

February 2007

# **THE CHARTER AND GOVERNMENT**

## **A New Approach to Serving the Public**

**Jo Carden**  
**Director of Investigations**  
**Ombudsman Victoria**

### **Outline**

In respect to the Victorian Ombudsman, the *Charter of Human Rights and Responsibilities Act* 2006 (the Charter) came into operation on 1 January 2007. The Ombudsman has increased responsibilities under the Charter to investigate human rights complaints.

From 1 January 2008, public authorities are required to act compatibly with human rights and the Ombudsman is expecting an increase in complaints. In addition to interpreting this new legislation, the Ombudsman is approaching this as a practical exercise and has been establishing systems to manage enquiries and investigations; planning the data collection and reporting frameworks; and developing the internal resources to support his investigators.

This paper provides an overview of the role of the Ombudsman in regards to the Charter; how his office is preparing for the Ombudsman's responsibilities; and previous case studies. The case studies are a practical illustration and not an attempt to analyze previous complaints against the new Charter.

## **THE OMBUDSMAN**

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### **The Ombudsman's mission**

1. The mission of the Ombudsman is to promote fairness, integrity, respect for human rights and administrative excellence in the Victorian public sector.

The Ombudsman is **independent** and **impartial** and provides a **free** service.

### **The Ombudsman's role**

2. The Victorian Ombudsman is an independent officer of Parliament who investigates, reviews and resolves complaints concerning administrative actions of state government departments, local councils and public statutory bodies; reports the results to the complainants and agencies; reports to parliament; improves accountability; and promotes fair and reasonable public administration.

#### **Administrative action**

Means any action relating to a matter of administration, and includes:

- A decision and an act;
- The refusal or failure to take a decision or to perform an act;
- The formulation of a proposal or intention; and
- The making of a recommendation

(including a recommendation made to a Minister).<sup>1</sup>

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<sup>1</sup> Section 2 *Ombudsman Act 1973*

### **Public Statutory Body**

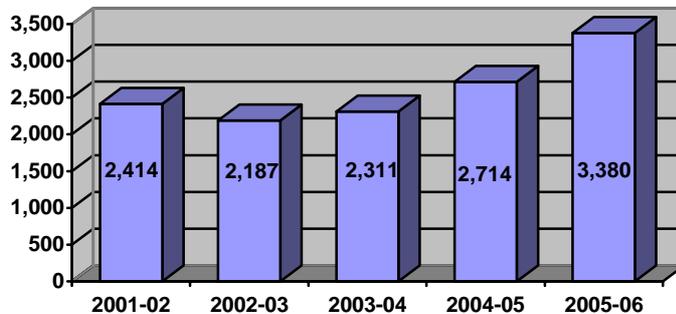
Means a body of persons, whether corporate or unincorporate, constituted or established under an Act for a public purpose, in respect of which the Governor in Council or a Minister has a right to appoint all or some of its members and includes State Trustees.<sup>2</sup>

3. The Ombudsman’s jurisdiction excludes:

- Ministers
- Court of law, judge or magistrate, tribunal, commission or other body presided over by such a person as required by statute
- Legal adviser or counsel to the Crown in any proceedings
- Trustees under the *Trustees Act* 1958
- The Auditor-General
- The council of a municipality or a councilor of a municipality acting as such.<sup>3</sup>

4. Ombudsman Victoria (OV) has a staff of 40. Last year OV received 3,380 complaints and 11,587 telephone enquiries. This represented a 14 per cent increase in complaints within the Ombudsman’s jurisdiction compared to the previous year. The following graph illustrates the complaint numbers over previous years.

### **Complaint numbers**

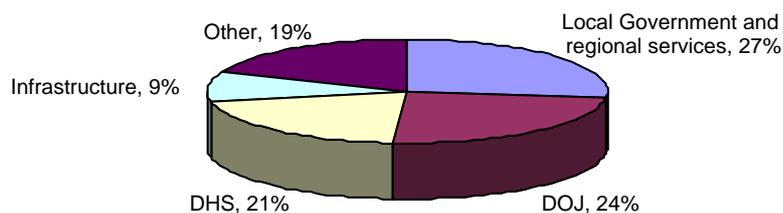


<sup>2</sup> Section 2 *Ombudsman Act* 1973

<sup>3</sup> Section 13 (3) *Ombudsman Act* 1973

5. Most complaints received are regarding local council and regional services but complaints about Department of Justice (DOJ) and Department of Human Services (DHS) are also significant proportions of the total number of complaints dealt with by the Ombudsman.

### **Complaint types**



### **The Ombudsman's powers**

6. Under the *Ombudsman Act 1973* (the Act) the Ombudsman has jurisdiction and power to investigate individual complaints by people and organisations such as employers and professional associations. All enquiries and investigations are conducted in private.
7. It is not the practice of the Ombudsman to become involved in a complaint until the responding agency has been given the opportunity to address or resolve the matter. This office may forward the complaint to the agency and ask that they respond directly. This allows resolution without a third party being involved, and for the agencies to exercise their complaint management processes. It also allows the Ombudsman to direct resources to investigations which have not been resolved.
8. The majority of complaints received are managed under Section 13A of the Act. This allows for enquiries to be made by telephone, email, fax and letter and may also involve site inspections, review of files and informal interviews. Under this section, the respondent's principal officer must assist the Ombudsman in the

conduct of an enquiry. If reasonable requests are refused then exercising formal powers can be considered.

9. Generally, information can be accessed through a cooperative approach. However, if there is to be adverse conclusions about the agency's actions or the enquiries under Section 13A have resulted in incomplete responses, complaints can then be formally investigated under Section 14 of the Act. The Act specifically requires the Ombudsman to inform the principal officer and the relevant Minister of his intention to conduct such an investigation.
10. The powers under Section 14 investigations include:
  - The Ombudsman can conduct an investigation in such manner as he thinks fit and there is no obligation to hold a hearing.
  - The provisions of sections 17, 18, 19, 20 and 20A of the Evidence Act apply to formal investigations 'as if he were the sole Commissioner issued with a commission by the Governor in Council'<sup>4</sup>. The Ombudsman may summon witnesses; request production of documents; and take evidence under oath.
  - The Ombudsman may enter the premises of an authority to inspect the premises or anything in them.
  - Certain privileges which protect disclosures of information are not available to the Crown for the purposes of an investigation.
11. In addition to s14 investigations, the Ombudsman can initiate, without a specific complaint, an Own Motion enquiry or investigation into a matter including systemic issues.<sup>5</sup> In the last 12 months these have included reports into prisons and property, a review of the FOI Act and a review of complaint handling in Victorian universities.
12. Enquiries and investigations are confidential. Section 14 and Own Motion reports may be tabled in parliament if the Ombudsman considers that it is in the public interest to make the findings and recommendations public. Copies of the reports which have been made public can be found at **[www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au)**.

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<sup>4</sup> Section 18 (1) *Ombudsman Act 1973*

<sup>5</sup> Section 13A and section 14 *Ombudsman Act 1973*

## **THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006**

### **The Charter**

13. The Charter protects and promotes human rights by placing an obligation on public authorities to act in a way which is compatible with human rights. Public authorities should have internal monitoring mechanisms to oversee their administrative decision making and to ensure that human rights are put into practice.
14. If a complaint regarding a public authority's action and its compatibility with human rights (s38) remains unresolved after consideration by the public authority, the complainant will remain dissatisfied. There may be an opportunity for a remedy through legal proceedings (s39) or through the Ombudsman. Pursuant to section 47 of the Charter, the schedule makes a consequential amendment to the *Ombudsman Act 1973* (the Act) by inserting s13 (1A) which took effect from 1 January 2007.
13. Functions and jurisdiction
- (1) The principal function of the Ombudsman shall be to enquire into or investigate any administrative action taken in any Government Department or Public Statutory Body to which this Act applies or by any member of staff of a municipal council.
  - (1A) The functions of the Ombudsman under sub-section (1) include the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities.
15. The Ombudsman is an independent, impartial and free complaint handling service. It is accessible for those pursuing an administrative remedy and at the same time as considering complaints, it can play a role in promoting human rights in Victoria. The role of the Ombudsman is to ensure good administration and to consider practical and effective remedies. This is in the spirit of the Charter which has a practical focus on ensuring policies, programs and legislation enshrines good human rights practices.
16. For the Ombudsman to consider a complaint:
- the respondent needs to be within the Ombudsman's jurisdiction,

- the allegations need to be about administrative actions,
- the complainant needs to be affected by the actions, and
- the Ombudsman may consider the discretionary provisions.

17. From 1 January 2008, public authorities are required to act in a way that is compatible with human rights and when making decisions, give proper consideration to the rights in Part 2 of the Charter. The Charter provides a new focus with a growing awareness for rights and responsibilities. As a result the Ombudsman is expecting an increase in complaint numbers and recognizes the need to assist public authorities to understand good complaint handling practices in this environment.

### **Changes in Ombudsman Victoria**

18. In respect to the Ombudsman, the Charter came into operation on 1 January 2007. The Ombudsman has responsibilities under the Charter as he may conduct an enquiry or investigation regarding an allegation that a public authority's administrative action was incompatible with a human right.

19. The Charter's consequential amendment to the Act enhances the jurisdiction of the Ombudsman. While the role of the Ombudsman enshrined in the Act remains unchanged, the Charter however, provides an opportunity for the Ombudsman to:

- focus on human rights as a complaint theme,
- track and report human rights complaints in a framework,
- promote human rights through communication and outreach activities, and
- continue to drive administrative improvement through the enquiries and investigation considering human rights.

20. The Ombudsman already promotes fairness, integrity, respect for human rights and administrative excellence in Victoria. Conferring the human rights complaint handling function on the Ombudsman takes advantage of existing enquiry and investigation skills and the significant experience this office has in considering complaints about human rights prior to the enactment of the Charter.

21. Since 1 January 2007, the Ombudsman has been able to enquire into or investigate whether an administrative action is compatible with human rights. Under the Charter, public authorities are obliged to act in a way that is compatible with human rights after 1 January 2008. The Ombudsman can investigate in 2007 however the public authorities do not need to act compatibly, providing an opportunity for the Ombudsman to assist the public authorities to understand the Charter in practice and allow them to prepare for their obligations in 2008.

*The staggered commencement will allow for a period of approximately 18 months for government departments to review existing laws, policies and procedures to ensure compliance with the Charter.*<sup>6</sup>

22. The Human Rights Consultation Committee discussed the need for the Charter ‘to contribute to the development of a better framework for government decision-making’<sup>7</sup>. The Committee specifically stated the need to create the Victorian Human Rights Commissioner and establish a Human Rights Unit in the Department of Justice to assist public authorities to put human rights into practice. The Ombudsman also promotes human rights and drives improvement in administrative actions. This is done through the consideration of individual complaints, Own Motion investigations, outreach activities and communication tools such as public reports, websites and the annual report.

23. In addition to interpreting this new legislation, the Ombudsman is approaching this as a practical exercise and has been establishing systems to manage the enquiries and investigation of human rights complaints; planning the data collection and reporting frameworks; and developing the internal resources to support his investigation officers.

24. The mechanisms which have required a review include the:

- assessment of each new complaint,
- data collection and monitoring of investigations,
- reporting: investigation and annual reports.

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<sup>6</sup> *Charter of Human Rights and Responsibilities Act 2006 Explanatory Memorandum Clause 2*

<sup>7</sup> *Rights, Responsibilities and Respect –Human Rights Consultation Committee November 2005*

In addition there are key references which have required a review to ensure their compliance to the Charter, such as the Ombudsman's Investigation Guidelines and the Good Practice Guide to Complaint Handling. Information on the website and communication products will also be reviewed.

25. The Ombudsman has met with other bodies to confirm the roles and relationships in this new mechanism. This dialogue will continue and there will be opportunities to share data and experiences and review the interactions between the Charter and the Ombudsman's Act.

### **Protecting rights through remedial action by the Ombudsman**

26. The Ombudsman has the power to recommend remedial actions and systemic improvements but does not have the power to enforce these. Cooperation by agencies is excellent due to the existing focus on business improvement in the Victorian public sector and due to the Ombudsman's option to make a report public. A report is made public by tabling the document in parliament where it is available to the general public and the media. All reports made public can be located at [www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au).

27. The types of outcomes as a result of an the Ombudsman's enquiry or investigation can include:

- an apology
- clarification
- ceasing or pursuing an action/conduct
- reviewing a decision
- compensation
- improving internal monitoring mechanisms
- improving or developing communication materials
- improving or developing policies or procedures
- improving or developing auditing or reporting mechanisms
- training staff.

The Charter does not expand the Ombudsman's existing powers, jurisdiction and possible remedies but there will be a difference at the end of a human rights investigation, as the Ombudsman may draw conclusions about the compatibility of an administrative action against the Charter.

28. The Ombudsman expects government departments and agencies to have their own complaint handling processes. Promoting this service and ensuring access allows complaints data to be collected, complaint trends to be responded to and an opportunity to identify business improvement opportunities. These internal complaint handling processes should also respond to complaints about human rights and if a complainant is not satisfied after exercising this process then the complaint can be escalated to the Ombudsman.
  
29. The Ombudsman's Good Practice Guide To Complaint Handling which is located at [www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au) is a popular reference and is accessed by people across Australia. This document is based on the Australian standards for complaint handling<sup>8</sup> and refers to examples of complaint handling strategies within the Ombudsman's jurisdiction. The Ombudsman encourages use of the Guide which may be downloaded and modified to suit an agency's needs. This Guide is being reviewed to ensure that there is reference to and consistency with the Charter.

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<sup>8</sup> Australian Standard: Complaints Handling, AS 4269-1995 Standards Australia

## **CASE STUDIES**

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### **Human Rights before the Charter**

30. Many of the rights in the Charter are not new to members of the Victorian community as they can be found in existing law. Prior to 2007, the Ombudsman enquired into and investigated the lawfulness and reasonableness of actions taken by government departments and agencies. Some of the allegations would now be considered against the human rights articulated in Part 2 of the Charter. These include allegations about conditions for persons in custody, protection of children and humane treatment of persons in the care of the state. The Ombudsman considered these actions using many references such as existing legislation, policies, procedures, codes of conduct, standards, contracts and other similar statutory functions or programs.
31. Case studies are included in this paper to illustrate previous Ombudsman enquiries and investigations which had a human right focus. Major public reports released by the Ombudsman in this regard have included:
- Conditions Of Persons In Custody – July 2006
  - Review Of The Freedom Of Information Act – June 2006
  - Improving Responses To Allegations Involving Sexual Assault – March 2006
  - Investigation Into The Handling, Storage And Transfer Of Prisoner Property In Victorian Prisons – December 2005
32. The Ombudsman also conducts a number of other enquiries and investigations which, while not public reports, achieve substantial improvements to public administration in the area of human rights. Some of these have been recorded in previous annual reports.

The following case studies are summaries of previous enquiries and investigations completed by the Ombudsman which if received today may be considered against the Charter.

## Reporting Sexual Assault

33. The State has a duty of care to protect the vulnerable members of the Victorian community including people with disabilities, the older adult or children. These people can be at a greater risk of being subject to sexual assault.

The public authorities who receive reports about sexual assaults or provide services to support those requiring it, continually balance competing rights. For example the risk of damaging the reputation of an alleged offender might need to be balanced against the safety of persons making the report or persons with whom the alleged offender resides.

### **Own Motion: Improving Responses to Allegations Involving Sexual Assault<sup>9</sup>**

The Ombudsman completed an analysis of relevant complaints received by this office and the Office of Police Integrity. He consulted with a wide range of service providers and interest groups, invited the general public to make written submissions, developed and distributed a discussion paper and held a forum for key agency representatives.

The Ombudsman opens the report by stating that ‘The recommendations contained in this report are an agenda for further action to address these issues and to establish administrative arrangements that will:

- provide environments that discourage sexual assault,
- encourage early reporting of sexual assault, and
- give early access to support services necessary for the long-term recovery of victims from the mental and physical harm caused by such assaults.’

The Ombudsman reviewed the areas of reporting, protecting against sexual assault, inter-agency liaison, workforce issues, police investigations processes and community education about sexual assault. The enquiry found:

- Inconsistent understanding of mandatory or other reporting requirements.
- Differences in the way government agencies categorise and collect information.
- Difficulties in identifying offending patterns and systemic issues.

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<sup>9</sup> Improving Responses to Allegations Involving Sexual Assault Report, Ombudsman Victoria, March 2006

- A lack of formal inter-agency liaison processes.
- Process issues in agencies where employees are accused of sexual assault.
- A lack of uniform vetting of employees working with vulnerable people.
- Limited specialist training for agency employees responding to reports of sexual assault.
- Deficiencies in some aspects of police practice relating to sexual assault investigations.
- Significant lack of understanding within the community about sexual assault.

Thirty five recommendations were made and included:

- Develop training packages for school, disability workers and others required to report child sexual abuse.
- Develop compatible data collections systems to enable the lawful sharing of information and a whole-of-government analysis of individual and systemic patterns of offending.
- Allocate extra resources to providing specialised programs for children under the age of 14 exhibiting sexual abuse behaviors.
- Department of Human Services (DHS) establish a regional and rural intervention and treatment service for children and young people.
- Government agencies and Centres Against Sexual Assault explore partnership projects with agencies representing or serving people with culturally or linguistically diverse backgrounds to create environments conducive to reporting sexual assault and to facilitate access to support service.

### **Intervening in family life**

34. The Victorian Government performs functions which can be intrusive. Child protection officers assess the capacity of parents to protect their children; young people are detained in juvenile justice centres; and sensitive information is collected from people to determine their eligibility for services. There are waiting lists for housing and disability services and the urgency of child protection matters places pressure on staff to respond quickly. Departments like DHS provide programs to support and assist some of the more vulnerable members of the community, such as caring for children who can not live safely with their own

families, supporting people with disabilities, and provide housing for those who struggle to survive in the private rental market. Considering this, it is not surprising that the Ombudsman receives a significant number of complaints about programs and services delivered by some departments such as DHS.

**Enquiry: Communication**<sup>10</sup>

The grandmother of a 15 year old young woman complained that DHS was trying to prevent her from having contact with her granddaughter and her granddaughter's infant child. The grandmother was also concerned that DHS intended to remove the baby from the granddaughter.

DHS advised the Ombudsman that it was the young woman's decision not to contact her grandmother. DHS also advised the Ombudsman that it had obtained a favorable assessment of the capacity of the young woman her partner to care for the baby. DHS intended to withdraw from the case as soon as it could ensure the couple was receiving sufficient ongoing support. However, the young couple had recently left their accommodation and taken the baby with them. DHS became concerned for the baby as it was not able to monitor his care when the parents' whereabouts were unknown.

The young woman contacted the Ombudsman because her extended family told her that DHS intended to remove her baby. The Ombudsman's office facilitated contact between the young woman and a child protection worker who reassured her about DHS' intentions. DHS later advised the Ombudsman that the young parents were diligently caring for their baby with the assistance of support services.

**Safety of children in care**

35. The sensitivity and confidentiality of individual cases can prevent a report from being made public. One such case was the alleged abuse of an infant boy in foster care.

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<sup>10</sup> Annual Report, Ombudsman Victoria 2004

**Investigation: Protecting a child in foster care**<sup>11</sup>

DHS removed an infant and his sister from their parents in July 2003 because of concerns that the father had physically abused the daughter. Their removal followed a DHS investigation that was, in the Ombudsman's opinion, well managed and thoroughly conducted. DHS arranged for the children to be placed in foster care.

The two children were placed with the foster carers for five months. The infant was subsequently admitted to hospital on three separate occasions, with increasingly serious injuries. Experienced child protection supervisors interviewed during my investigation acknowledged that there were clear indicators that the infant was abused during the placement. Medical evidence also supported this.

The Ombudsman investigation established gaps in child protection practice, deficiencies in DHS's supervision of its contract with the foster care agency and the assessment process followed by the agency to accredit the foster parents. The Ombudsman also discovered that the case had not been allocated to a child protection worker during the period of abuse. This case indicated that the lack of an allocated worker was not an isolated incident and there was a systemic issue with the lack of resources to cope with the number of cases leading to cases being closed without ensuring the safety of the child.

The Secretary accepted the Ombudsman's recommendations for significant improvements to the administration of the child protection system. The Ombudsman recommended that any allegation of a child being abused whilst in the care of a community services organization be reported to the Child Safety Commissioner. The Ombudsman also recommended that all allegations of 'abuse in care' be collated centrally and that DHS should not renew its contracts with community service organizations unless it has considered a comprehensive report regarding the quality of the care it provides.

The Ombudsman was advised by the Secretary that, shortly after she received his report, the government announced \$75 million in new funding for the child protection program. These additional resources should provide considerable assistance to DHS efforts to intervene earlier in cases of concern.

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<sup>11</sup> Annual Report, Ombudsman Victoria 2006

## **Complaints from persons detained**

36. The Ombudsman's jurisdiction includes both public and private prisons. There has been an increase in complaints from prisoners of 86 per cent over ten years. Common complaints include allegations about property, visitors, access to medical services, classification/location, harassment, victimization, assaults by officers, drug testing, mail, facilities and conditions.
37. Own motion investigations regarding prisons have included:
- Drug Testing In Prisons - 2005
  - Handling Storage And Transfer Of Prisoners' Property - 2005
  - Condition For Persons Held In Custody - July 2006  
(in conjunction with the Office of Police Integrity)
38. Remedial actions have been in the areas of:
- prisoner property,
  - transporting prisoners,
  - prisoners' telephone access,
  - prisoner wages,
  - disciplinary system in prisons,
  - conditions for prisoners under restricted regimes, and
  - improving access to the Ombudsman.
39. Corrections Victoria has responded well to the Ombudsman's conclusions and has more recently improved complaint handling in prisons and access to this office by the prisoners. All prisons have a complaint handling system which can be exercised first. If a prisoner is not satisfied he/she can contact the Ombudsman. This has previously been by letter but to be in line with other members of the Victorian community since July 2006 a prisoner can make a 1800 free call direct to this office.
40. The Ombudsman continues to monitor with Corrections Victoria the implementation of his recommendations and opportunities to review the condition for persons in custody.

## **Own Motion: Conditions in custody** <sup>12</sup>

An Own Motion investigation conducted in conjunction with the Office of Police Integrity.

In Victoria, there are people compulsorily deprived of liberty by the State and to whom the State owes a duty of care for their safety, security and well-being. This investigation reports on conditions in both prison and police cells at various stages of the custody process. Police cells and prisons were visited to observe conditions and amenities, examine relevant documents and meet with Police, prison staff, with prisoner/detainees and stakeholders in the Victorian custodial system.

The concerns identified by the Ombudsman include:

- Overcrowding and long stays for persons in police cells
- None compliance with duty of care and contractual obligations for detained persons and insufficient attention to custodial standards
- Lack of access to basic amenities by detainees/prisoners
- Inadequate transport arrangements
- Deficiency in the provision of health and mental health care
- A need for a more robust and transparent internal mechanisms for monitoring custodial conditions both in police cells and prisons

Specific conditions observed include intoxicated persons held in police cells inappropriately; design faults including hanging points in old police cells; deficiencies in the health care provided in prisons; poor access to telephones and visits for prisoners; and segregation of different categories of detainees in police cells is difficult: male from females, young persons, drunks, with mental illness, with 'protection status'. The full report provides greater detail.

The Ombudsman's recommendations included those which were required immediately to improve current conditions and those which have strategic impact on the directions of the Victorian custodial system. The 44 recommendations included:

- Ensure the yard at the Acacia Unit at Barwon Prison is provided with a toilet as a matter of urgency.
- Review the number of Aboriginals Well-being officers.
- Ensure the recommendations made by the Coroner into the deaths in prison are properly implemented.

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<sup>12</sup> *Condition For Persons Held In Custody Report*, Ombudsman Report July 2006

- Regularly monitor the standards of the quality and quantity of food.
- Review mental health services for prisoners in all prisons.
- Ensure that both prisoners and visitors are aware of the requirement to conduct strip searches and that the consequences of refusal are explained.
- Ensure the designated facilities are available at each prison to accommodate the needs of intellectually and physically disabled prisoners.

**Enquiry: Access to medical services** <sup>13</sup>

A prisoner wrote to the Ombudsman stating that he attended regular medical appointment in Melbourne due to a medical condition could not climb into the prison van. Approaches by the prisoner to prison officers failed to resolve the matter. Enquiries conducted by Ombudsman Victoria resulted in the prison industries building a portable step to assist the prisoner to step into the van. In the interim, a sedan vehicle was used to transport the prisoner to his medical appointments.

**Enquiry: Too Rough** <sup>14</sup>

A 16 year old detainee in a juvenile justice centre alleged that a staff member deliberately elbowed him in the head during an incident. DHS engaged a contract investigator who took statements from witnesses and concluded that the staff member had restrained the detainee in an 'unduly rough manner'. DHS took disciplinary action against the staff member concerned. Of further concern was the five day delay in completing the incident form, and the fact that two staff members present at the incident had not been trained in restraint techniques. Reporting procedures were reinforced to staff in a new edition of the Juvenile Justice Custodial Service Operating Manual.

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<sup>13</sup> Annual Report, Ombudsman Victoria 2006

<sup>14</sup> Annual Report, Ombudsman Victoria 2004

## **Disability services**

41. Complaints received by the Ombudsman regarding people with disabilities are often regarding access to services and the costs. The complaint can become complex because of the relationship this person has with family members, their carer, advocates, treaters and their guardians.

### **Enquiry: Fully-funded training**<sup>15</sup>

A parent lodged a complaint on behalf of his intellectually disabled son about fees charged for services provided to his son. The Adult Training and Support Service (ATSS) requested his son pay fees in addition to the funding provided by DHS. The complainant had previously lodged an appeal with DHS and a review panel found the complainant's son, a pensioner, had the capacity to pay the increased fees and therefore should.

The Ombudsman found the ATSS had charged fees for attendance at a program described as fully-funded by DHS. The service did not adequately explain the need to charge fees or the authority to impose them. The ATSS imposed these fees at a time when its budget was operating in surplus.

The Ombudsman also concluded that DHS's poor definition of key concepts, such as what constitutes a 'basic service' or a 'capacity to pay', contributed to the dispute. The complainant had pursued the issue for four years before DHS reached a final position on the matter. The Ombudsman recommended DHS require the ATSS to reimburse the fees it had charged and DHS apologize to the complainant for its handling of the matter. The Ombudsman also recommended DHS define the terms basic services and capacity to pay.

The Ombudsman investigation also found that the ATSS had considered making an application to VCAT for an administrator to be appointed to manage the intellectually disabled person's affairs if the outstanding fees remained unpaid. The Ombudsman considered that this was inappropriate and recommended DHS enquire into the ATSS's use of the Guardianship and Administration Act 1986 in this context.

DHS agreed to implement most of my recommendations however advised that it was not able to enforce my recommendation that the fees be refunded as the ATSS was a private provider.

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<sup>15</sup> Annual Report, Ombudsman Victoria 2006