive formal reports and/or engage in lengthy formal correspondence.

Accordingly as part of informal resolution, the Ombudsman's investigators may telephone, fax or email a local government to request:

- information,
- relevant documents or files,
- a meeting, or
- telephone discussion.

Many matters are able to be resolved quickly and informally. I should also point out that a resolution of a matter doesn't necessarily mean that the complaint is substantiated. It may also mean that the local government's decision or action was determined to be correct.

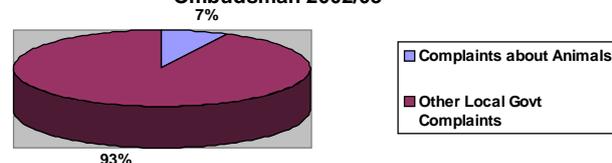
### Formal investigation

Formal investigations are those where the Ombudsman writes to the ceo of a local government advising that he has decided to conduct an investigation and has also decided to use his powers under the Ombudsman Act to compulsorily require the local government to assist in the investigation. For example, requiring an officer of the local government to attend for an interview. In this financial year the Ombudsman has not conducted any formal investigations. The Ombudsman's focus has definitely been on informal resolution of matters.

### COMMON COMPLAINTS ABOUT LOCAL GOVERNMENTS IN RELATION TO ANIMAL MANAGEMENT

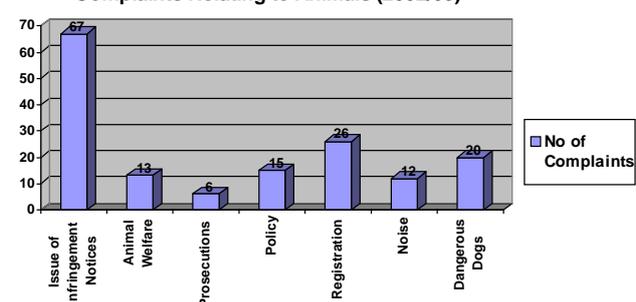
In the 2002/2003, the Ombudsman received approximately 2180 complaints about local governments. Of those complaints approximately 160 of those matters related to animals. Which equates to approximately 7% of the local government complaints received by the Ombudsman.

Local Government Complaints Received by the Ombudsman 2002/03



A further breakdown of the complaints received which relate to animals follows:

Complaints Relating to Animals (2002/03)



As you can see the areas about which the Ombudsman receives the most complaints relate to enforcement type issues.

The following are some of the more common complaints we have received over the years.

### **Complaint 1 - The Council did not respond to me when I contacted it**

*Lesson 1 – Communicate with your customers*

Our experience shows that communication is a big issue for complainants. People complain most often because of poor communication between an agency, its staff and the public. If you are able to communicate well with the public and take the time to explain your actions and decisions in a manner that shows an appreciation of their concerns and points of view, this can often prevent a minor matter escalating into a major drama. Excellent communication strategies promote openness in decision-making and help customers to view your Council as accessible and user-friendly.

### **Complaint 2 - The Council did not record my complaint**

*Lesson 2 – Keep a central complaints register that can be accessed by all officers across Council*

People often complain to us that their complaints are not recorded by Councils, meaning the complaint is not actioned for investigation or if there is a history to the complaint, there are no records of it. In turn, people feel their complaints are not being taken seriously.

Often, when we investigate this type of complaint, we find that this is not the case. What we do find is that some Councils have a number of branches with different regulatory responsibilities but they do not have not a central complaints recording and investigation monitoring system. Different branches have different systems with different procedures. We find the left hand does not know what the right is doing.

The lesson to be learned – it is imperative that Councils have a central register, a ‘single point of truth’, for the receipt of complaints and a full and proper record should be made of each complaint, allowing all officers to access information about a complaint.

### **Complaint 3 - Delaying or failing to investigate complaints about unlawful activity**

*Lesson 3 – Inform customers about reasonable investigation timeframes*

The first task when you receive a complaint about alleged unlawful activity is to determine the nature of the complaint. Not every complaint requires investigation. If a decision is made not to investigate a complaint, you should record the reasons for that decision and the name and position of the decision-maker. The Council should then inform the person of the decision to not investigate and also explain why that decision was made.

Often people who approach local governments with a complaint have an expectation that the matter will be dealt with immediately. Any delay by the Council is seen as unreasonable. Councils need to manage their customers’ expectations by providing them with

information about timeframes in regard to the investigation of their complaint. However, Councils need to ensure that if these timeframes are not going to be met that they contact the customer and inform them of the change to the timeframes.

### **Complaint 4 - Failing to enforce action despite evidence of unlawful activity**

*Lesson 4 – Manage customer expectations and always communicate decisions and reasoning*

When a person makes a complaint about an unlawful activity they have an expectation that enforcement action will be taken by the Council. Again, Council needs to manage this expectation to ensure that they have a realistic understanding of what the Council’s investigation can and cannot achieve.

Councils should take a range of considerations into account when deciding whether or not to take enforcement action. These considerations include whether the breach is a technical breach only, the effects of the unlawful activity on the local area, whether the person who is the subject of the complaint has received a previous warning, and issues such as reasonableness and proportionality and the public interest. Should the Council decide not to take enforcement action, the person who made the complaint should be informed of this decision and the reasoning behind the decision.

Of course there are a range of possible outcomes at the completion of an investigation and these include enforcement action. The Council should inform the person who made the complaint about any other outcomes or actions that have, or will, take place. For example, educating the person about Council requirements or receiving an undertaking from the person about their future actions.

### **Complaint 5 - Failing to inform complainants of the outcome of investigations and the reasoning behind decisions on enforcement action**

*Lesson 5 – Communicate with your customers*

If your customer knows what actions the Council is taking they are less likely to complain. Transparency in decision-making is a key factor in providing good customer service. Not only should you inform the customer of the decision reached by the Council in regard to their complaint but also the reasons for that decision. As I said before, communication is a key factor in providing good customer service.

### **Complaint 6 – Failure to respond to similar situations in a consistent manner**

*Lesson 6 – Work in accordance with Council policy and procedures.*

Often inconsistent decisions arise when a range of people exercise discretion. Outcomes on similar complaints can vary depending on who makes the decision. The proper exercise of discretion is an important part of good administrative conduct.

To ensure that the Council responds in a reasonably consistent manner to similar situations, Councils need to have clear policies and procedures in place to guard against inconsistencies in discretion. For example, many Councils have standard operating procedures in

place for each of their local laws. Of course, such policies and procedures can't be blindly followed in the exact same manner for every situation because the individual circumstances of each case need to be taken into account.

Therefore, before beginning an investigation you should ask yourself whether the Council has a policy on investigation and enforcement action covering your case. If it does, read the policy and make sure any decision you make is reasonable in light of the policy. You should also see if there are any recent cases of a similar nature where the decision might be relevant to your case.

### **Complaint 7 - Failure to enforce local laws**

*Lesson 7 - Ensure the local laws correlate with your Council's requirements*

Another area where there has historically been a number of complaints to our office is in regard to governments failing to take enforcement action under a local law, generally because the law in question does not correlate with that government's actual requirements. This is particularly common in cases relating to local laws about animals.

Let me relate to you a case that we recently dealt with.

A person complained that a local government in a rural community failed to enforce its 'Keeping and Control of Animals' local law about wandering dogs.

The Council administered a very large area but had limited staff. The complainant lived a good distance away from the town where the Council was based. In this case, it was impractical for the Council's ranger to respond to the complaint in adequate time because being such a distance away, by the time he would have arrived at the property where the dogs were wandering, they would have been long gone. Under these circumstances, I would question whether the local law met the needs of that Council. Possibly the Council should consider whether it might be appropriate to limit the area to which the local law applies.

Councils also need to ensure that the processes provided by their local laws are practical. Sometimes they are too complicated to be useful. Let's look at another example about dogs.

The complaint alleged that the Council failed to take action against a barking dog. The Council's procedure provided that the Council should issue three warning letters to the dog owner before taking action by way of issuing a compliance notice. Of course, by the time this process took place, the constant barking from the dog had driven the complainant to distraction and they had taken their frustration out on the Council officers.

It makes sense that a much simpler process under the Council's procedures might have been more appropriate.

It was also suggested to this Council that if they were going to give warning letters to an owner of a barking dog that the letter should be comprehensive and include details of the offence under the local law to fully outline the consequences of any future failure to comply.

I'm sure it's not news to you that noise nuisances from animals, especially dogs, is one of the most frequent complaints in urban areas. As you'd also be aware, the investigation of noise complaints isn't always easy.

### **Complaint 8 - Noise nuisances**

*Lesson 8 - Ensure investigations procedures comply with legislative requirements*

One common error that local governments make is that their procedures for investigating noise nuisances do not always comply with legislative requirements.

Let's look at a couple of matters regarding legislative requirements for noise nuisances to illustrate my point.

The first point relates to a requirement provided for under the *Environmental Protection Regulation 1998*.

The second point relates to fulfilling the requirements of Council's own local laws.

1. Section 6O of the Environmental Protection Regulation requires local governments to investigate a nuisance complaint as soon as practicable after it has received the complaint.

Subsection 3 provides that where the administering authority decides to use its local law instead of the Regulation it must advise the complainant of the law under which it considers the complaint would be more appropriately dealt with.

At the moment, many local governments do not have procedures in place to deal with this requirement of the Regulation. Although this is really a minor procedural matter, it is important that local governments adhere to the requirements of the Regulation.

2. When dealing with noise nuisances from animals, we have found that many Councils find it difficult to gather enough evidence about the alleged breaches of the local law. Unfortunately, animals don't confine their noises to business hours so this does put an obligation on local governments to provide officers who can make inspections out of business hours and on weekends or offer a service provided by others out of hours.

*Lesson 9 - Gather direct evidence*

We'd also recommend that Councils try to gather more direct evidence about the alleged nuisances. In many cases, we find that the evidence gathered by Councils is generated solely from conversations with, and the surveying of, neighbours. Gather more direct evidence - officers should record their own personal observations about the animal's behaviour.

We often find that that Councils don't gather evidence that shows a direct breach of their local law.

For example, many Councils' local laws provide that a person must not keep an animal if that animal causes a nuisance. The local law then states that a nuisance includes any noise made by an animal that, in the **opinion of an authorised person**, substantially disrupts or inhibits an activity ordinarily carried out on residential premises.

In most cases we have investigated, we've noted that there have been no 'notes to file' of any observations made by Council officers about the intrusiveness of the noise from the complainant's residences.

In these situations, Council officers should make personal observations verifying the nuisance by observing the nuisance from the complainant's property (with their permission, of course). The authorised officer needs to have sufficient evidence to form an opinion. Having talked to the neighbour and received **their opinion** is simply not enough.

Of course, this lesson is not restricted to investigations about barking dogs. It can be applied to all types of investigations. The lesson to take home with you today is that in your day to day work, you should gather direct evidence that proves or disproves the actual offence stated in the local law.

It is a useful exercise for you to go through each local law and break down each offence into the simple elements that should be proved. This way you can be clear about exactly what kind of evidence you need to gather.

### Complaint 10 - Local Law Enforcement

*Lesson 10 - Ensure the authorised officer has the correct delegation to exercise the relevant power*

One thing that we regularly find when investigating a complaint about a local government's enforcement action under a local law is that the officer involved in carrying out the enforcement action has not had the correct delegation. It is important to remember that a delegated officer for the purposes of the *Local Government Act 1993* is not automatically a delegated officer for the purposes of the Council's local laws. Before taking any decision you need to be sure that you have the legal authority to make that decision.

### So How Do You Avoid Being Complained About to the Ombudsman?

1. Make sure your decisions are as good as they can be. Follow procedures set down in the Council's local laws and standard operating procedures.
2. Ensure that you have a reasonable basis for making your decisions. If you had to explain your decision would you be able to do so?
3. Have regard to the grounds of complaint the Ombudsman may investigate –
  - unlawful, unreasonable or unjust,
  - discriminatory,
  - improper,
  - based on irrelevant grounds or information,
  - made without giving reasons,
  - based wholly or partly on a mistake of law or fact wrong.
4. Observe the principles of good administration

Unfortunately I don't have the time today to go through the principles of good administration. You may wish to read a publication recently issued by the Ombudsman entitled "An Easy Guide to Good Administrative Decision-Making" which is available on the Ombudsman's website at [www.ombudsman.qld.gov.au](http://www.ombudsman.qld.gov.au)

But basically, the principles of good administration equate to those of good conduct. Therefore, you should ensure that you are familiar with your Council's Code of Conduct and that you adhere to the principles set out in that code.

### Contact Details

Queensland Ombudsman  
GPO Box 3314  
Brisbane Qld 4001  
Telephone: (07) 3005 7000  
Fax: (07) 3005 7069  
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Website: [www.ombudsman.qld.gov.au](http://www.ombudsman.qld.gov.au)

These are the general contact details for the Queensland Ombudsman. I am happy to provide any further information to you about the role of the Ombudsman and good decision making. You can contact me through any of these modes.

### REALLY IMPORTANT TAKE HOME MESSAGES

1. Your decisions as a local government officer are reviewable by the Ombudsman.
2. The Ombudsman has the power to review a decision not only to ensure that it is legally correct but also that the decision is fair and reasonable.
3. Make sure your decisions are as good as they can be. Follow procedures set down in the Council's local laws and standard operating procedures.

### ABOUT THE AUTHOR

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I have a Bachelor of Information Technology, a Bachelor of Laws and a Graduate Certificate in Management. I completed my articles of clerkship and was admitted as a solicitor in 1996. I have worked at the Ombudsman's Office for 4 1/2 years. Prior to that I worked within Local Government Services at the Queensland Department of Local Government and Planning for 3 years.

