

The Ombudsman's jurisdiction to investigate when there are related court proceedings

A special report to Parliament under section 31 of the Ombudsman Act 1974.

4 May 2022

ISBN: 978-1-925885-98-9

NSW Ombudsman

Level 24, 580 George Street
Sydney NSW 2000

Phone: (02) 9286 1000

Toll free (outside Sydney Metro Area): 1800 451 524

Website: ombo.nsw.gov.au

Email: nswombo@ombo.nsw.gov.au

© State of New South Wales

ABN 76 325 886 267

Level 24, 580 George Street, Sydney NSW 2000

T 02 9286 1000 **Tollfree** 1800 451 524

www.ombo.nsw.gov.au



4 May 2022

The Hon Matthew Mason-Cox MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Enclosed is a report titled *The Ombudsman's jurisdiction to investigate when there are related court proceedings*. The report is made under section 31 of the *Ombudsman Act 1974*.

The report relates to a provision of the Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022. That Bill is currently before the Legislative Assembly, having previously passed the Legislative Council.

I request that the report be drawn to the attention of members for the purpose of debate on that Bill, and that it be made public forthwith.

I note that section 31AA of the *Ombudsman Act 1974* applies in relation to the tabling of this report.

Yours sincerely

A handwritten signature in black ink, appearing to read "Paul Miller".

Paul Miller
NSW Ombudsman

Contents

1. Purpose of report	1
2. Ombudsman's view	1
3. Drafting amendments.....	3
4. Example situations where the issue has arisen	4
Annexure A.....	6
The Ombudsman's jurisdiction to investigate when there are related court proceedings.....	7
The Ombudsman's jurisdiction	7
The exclusion for conduct relating to the <i>carrying on</i> of court proceedings	8
The Ombudsman's discretion not to investigate.....	10
Annexure B.....	11
Legal advices of Roger D. Giles QC	12
Annexure C	13
Recommendations for legislation to be enacted to confirm that the Ombudsman has jurisdiction to investigate when there are related court proceedings.....	14
Parliamentary Committee Inquiry into Child Protection (2017).....	14
The Family is Culture report	15

1. Purpose of report

This is a special report to Parliament by the Ombudsman under section 31 of the *Ombudsman Act 1974*.

The purpose of this report is to provide information to Parliament relevant to its consideration of a proposed amendment to the Ombudsman Act. The amendment concerns the Ombudsman's jurisdiction to investigate complaints in circumstances where there may be related court proceedings.

The amendment is contained in the Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022 (the **FIC Bill**). The FIC Bill was introduced by Mr David Shoebridge MLC, and passed the Legislative Council on 23 February 2022. The Bill is currently awaiting debate in the Legislative Assembly.

The proposed amendment to the Ombudsman Act

The amendment set out in Schedule 8 of the FIC Bill is as follows:

Section 13 Decision for investigation

Insert after section 13(5) –

- (6) *To avoid doubt, the Ombudsman may investigate a complaint despite there being related court proceedings, either underway or anticipated, if, in the Ombudsman's opinion, the investigation is unlikely to adversely effect those proceedings.*

2. Ombudsman's view

The Ombudsman's view of the proposed amendment is as follows:

- The amendment is not *legally* necessary. The Ombudsman Act confers jurisdiction on the Ombudsman to investigate certain conduct, and that jurisdiction exists irrespective of whether there may be related court proceedings. See **Annexure A**.
- Item 8 Schedule 1 of the Ombudsman Act provides that the Ombudsman cannot investigate complaints about conduct of a public authority 'relating to the carrying on of any proceedings' before a court or any other person or body before whom witnesses may be compelled to appear and give evidence.¹ This exclusion only concerns conduct relating to the *carrying on* of court proceedings (that is, how the parties or others conduct themselves in the proceedings). This exclusion is appropriate because it is for the court itself, and not the Ombudsman, to control those proceedings and the conduct of those involved with them.
- From time to time, however, agencies will refuse a request for information or object to other action by the Ombudsman on the basis of an assertion that the Ombudsman does not have jurisdiction to investigate the relevant conduct because it (or a related matter) is or will be 'before the court'. Agencies incorrectly refer to item 8 Schedule 1 (the exclusion of conduct 'relating to the carrying on of any proceedings') as a basis for their assertion. We do not accept that assertion and believe that it has no legal basis. However, these objections continue to be raised from time to time (see **section 4** below).

¹ Item 8 Schedule 1 *Ombudsman Act 1974*.

- This is not a new issue. In the early years after the Ombudsman was established (in 1975), Government agencies would sometimes oppose the Ombudsman's investigation or findings. In some cases they argued that item 8 Schedule 1 prevented an investigation of their conduct because that conduct was 'before a court'. On multiple occasions, the Ombudsman obtained legal opinions (from Roger D. Giles QC) on particular investigations. The key principles from those opinions were later summarised in advice from Allen Allen & Hemsley; that summary is set out in **Annexure B**.
- The issue was recently raised again in the 2019 Family is Culture (**FIC**) Report (which recommended legislation be enacted to confirm that the Ombudsman does have jurisdiction) as well as in an earlier 2017 Parliamentary Committee inquiry into the child protection system (which likewise recommended legislation be enacted to expressly provide that the Ombudsman does have jurisdiction). See **Annexure C**.
- Given the recommendations of the 2017 Parliamentary Committee and the 2019 FIC Report, and the fact that the issue continues to be raised by agencies, there may be benefit in putting the Ombudsman's jurisdiction beyond any possible doubt.
- Accordingly, although we do not think it is legally necessary to do so, the Ombudsman supports an amendment – provided it is expressed to be *for the avoidance of doubt* – to confirm that the Ombudsman may investigate despite any related court or other proceedings. However, if the amendment is to be enacted, a number of amendments should be made to the wording before it is passed – see **section 3** below.
- Of course, even though the Ombudsman may investigate, if there are related court or other proceedings already on foot the Ombudsman may exercise discretion not to investigate a matter, particularly if:
 - the complaint is in the nature of a legal dispute for which adjudication is available and the most appropriate course to resolve the dispute, and/or
 - the court proceedings are likely to address the substance of the complaint or otherwise determine the substantive matter(s) in contention, and therefore provide an adequate alternative avenue for resolution or redress, and/or
 - any findings by the Ombudsman could conflict with, or otherwise be rendered redundant by, the findings of the court (noting that, unlike a court, the Ombudsman's findings cannot be legally enforced and do not otherwise affect legal rights or obligations), and/or
 - an investigation by the Ombudsman could adversely affect the court proceedings.
- In the exercise of discretion, the Ombudsman must also have regard to available resourcing and priorities.²
- For these reasons, even though the Ombudsman has jurisdiction to investigate or take other action in respect of the suspected wrong conduct of a public authority where there are related court proceedings, this is not a common occurrence. When it does happen, the focus of the Ombudsman's investigation or action will typically be on matters tangential to and/or systemically broader than the particular matter contested in the court proceedings. For example:

² In the case of deaths in custody, it is also relevant that there is a separate Inspector of Custodial Services with statutory functions to inspect correctional facilities, to examine and review custodial services, and to provide advice and recommendations to Parliament: *Inspector of Custodial Services Act 2012*.

- in relation to the removal of a child before the Children’s Court, the Ombudsman’s inquiries may focus on the conduct of DCJ in supporting a child to continue (after removal) to maintain a relationship with their family, kin and culture
- in relation to a death in custody, an Ombudsman’s inquiries might focus on the manner in which the family of the deceased was informed of the death, or on systemic problems that were apparent before or after the death (but not the immediate circumstance or cause of the death itself, which will be examined in detail by the Coroner).³

3. Drafting amendments

While for the reasons set out above the Ombudsman supports the terms of the proposed amendment in the FIC Bill, we recommend the following drafting amendments be made before it is passed:

(a) Replace the words “*may investigate a complaint*” with “*may make conduct the subject of an investigation under this Act*”

This amendment is necessary as the Ombudsman may commence an investigation ‘whether or not any person has complained to the Ombudsman’.⁴ The proposed amendment will make clear that the Ombudsman’s jurisdiction to investigate despite related court proceedings extends to ‘own motion’ investigations.

(b) Replace the words “*either underway or anticipated*” with “*whether completed, underway or anticipated*”

Related court proceedings may have been completed, but not have dealt with or made any relevant findings about the particular conduct that is the subject of a proposed investigation by the Ombudsman.⁵

(c) Insert the words “*or other*” between “*court*” and “*proceedings*”

For consistency with other provisions of the Ombudsman Act (for example, item 8 of Schedule 1) which refer to proceedings before any court ‘or before any other person or body before whom witnesses may be compelled to appear and give evidence’, the proposed amendment should apply to court *and other* proceedings.

(d) Replace the word “*effect*” with “*affect*”.

This corrects a typographical error.

³ For example, in an investigation by the South Australian Ombudsman in relation to a death in custody, the Ombudsman’s investigation was confined to administrative conduct before and after the death, but excluded any consideration of the incident preceding the death: <https://www.ombudsman.sa.gov.au/publication-documents/investigation-reports/2020/Department-for-Correctional-Services-various-issues-before-and-after-the-death-of-a-prisoner-Mr-Wayne-Fella-Morrison.pdf>

⁴ s 13(1) Ombudsman Act.

⁵ Of course, the Ombudsman would not investigate a complaint if the related court proceedings had effectively determined the complaint by making findings about the substantive matter(s) in contention. The Ombudsman has no power to make binding findings or determine legal rights, and a complainant who is unhappy with the outcome of court proceedings would be limited to considering their appeal rights (if any).

The proposed amendment would then read as follows:

Section 13 Decision for investigation

Insert after section 13(5) –

- (6) *To avoid doubt, the Ombudsman may make conduct the subject of an investigation under this Act despite there being related court or other proceedings, whether completed, underway or anticipated, if, in the Ombudsman's opinion, the investigation is unlikely to adversely affect those proceedings.*

4. Example situations where the issue has arisen

Children's Court matters relating to child protection matters

From time to time it has been claimed that the Ombudsman cannot investigate, undertake preliminary inquiries into, or otherwise handle complaints about, the conduct of the Department of Communities and Justice (**DCJ**) in relation to its conduct regarding a particular child or family if child protection matters related to that child are currently also before the Children's Court.

DCJ has, on occasion, cited this as a reason to refuse to provide information requested by the Ombudsman.

For example, in 2021 we made preliminary inquiries of DCJ and another community services (out-of-home care) provider in relation to three separate complaints we received about the alleged lack of support from DCJ regarding the restoration of Aboriginal children to the care of their immediate family or kin.

In those cases, DCJ responded initially that it 'could not' provide us with the information we requested because the matters are 'currently before the Children's Court for determination'.

We rejected DCJ's assertion that we could not (as a matter of jurisdiction) ask for and obtain the information from DCJ that we had requested, and eventually we were provided with the information we had requested.

We decided (as a matter of discretion) not to press any further inquiries in so far as they went to matters being considered by the Children's Court (which was in each case reviewing the capacity of the families to care for the children). However, we continued to make inquiries in relation to matters tangential to the court proceedings. For example, in one case we made inquiries in relation to the conduct of DCJ in providing supports to a mother to maintain a relationship with her children following the court order that placed the children in out-of-home care.

Deaths in custody

All deaths in custody are examinable and subject to an inquest by the NSW State Coroner. The primary purpose of coronial proceedings is to establish the cause and manner of death.

When a death occurs in the custody of Corrective Services NSW (**CSNSW**), CSNSW, together with Justice Health and Forensic Mental Health Network (**Justice Health**), will also undertake an internal 'critical

incident' investigation. The Coroner may be given a copy of the report of an internal investigation, which may cause the Coroner to undertake further inquiries or investigation prior to the inquest.

Concerns that deaths in custody are not subject to investigation by an independent external body, or that internal investigations are not subject to routine oversight by an independent external body, were discussed in a recent Parliamentary Committee inquiry.⁶

During that inquiry, the Ombudsman noted that the Ombudsman Act does not currently confer on the Ombudsman, or any other independent oversight body, an express power (and duty) to routinely *monitor* internal investigations of deaths in custody by CSNSW, in the way that the Law Enforcement Conduct Commission (**LECC**) must routinely monitor Police critical incident investigations. However, the Ombudsman does have a general power to *investigate* any conduct of CSNSW (or Justice Health) if that conduct appears to the Ombudsman to be unlawful, unreasonable, oppressive, otherwise wrong etc. That could include conduct that relates in some way to a death in custody.

Since January 2021, the Ombudsman has repeatedly sought information from CSNSW in relation to a death in custody that occurred in 2020. The information we have requested is:

- The investigation plan adopted by CSNSW to investigate the critical incident.
- Any report produced by CSNSW on the investigation conducted into this incident.
- Details of any recommendations made in relation to any policy or procedural change following investigation.

CSNSW refused to provide the Ombudsman with the information requested.

It now says that it has received internal legal advice from DCJ that item 8 Schedule 1 of the Ombudsman Act prevents the Ombudsman investigating any conduct of CSNSW that may relate to a death in custody, because the death in custody is or will be subject to coronial proceedings.

This interpretation of item 8 is incorrect, and we continue to press our request for this information.

Child death reviews

For completeness, we note that the Ombudsman has a separate statutory function to *review* the deaths of certain children, being children who have died in circumstances of abuse or neglect (or in circumstances suspicious of abuse or neglect) and children who have died in out-of-home care.⁷

Many of these deaths will also be the subject of coronial proceedings in due course. Some may also be the subject of criminal proceedings.

In this case, there can obviously be no question as to the Ombudsman's jurisdiction to undertake the reviews (despite related court proceedings).

The Ombudsman and the Coroner have in place established processes and relationships between their two offices to ensure their work in respect of child deaths is supportive and not unnecessarily duplicative. In this respect, the outcomes of the Ombudsman's death review work (which typically happens earlier than any coronial inquest) will frequently provide an important input into the coronial proceedings, providing evidence and potentially identifying avenues of inquiry for the Coroner. Where a death may involve a homicide or other criminal investigation, the Ombudsman also liaises with NSW Police if there may be any potential impact on that investigation or any ensuing proceedings.

⁶ <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=266>

⁷ Part 6 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

Annexure A

The Ombudsman's jurisdiction to investigate when there are related court proceedings

The Ombudsman's jurisdiction

Right to complain to the Ombudsman

Any person has a legal right to complain to the Ombudsman about the conduct of any public authority.⁸ Complaints may also be made, by certain persons, about the conduct of any community services provider.⁹

A person cannot complain to the Ombudsman if the conduct is 'excluded conduct' of the kind listed in Schedule 1 of the Ombudsman Act. The items listed Schedule 1 are variously expressed in terms of the:

- (a) conduct of a specified public authority (for example, any conduct of NSW Police¹⁰), or
- (b) specified conduct of any public authority (for example, conduct of any public authority relating to alleged violations of the privacy of persons¹¹), or
- (c) specified conduct of a specified public authority (for example, conduct of the Independent Commission Against Corruption where exercising functions under the *Independent Commission Against Corruption Act 1988*¹²).

Jurisdiction to investigate

The Ombudsman may investigate the conduct of a public authority (or a community services provider) if:

- (a) it is conduct about which a complaint may be made (that is, it is not conduct excluded by Schedule 1), and
- (b) it appears to the Ombudsman that it may be conduct referred to in section 26 of the Ombudsman Act (that is, unlawful, unreasonable, unjust, oppressive, otherwise wrong etc conduct of an administrative nature).¹³

In the case of a community services complaint, the Ombudsman may also investigate if it appears to the Ombudsman that the complaint:

- (a) raises a significant issue of public safety or public interest, or
- (b) raises a significant question as to the appropriate care or treatment of a person by a service provider.¹⁴

⁸ s 12(1) Ombudsman Act.

⁹ See s 22 Community Services (Complaints, Reviews and Monitoring) Act. Section 23 of that Act prescribes who may make a community services complaint, while s 24 applies most of the provisions of the Ombudsman Act to these complaints.

¹⁰ In respect of which complaints may be made to the Law Enforcement Conduct Commission: *Law Enforcement Conduct Commission Act 2016*.

¹¹ In respect of which complaints may be made to the Privacy Commissioner: *Privacy and Personal Information Protection Act 1998*.

¹² In respect of which complaints may be made to the Inspector of the ICAC: Pt 5A *Independent Commission Against Corruption Act 1988*.

¹³ s 13(1) Ombudsman Act.

¹⁴ s 27 Community Services (Complaints, Reviews and Monitoring) Act.

An investigation may be commenced whether or not any complaint has been received.¹⁵ This means that the Ombudsman can commence an investigation in response to a complaint or on their own motion.

Power to undertake preliminary inquiries

Before deciding whether to commence an investigation, the Ombudsman may make ‘preliminary inquiries’. The purpose of preliminary inquiries is to decide whether to make particular conduct of a public authority (or community services provider) the subject of an investigation.¹⁶

Again, preliminary inquiries can be undertaken following a complaint or on the Ombudsman’s own motion.¹⁷

In most cases, preliminary inquiries result in the Ombudsman being satisfied that an investigation is not required. This may be because the preliminary inquiries demonstrate that the relevant public authority’s conduct or community service provider’s conduct does not appear to constitute wrong conduct under section 26 of the Ombudsman Act or because the public authority or community service provider is taking, or has agreed to take, appropriate action to accept and redress any apparent wrong conduct.¹⁸

Unlike the Ombudsman’s powers to require the production of evidence in an investigation, requests for information by way of preliminary inquiries do not compel a public authority or community service provider to answer those inquiries. It would, however, be extraordinary for any public authority or community service provider to not co-operate with such requests.

The exclusion for conduct relating to the *carrying on* of court proceedings

Item 8 Schedule 1 Ombudsman Act

Item 8 Schedule 1 of the Ombudsman Act provides that the following is excluded conduct, and therefore cannot be the subject of a complaint to, or investigation by, the Ombudsman:

Conduct of a public authority relating to the carrying on of any proceedings –

- (a) *before any court, including a coronial inquiry and committal proceedings before a magistrate, or*
- (b) *before any other person or body before whom witnesses may be compelled to appear and give evidence.*

The meaning of ‘relating to the carrying on’ of proceedings¹⁹

Item 8 Schedule 1 refers to conduct ‘relating to *the carrying on* of proceedings’ and not merely to conduct ‘relating to proceedings’. The words ‘carrying on’ refer to the conduct of the proceedings.

That this is what is meant by item 8 is reinforced by comparing the wording of that item with the wording in the previous item. Item 7 Schedule 1 provides that the following is also excluded conduct:

*Conduct of the Attorney General, or of the Solicitor General, or of the Director of Public Prosecutions, relation to **the commencement, carrying on or termination** of any proceedings*

¹⁵ s 13(1) Ombudsman Act.

¹⁶ s 13AA Ombudsman Act.

¹⁷ s 13AA(2) Ombudsman Act.

¹⁸ It is relevant in this regard that, when or after making preliminary inquiries, the Ombudsman is also able to make ‘comments’ to the public authority: s 31AC Ombudsman Act. Those comments may take the form of suggestions as to action the authority should take to resolve the relevant complaint and/or correct any apparent wrong conduct.

¹⁹ See also Annexure B, which sets out the legal advice of Allen Allen & Hemsley (based on advices from Roger D. Giles QC).

before a court, including a coronial inquiry and committal proceedings before a magistrate.
[emphasis added]

Item 7 covers conduct by the relevant authorities relating to their ‘commencement’, ‘carrying on’ and ‘termination’ of proceedings, whereas item 8 covers only conduct relating to the ‘carrying on’ of proceedings.

It is clear from its position in item 7 (between ‘commencement’ and ‘termination’) that ‘carrying on’ is concerned with conduct involved in the carrying on of the proceedings themselves, rather than with the subject matter that the proceedings may happen to be about.

The exclusion from the Ombudsman’s jurisdiction in item 8 Schedule 1 appears intended to protect the independence and integrity of the judicial process, which is controlled by the courts themselves.

Support for this legislative intent is apparent in the second reading speech for the Ombudsman Bill 1974, in which it was explained that:

‘[I]tem 8 [of Schedule 1] ... is not as wide in its application as item 7; it is limited to conduct related to the carrying on of legal proceedings and it does not extend to conduct relating to the commencement or termination of those proceedings. As to this, the Law Reform Commission said that conduct of the former kind [ie conduct relating to the carrying on of legal proceedings] is properly controllable by the tribunal before which the proceedings are taken. Conduct of the latter kind [ie conduct relating to the commencement or termination of those proceedings], except in the case of the Attorney General or the Solicitor General, should he [sic] within the jurisdiction of the Ombudsman. The Law Reform Commission points out, rightly in the Government’s view, that discriminatory treatment of persons – for example, a decision to prosecute or not to prosecute for an offence – occur in relation to legal proceedings as in other areas of public administration. It is therefore the Government’s view that the distinction is validly drawn between exclusions 7 and 8 with regard to the Ombudsman’s jurisdiction to inquire into the reasons for commencement or non-commencement of proceedings.’²⁰

Situation of other ombudsmen

The Tasmanian Ombudsman’s jurisdiction also excludes ‘action taken by or on behalf of a government department or other authority with respect to proceedings before a court or a person authorized by law, or by consent of the parties, to hear, receive, and examine evidence’.²¹

We could find no similar express exclusion from the jurisdiction of any other Australian parliamentary ombudsman.

In Victoria, while there is no such exclusion, the Ombudsman must ‘not perform the functions or duties or exercise the powers of the Ombudsman in a manner that would prejudice any – (a) criminal proceedings or criminal investigations; or (b) investigations by the IBAC or Victorian Inspectorate’.²²

²⁰ Hansard, Legislative Assembly, *Ombudsman Bill 1974: Second Reading Speech*, 29 August 1974, at 777-778 (Mr Maddison, Minister for Justice).

²¹ Item 3 Schedule 2 *Ombudsman Act 1978* (Tasmania).

²² s 13AB *Ombudsman Act 1973* (Victoria). See also s 25A(1)(a) which provides that the Ombudsman ‘must not include in a report under this Act...any information that the Ombudsman considers would prejudice any criminal proceedings or investigations, or investigations by the Ombudsman, the IBAC or the Victorian Inspectorate’.

The Ombudsman's discretion not to investigate

The Ombudsman Act gives the Ombudsman a power but not an obligation to undertake an investigation. Whenever conduct reaches the jurisdictional threshold for investigation,²³ the Ombudsman can decide whether or not to make that conduct the subject of investigation.

In exercising this discretion, the Ombudsman 'may have regard to such matters as he or she thinks fit'.²⁴

Section 13(4) sets out a non-exhaustive list of matters that the Ombudsman may consider in deciding whether or not to commence an investigation. These include 'whether, in his or her opinion...(v) in relation to the conduct complained of there is or was available to the complainant an alternative and satisfactory means of redress'.

If the substantive issue raised by the complaint has been, is being, or is likely to be appropriately dealt with in court or other proceedings, then the Ombudsman would be expected to exercise discretion to decline to investigate that matter. Clearly, the Ombudsman would also exercise discretion not to investigate a matter if to do so would prejudice or otherwise adversely affect court or other proceedings.

²³ See notes 13 and 14 above.

²⁴ s 13(4)(a) Ombudsman Act.

Annexure B

Legal advices of Roger D. Giles QC

During the preparation of this report, we located a number of advices from the early 1980s that were obtained by the Ombudsman, through the law firm Allen Allen & Hemsley, from Roger D. Giles QC.

The advices concerned the effect of item 8 of Schedule 1 of the Ombudsman Act. item 8 Schedule 1 was in relevantly the same terms as it is now.

They were each obtained whenever a public authority, citing item 8 Schedule 1, opposed an investigation, finding of ‘wrong conduct’ or other action taken by the Ombudsman.

As the advices were obtained in relation to, and provide details about, particular complaint investigations, they are not public.²⁵

Subsequently, however, Allen Allen & Hemsley (in 1985) provided the Ombudsman with the following written summary based on the advices received from Roger D. Giles QC, which it described as ‘guidelines for the interpretation’ of item 8 Schedule 1:

1. *Conduct of a public authority prior to, at the point of, at the termination of, or after the termination of, court proceedings will not generally relate to a “carrying on” of proceedings and will not therefore be immune from investigation [by the Ombudsman].*
2. *Conduct of a public authority occurring whilst court proceedings are on foot will be immune from investigation if it bears an “appropriate relationship ... of the requisite kind” to those court proceedings.*
3. *This will ordinarily require that it [ie. the conduct of the public authority] be a step taken to advance the proceedings in some way, whether in the face of the court or otherwise, such as consulting legal advisers, conferring with witnesses, filing court documents, or actually (through a legal representative) appearing in court.*
4. *Conduct which is part of the authority’s routine administrative functions will not ordinarily bear the appropriate relation to particular court proceedings. In this case it will not matter that the conduct would not have occurred but for the proceedings or in some other way arose out of the proceedings.*
5. *Further, having regard to the mischief at which the [Ombudsman] Act is directed, and to the fact that paragraph 8 operates as an exclusionary provision, it will usually also be necessary for the person opposing the investigation to demonstrate that there is some reason in policy why the Ombudsman should be denied the power to investigate the public authority’s conduct.*

²⁵ Investigations by the Ombudsman must be ‘made in the absence of the public’: s 17 Ombudsman Act.

Annexure C

Recommendations for legislation to be enacted to confirm that the Ombudsman has jurisdiction to investigate when there are related court proceedings

Parliamentary Committee Inquiry into Child Protection (2017)

In 2017, the Legislative Council's General Purpose Standing Committee No 2 reported on an inquiry into child protection.²⁶ Its report made the following recommendation:

Recommendation 22: *That the NSW Government amend the Ombudsman Act 1974 to provide the NSW Ombudsman with the power to investigate complaints relating to child protection matters, where appropriate, even if a matter may be before a court.*

The Committee's report contains the following commentary around this recommendation:

8.103 The committee believes that there may be circumstances in which it is entirely appropriate for the Ombudsman to investigate complaints which relate to the conduct of the department, despite a matter being before the courts. This would not place the Ombudsman in a position in which it would be able to question or override the decision of court, rather the Ombudsman would still be able to investigate a complaint about the administrative or executive practices of the department, which could help to identify broader systemic and administrative issues.

8.104 Of course, the committee appreciates that it would be up to the Ombudsman and the President of the Children's Court of NSW to agree in such cases that a complaint could be investigated by the Ombudsman's office even if legal proceedings were on foot. Therefore, we recommended that the Ombudsman Act 1974 be amended accordingly to enable the Ombudsman to investigate complaints, where appropriate, even if a matter may be before the courts.

Government response

The Government's response to this recommendation was as follows:

Noted. *Amending the Ombudsman Act 1974 to provide the NSW Ombudsman with the power to investigate complaints relating to child protection matters that are before a Court could place the integrity of the court process at risk. However, the NSW Government will explore whether appropriate amendments can be made that will ensure that the independence of the judiciary in considering a care application is not compromised by allowing the Ombudsman to investigate a complaint made in relation to the same matter during court proceedings.*²⁷

Advice from Parliamentary Counsel

Following the Parliamentary Committee's report, the Ombudsman, with the support of the President of the Children's Court, wrote to the Department of Premier and Cabinet (**DPC**) in December 2018 to pursue the recommendation. In August 2019, DPC approached the Parliamentary Counsel to draft an amendment to give effect to Recommendation 22 of the Parliamentary Committee report.

²⁶ <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2396/Final%20report%20-%20Child%20protection.pdf>

²⁷ <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2396/Government's%20Response%20-%20Child%20Protection.pdf>

However, the Parliamentary Counsel's Office advised that an amendment was not needed to give effect to the recommendation. It advised that the Ombudsman already has the jurisdiction under the Ombudsman Act to investigate child protection matters that are (or could come) before a court. The Parliamentary Counsel's Office advised further that item 8 Schedule 1 of the Ombudsman Act does not exclude such matters from the Ombudsman's jurisdiction, as that provision only excludes conduct relating to the *carrying on* of court proceedings – that is, their conduct when involved in the proceedings, and not the conduct that may be under consideration in the proceedings.

The proposed amendment was accordingly not pursued.

The Family is Culture report

Professor Megan Davis's Family is Culture report (**FIC Report**)²⁸ included the following recommendation:

Recommendation 17: *The NSW Government should amend the Ombudsman Act 1974 (NSW) to enable the NSW Ombudsman to handle complaints in matters that are (or could be) before a court, in circumstances where doing so would not interfere with the administration of justice.*

The FIC Report picked up the comments and recommendation made in the earlier Parliamentary Committee inquiry (discussed above).

The Government's response to the FIC Report did not refer specifically to Recommendation 17.²⁹

Letter from the Ombudsman to the Minister

On 16 April 2020, the Ombudsman wrote a letter to the Minister for Families, Communities and Disability Services 'to provide advice that may help to inform the Government's response to the recommendations of the *Family is Culture* report'.

A letter in identical terms was sent to Mr David Shoebridge MLC, who was at the time convening community round tables to consider and progress the recommendations of the FIC report.

In relation to recommendation 17 of the FIC Report, the Ombudsman explained as follows:

Recommendation 17 - Matters before the Children's Court

The [FIC] Report states that my office cannot investigate complaints that are or could be considered by a Court, and that:

'There appear to be many cases where complaints about casework could run parallel to court processes without interfering with the administration of justice. It appears that this jurisdictional limitation severely hampers the ability of the Ombudsman to oversee the child protection sector, as in almost every case in which a child is removed from his or her family, court proceedings are commenced. In these cases, it appears that no complaint may be made about the pre-entry into care casework of the child protection caseworkers, even though this casework may not have a bearing on the issues to be decided by the court' (page 129)

This leads to Recommendation 17, that:

²⁸ https://www.familyisculture.nsw.gov.au/__data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf

²⁹ https://www.facs.nsw.gov.au/__data/assets/pdf_file/0005/784517/NSW-Government-Response-to-FIC.pdf

The NSW Government should amend the Ombudsman Act 1974 (NSW) to enable the NSW Ombudsman to handle complaints in matters that are (or could be) before a court, in circumstances where doing so would not interfere with the administration of justice.

Schedule 1 of the Ombudsman Act is complex, and we have given significant consideration to this issue since the Legislative Council General Purpose Standing Committee Inquiry into child protection (2017) recommended a change to the Schedule similar to that recommended in the Family is Culture Report.

In 2018, I wrote to Tim Reardon, Secretary, DPC, to propose an amendment to Schedule 1 to enable my office to handle complaints about the conduct of a public authority, including conduct relating to the carrying on of proceedings in the Children's Court. The President of the Children's Court also expressed support.

However, in 2019, Parliamentary Counsel's Office advised that clause 8 of Schedule 1 of the Ombudsman Act only excludes from my jurisdiction complaints about the public authority's conduct 'in the proceedings', and that amendment to Schedule 1 was unnecessary.

In the course of the various discussions that have taken place around this issue since 2017, two different types of conduct appear to have been conflated:

- *conduct of a 'public authority'¹ or 'service provider'² that was, has become, or may in future become the subject of Children's Court proceedings (**subject matter conduct**), and*
- *conduct of such an entity in the course of the Children's Court proceedings – as a party, witness or in another capacity (**proceedings conduct**).*

The Parliamentary Counsel's Office advice has made clear that my office already has subject matter conduct jurisdiction. That is, I may receive complaints about and investigate child protection matters (relating to the conduct of public authorities and community service providers) whether or not such matters were, are or may in future become also the subject of Children's Court proceedings.

Schedule 1 item 8 of the Ombudsman Act only excludes the second type of conduct – proceedings conduct. I cannot investigate the conduct of a public authority (and, by extension, a service provider) that relates to:

*'the **carrying on of** any proceedings—*

- (a) before any court, including a coronial inquiry and committal proceedings before a magistrate, or*
- (b) before any other person or body before whom witnesses may be compelled to appear and give evidence'. [emphasis added]*

What this provision means is that my office cannot investigate proceedings conduct. This is consistent with the fact that I am also precluded from investigating the conduct of a public authority acting as legal adviser to or legal representative for a public authority: Schedule 1 item 6.

It therefore appears that no amendment or other action is needed in order to achieve the outcome sought by Recommendation [17] of the Report.

I should note, however, that while I have jurisdiction over subject matter conduct, I have a discretion as to whether to investigate or take other action in respect of any complaint.

As a matter of discretion, one of the factors my office takes into account when considering whether to investigate or take other action in respect of a complaint is whether the complaint could be resolved by another alternative means.

If a complaint to my office is also the subject of Children's Court proceedings, we may decide against further inquiry or investigation at that stage, particularly if it is clear that the outcome of the Children's Court proceeding would overtake or make redundant the outcome of any investigation undertaken by my office. I would also exercise discretion not to investigate or take action in respect of a complaint that also relates to court proceedings if doing so would likely interfere with those proceedings or otherwise interfere with the administration of justice.

I acknowledge that it is possible that some of the confusion in this area may have arisen from a failure of my office in the past to be clear about this distinction between jurisdiction and discretion.

Accordingly, I have instructed my office to ensure that, when in future, we decide not to investigate a complaint in respect of a matter that is before the Children's Court, we make the basis of that decision clear to complainants. That is, we explain whether the decision is because we do not have jurisdiction to investigate (proceedings conduct); or because, as a matter of discretion, we have formed the view that we ought not investigate in the case of subject matter conduct.

1 as defined by Ombudsman Act s 5(1).

2 in the course of providing a 'community service': see CS CRAMA s 4(1)

3. unless the conduct is otherwise excluded by some other item of Schedule 1 of the Ombudsman Act.

The NSW Government's Family is Culture Legislation Discussion Paper

In April 2022, the NSW Government published a *Family is Culture legislative recommendations: Discussion paper*.³⁰

In relation to recommendation 17 of the FIC Report, the discussion paper includes the following:

There is uncertainty over whether the NSW Ombudsman can investigate the conduct of the Department relating to child protection matters if the matter is, or was, or may become the subject of Children's Court proceedings. It is important that any investigations of complaint about casework do not impinge on the administration of any parallel judicial proceedings that are on foot.

Further clarification is needed about the scope of the Ombudsman's powers and how the Ombudsman exercises its discretion to commence investigations.

Should the Ombudsman have the power to investigate a matter that may become the subject to proceedings in a court or tribunal?

If so, what safeguards can be put in place to ensure that court or tribunal proceedings are not prejudiced?

Letter from the Ombudsman to the Minister for Families and Communities

On 21 April 2022, the Ombudsman wrote a letter to the Minister for Families and Communities about the discussion paper, and in relation to Recommendation 17 of the FIC Report noted the following:

³⁰ https://www.familyisculture.nsw.gov.au/__data/assets/pdf_file/0008/831059/Family-is-Culture-Discussion-Paper-2022.pdf

The suggestion [in the discussion paper] that the Ombudsman does not have jurisdiction to investigate matters if the relevant subject matter is, was or may in future become the subject of children's court proceedings was also raised in the Family is Culture (FiC) report itself.

That suggestion appears to have first been raised in a Parliamentary Committee report from some years previous, in which a recommendation was made to amend the Ombudsman Act 1974 to ensure that the Ombudsman does have such jurisdiction: Child Protection General Purpose Standing Committee 2 2017

However, the Ombudsman already has clear jurisdiction to investigate a matter that is, was, or may become, the subject of court proceedings.

Schedule 1 clause 8 of the Ombudsman Act 1974 excludes the Ombudsman only from investigating the conduct of a public authority relating to the carrying on of any court proceedings.

That is, clause 8 only excludes the conduct of an agency in the court proceedings from my jurisdiction. It does not prevent the Ombudsman from investigating conduct that might happen also to be before the Children's Court or any other court, provided the conduct is otherwise within the Ombudsman's jurisdiction.

This was confirmed by the Parliamentary Counsel's Office in 2019, when the Government took steps to seek an amendment to clause 8 (in response to the abovementioned Parliamentary Committee recommendation) so that the Ombudsman would not be prevented from investigating conduct that is also the subject of court proceedings.

Parliamentary Counsel's advice was that no amendment was needed, as clause 8 already does not prevent the Ombudsman from doing this. This outcome was communicated to the (former) Secretary and the (former) Minister for Families, Communities and Disability Services in April 2020. I attach a further copy of that letter for reference.

