

# **VICTORIAN** **ombudsman**

**Annual Report 2011**

**Part 1**

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## Letter to the Legislative Council and the Legislative Assembly

To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to the Parliament Part 1 of the annual report of the Ombudsman for the year 2010-11 which relates to my statutory functions.

In order to provide Parliament with a timely report of the activities of my office over the past year, I am tabling my report in two parts:

Part 1 – dealing with my statutory functions

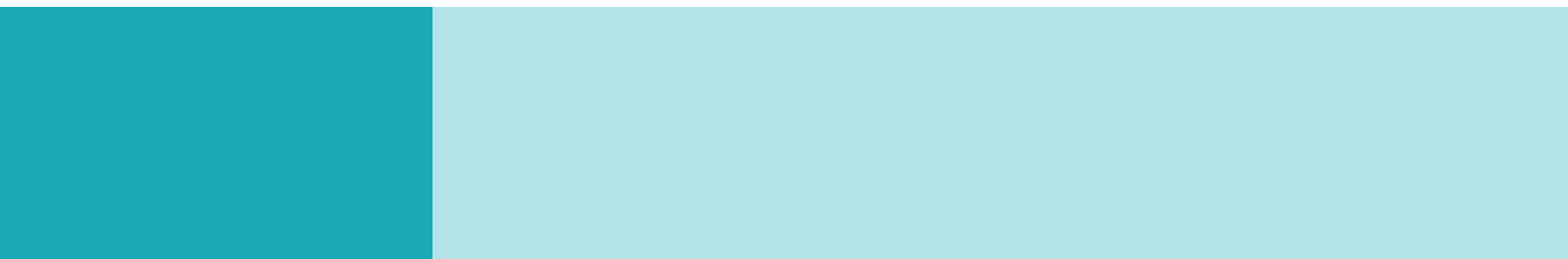
Part 2 – providing statistical details and the financial statements for my office.

I shall be tabling Part 2 of the annual report shortly.



G E Brouwer  
**OMBUDSMAN**

30 August 2011

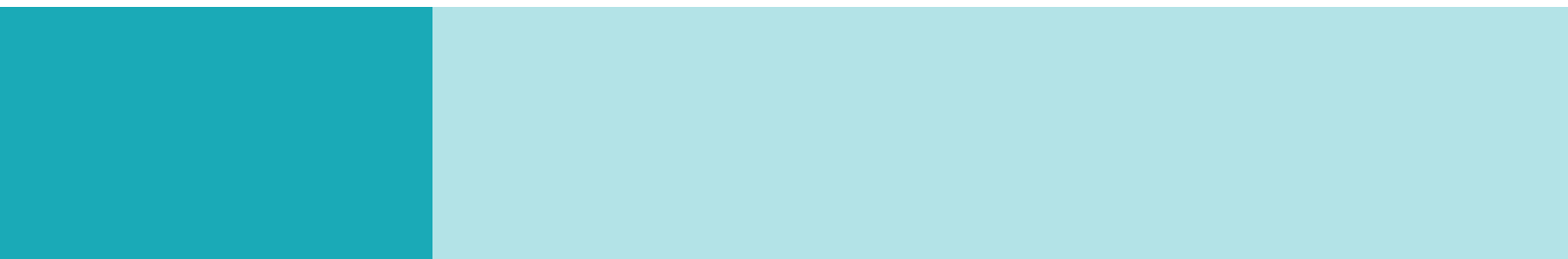


## **Mission**

to promote fairness, integrity, respect for human rights and administrative excellence in the Victorian public sector

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# 1 Year in review

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# 1 Year in review

## Approaches to my office

During 2004-05 my office handled some 15,700 approaches<sup>1</sup> from members of the public seeking assistance. That figure has now grown to 25,569, a 63 per cent increase in the number of approaches to my office in the past six years.

There are many reasons for the rise in the number of people contacting my office including:

- the increase in awareness about the role of my office in addressing complaints about the decisions and actions of public officials, and
- the greater propensity of the general public to question and assert their rights.

## Warnings not heard

My statutory role is to investigate the administrative actions taken by or on behalf of government departments and authorities.

I identify and report to Parliament on areas of defective administration with recommendations for improvement or change. While in many cases my reports relate to specific circumstances relevant to a particular agency, they have a wider application across the public sector.

When weaknesses are identified some agencies are effective in implementing improved processes and others are not. This year, some of my reports have highlighted persistent administrative problems that have been previously identified by my office. Agencies that fail to address problems when they are formally identified by my office elect, by that omission, to continue to conduct their business in a flawed, unreasonable or improper manner. This is unacceptable.

I continue to identify the following issues:

- inadequate leadership and management of programs which have an impact on the community
- corrupt behaviour and misconduct brought to my attention by whistleblowers
- failure of departments and agencies to perform their statutory duties
- the inappropriate application of freedom of information legislation
- poor procurement management in the public sector
- conflicts of interest
- failure to protect members of the community with particular vulnerabilities.

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<sup>1</sup> 15,753 approaches – Victorian Ombudsman, *Annual Report*, 2004-05.

I examine these issues in further detail in this report. I also discuss my concerns about legislative and jurisdictional anomalies, to which I have alerted previous governments, and which continue to restrict my ability to look at some matters brought to my attention.

## Defensive attitudes

Most agencies are cooperative with my investigations and enquiries, recognising the importance of those investigations and enquiries to the improvement to standards in those agencies and the public sector generally. I have, however, noticed an increasing trend for some agencies to adopt a protective and adversarial position, in an attempt to hamper my ability to receive documents or information necessary to complete investigations. This is seen from unnecessary delays in the provision of information to my investigators and an unwillingness to be open to scrutiny as is apparent from the increased reliance on legal arguments, including extremely tenuous legal arguments, as a justification for refusals to provide information and documents or as a justification for proposals that seek to narrow my jurisdiction.

This protective attitude is indicative of a culture of denial in the organisations concerned, an unwillingness to be open and transparent to the body charged by the Parliament with the public sector investigative function and is not in the long term interest of the organisations concerned or of the public. It also indicates a need for legislative changes to oblige all organisations to be fully open and transparent to my investigations.

## Ministerial advisers and elected officials

Part of the long-standing currency of Australian public life has been a notional fault line between departmental and ministerial advisers.<sup>2</sup> My investigation into The Hotel Windsor redevelopment<sup>3</sup> demonstrated that this separation can be bridged, that Ministerial staff can be subject to scrutiny and should be accountable to similar standards of conduct that govern departmental advisers. Similarly, the conduct of elected representatives, when influenced by factional and other pressures, can be in certain circumstances subject to the scrutiny of my office when administrative actions have been affected, as demonstrated by my report into Brimbank City Council.<sup>4</sup>

<sup>2</sup> See for example the non-attendance of ministerial staff and media advisers summonsed to appear before the Victorian Legislative Council Standing Committee on Finance and Public Administration in 2010 (Hotel Windsor redevelopment) ; or of ministerial advisers before the Australian Senate Select Committee on a certain maritime incident (the 'children overboard' incident) in 2002. The October 2002 report of the Select Committee observed 'There now exists a group of people on the public payroll – ministerial advisers – who seem willing and able, on their own initiative, to intervene in public administration, and to take decisions affecting the performance of agencies, without being publicly accountable for those interventions, decisions and actions.'

<sup>3</sup> Victorian Ombudsman, *Ombudsman investigation into the probity of The Hotel Windsor redevelopment*, February 2011.

<sup>4</sup> Victorian Ombudsman, *Investigation into the alleged improper conduct of councillors at Brimbank City Council*, May 2009.

Such investigations bring an additional layer of accountability to a culture and a set of values that have in some instances tainted democratic processes. This clearly presents a challenge to some who appear to believe that the political conduct of those in positions of influence should not be constrained by any external accountability. This was demonstrated by the challenges to my jurisdiction mounted in the course of The Hotel Windsor redevelopment investigation.<sup>5</sup> To ensure that level of accountability and scrutiny is maintained I consider that administrative decisions of elected officials and Ministerial advisers should be subject to the jurisdiction of my office.

The long term benefit of external scrutiny is clear: maintaining public confidence in good government. However my current jurisdiction over elected officials and Ministerial advisers relies on either a parliamentary referral or a whistleblower disclosure. Otherwise the conduct of elected officials and Ministerial advisers cannot be the subject of my investigations unless they are required as witnesses for my investigations.

## Promoting improvements through education

Training and education play an important role in promoting best practice and preventing corruption and maladministration. My office facilitates workshop programs for public officers on good complaint handling and improving public sector administration through the management of whistleblowers. These activities are provided by my office in addition to my statutory responsibilities and would be put to wider use if my legislation were expanded to include an educative function.

## Reports tabled

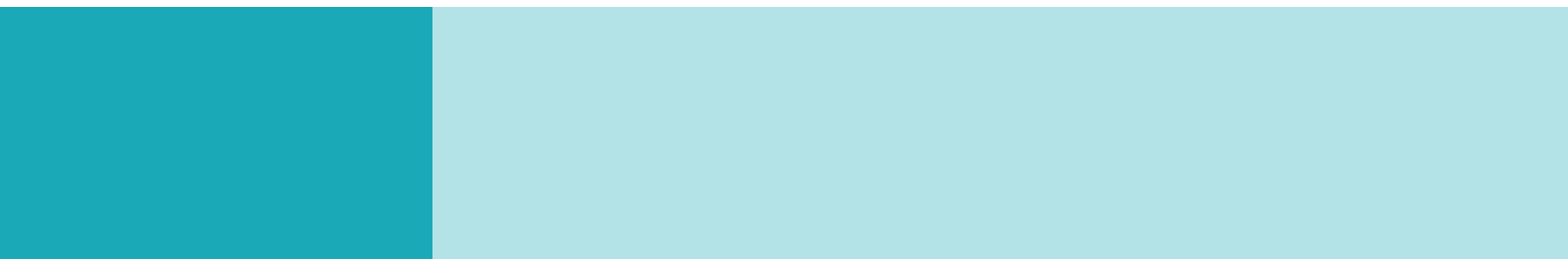
Over the course of this year I tabled 13 reports in Parliament:

- *Whistleblowers Protection Act 2001* Investigation into an allegation of improper conduct within RMIT's School of Engineering (TAFE) – Aerospace, July 2010
- *Whistleblowers Protection Act 2001* Investigation into conditions at the Melbourne Youth Justice Precinct, October 2010
- Ombudsman's recommendations second report on their implementation, October 2010
- Investigation into the issuing of infringement notices to public transport users and related matters, December 2010
- *Whistleblowers Protection Act 2001* Investigation into allegations of improper conduct by a councillor at the Hume City Council, February 2011
- *Whistleblowers Protection Act 2001* Investigation into the failure of agencies to manage registered sex offenders, February 2011

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<sup>5</sup> During my investigation, I received advice and correspondence from the then Attorney-General arguing that I did not have jurisdiction to investigate the actions of Ministerial advisers.

- Ombudsman investigation into the probity of The Hotel Windsor redevelopment, February 2011
- The Brotherhood – Risks associated with secretive organisations, March 2011
- Ombudsman investigation – Assault of a Disability Services Client by Department of Human Services Staff, March 2011
- *Whistleblowers Protection Act 2001* Investigation into the improper release of autopsy information by a Victorian Institute of Forensic Medicine employee, May 2011
- Investigation into record keeping failures by WorkSafe agents, May 2011
- Corrupt conduct by public officers in procurement, June 2011
- *Whistleblowers Protection Act 2001* Investigation into an allegation about Victoria Police crime statistics, June 2011.



## 2 Lack of leadership and management

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## 2 Lack of leadership and management

Many of the investigations I undertook over the past six years identified improper conduct and maladministration that occur as a result of failure of leadership and management.

Good leadership is:

- implementing, promoting and supporting the values contained in the Victorian Public Service Code of Conduct (responsiveness, integrity, accountability, respect, demonstrating commitment to human rights)
- having courage to act on work-related matters that may be difficult to address
- leading staff by example (being a positive influence, acting ethically, inspiring/empowering others)
- demonstrating impartiality and transparency
- providing staff with a safe and supportive work environment
- identifying weaknesses, whether real or potential, in the policies and processes employed by staff, and changing those policies and processes in response.

Good leadership in the public sector is important because it:

- assists in developing a culture where administrative excellence and ethical conduct is encouraged
- protects against improper conduct and can assist in its early detection
- ensures adequate scrutiny is applied to areas such as expenditure of public funds
- sets and achieves realistic and beneficial goals
- establishes an operating norm of efficiency and diligence.

Despite progress made by some agencies, I continue to identify agencies that fail to learn from their mistakes and fail to fully implement revised policies and procedures that my enquiries and investigations have identified.

### Poor responsiveness

I question why the internal governance measures of some agencies are neither identifying nor addressing the problems my investigations uncover. While agencies acknowledge the issues identified by my office, I consider they often have been aware of the issues for some time but did not act. In my view, poor responsiveness is an indication of lack of leadership and effective management. The following examples indicate the importance of leadership and effective management in ensuring that problems are dealt with.



## Child protection

Earlier this year a case was brought to my attention where the Department of Human Services (the department) allowed a Custody to the Secretary Order to lapse. It is an indication of ineffective management when children subject to such an order are not being monitored. In this case, decisions and assessment details relating to the child were not adequately recorded and conditions on the order not enforced. The department advised that staff shortages had contributed to poor practice in this case.

Workforce issues have been addressed by my office in a series of reports about child protection over the last six years. Throughout the period of these reports substantial additional funding has been allocated:

- \$226 million in the period November 2005 to May 2006 to support the implementation of the *Children, Youth and Families Act 2005*
- in response to my *Own motion investigation into the Department of Human Services Child Protection Program* report in November 2009 the department advised that the government had recognised the demand pressures facing the child protection program and had allocated new funding of \$77.2 million over four years.

Despite my recommendations and the significant additional funding, the child protection program continues to have difficulties in meeting its objectives.

## Crime statistics

In 2009 my office reported on the lack of public confidence in the integrity of crime data.<sup>6</sup> In this report I recommended that consideration be given to the establishment of a unit external to and independent of Victoria Police to develop and maintain statistical databases on crime.

My parliamentary report about crime statistics tabled in June this year provided further evidence of the implications of poor responsiveness.<sup>7</sup> In this report I raised concerns about misleading crime data and its effects on public perception when used in a political context. I recommended that an independent body be created to manage, collate and disseminate crime statistics to increase public confidence in data.

Had my 2009 recommendations been implemented, questions would not have been raised as to the integrity of data released by, or the motivations of, the then Chief Commissioner of Police.<sup>8</sup>

<sup>6</sup> Victorian Ombudsman, *Crime statistics and police numbers*, March 2009.

<sup>7</sup> Victorian Ombudsman, *Investigation into an allegation about Victoria Police crime statistics*, June 2011.

<sup>8</sup> *ibid.*

## Lack of oversight and appropriate action

Two reports I tabled this year demonstrate what can occur when the actions of staff are not sufficiently oversighted and questionable behaviour is not appropriately addressed.

### Toner investigation<sup>9</sup>

This investigation identified that staff in a number of departments purchased excessive quantities of photocopy toner from a company in return for receiving personal gifts such as electrical appliances, including televisions and gift vouchers up to the value of \$1,000. Several indicators failed to alert managers to this growing corruption. For example, one staff member accrued six years of annual leave, but was reluctant to take off any time – an indicator that the staff member may have been concerned that the misconduct might be exposed in their absence.

### Issuing of infringement notices<sup>10</sup>

This report revealed instances where adverse findings from criminal record checks and admissions of poor infringement history relating to ticket inspectors were not acted upon by management. A number of these ticket inspectors were later involved in assaults on commuters.

## Reasons for poor leadership and management

Leadership fails when public officers:

- do not take responsibility for the quality of the service their agency provides
- take the path of least resistance
- are reluctant to deal with difficult issues / individuals
- lack courage.

Public officers have a responsibility to act in the best interests of the Victorian community. Poor leadership has real consequences for public administration, including the waste of monies in poorly managed projects and the resulting loss of public confidence. It can create an environment in which corruption, abuse of power and maladministration can flourish. Poor leadership within an agency that has a statutory function to care for the vulnerable can have especially damaging effects for the individuals concerned.

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<sup>9</sup> Victorian Ombudsman, *Corrupt conduct by public officers in procurement*, June 2011.

<sup>10</sup> Victorian Ombudsman, *Investigation into the issuing of infringement notices to public transport users and related matters*, December 2010.

### 3 Failure to perform statutory and other duties

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### 3 Failure to perform statutory and other duties

Since 2004, I have regularly reported on the failure by agencies to perform statutory and other duties. The impacts of such failures range widely – from the potential danger and actual harm caused to a large number of Cranbourne residents described in my report on the Brookland Greens methane gas emergency,<sup>11</sup> to the personal frustration caused to numerous individuals when agencies fail to comply with their statutory obligations.

In extreme cases, the failure of agencies to perform their statutory or other duties may result in compensation being awarded to individuals for the impact administrative failure has had on their lives and wellbeing. One such example is the \$23.5 million settlement reached in Supreme Court proceedings in May 2011 on behalf of more than 750 home owners affected by the methane gas emergency at the Brookland Greens estate.

It is unacceptable when agencies fail to comply with the legislation that enables them to exist and/or to function; even more so, when they continue to display a lack of understanding of their obligations which I have previously brought to their attention.

#### Importance of proper internal review processes

Genuine internal review is necessary when people affected by decisions or actions complain and yet this frequently does not take place until my office becomes involved. Many agencies – such as VicRoads, Corrections Victoria, WorkSafe and local councils deal with my office frequently, and are aware of their obligations to review complaints on their merits, but on occasion it requires the intervention of my office to ensure this occurs.

This year, a number of matters came to my attention after they had already been reviewed by the agencies concerned and the original decision re-affirmed by the agencies. In some of these cases, after intervention by my office, the original decision was reversed. If an internal review process is effective, enquiries by my office should have little or no effect on the outcome. The following case study is an example.

##### **Case study – Incorrect student enrolment**

Monash University enrolled a student without her knowledge. At the end of the first semester, she was notified that she had failed four units, and was liable for course fees.

##### **Outcome**

As a result of my enquiries the university advised it had no evidence the student had voluntarily enrolled. It cancelled the student's fee debt and amended the academic record.

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<sup>11</sup> Victorian Ombudsman, *Brookland Greens Estate Investigation into methane gas leaks*, October 2009.

## Monitoring staff conduct

In the past I have seen agencies make efforts to implement policy changes and update procedures. However policy and procedural changes will often have a limited lifespan unless they also address the underlying reasons for non-compliance. The reasons for non-compliance can often be attitudinal and cultural. The following case studies are examples.

### Case study – Victorian Institute of Forensic Medicine

I received correspondence from the Secretary of the Department of Justice (the department) outlining an anonymous disclosure it had received. It was alleged that an employee of the Victorian Institute of Forensic Medicine (the Institute) had released confidential autopsy information to third parties not entitled to receive the information. I determined that the disclosure was a public interest disclosure under the *Whistleblowers Protection Act 2001* and subsequently commenced an investigation.

My investigation identified that the employee had, on numerous occasions over approximately six years, leaked confidential information which he obtained in his capacity as a Forensic Technician at the Institute. The employee had emailed descriptions of deaths to his friends using derogatory language because he felt the group would be interested in circumstances surrounding unusual deaths. My investigation also identified that the employee had, without authorisation, accessed an electronic autopsy file out of 'morbid curiosity'. The employee had removed autopsy documents from the Institute and retained these in a cupboard in his home. He also had 1,279 work related photographs on a CD and personal hard-drive in his house. The photographs had been copied onto the CD at the Institute and then transferred onto the hard-drive. Of these photographs, 77 were of the remains of deceased people.

The Institute had clear policies in relation to staff obligations concerning confidentiality and the handling of sensitive information. Despite this, the employee was able to access autopsy material, download photographs of deceased persons onto a disk and remove information from the Institute with ease. The Institute did not have mechanisms in place to monitor compliance with the principles of its confidentiality policies and its security arrangements were lacking. I recommended that the Institute review its physical and information technology security and auditing arrangements in consultation with the Victorian Coroner. The Institute accepted this recommendation.

### **Case study – Transport Ticket Inspectors**

I conducted an own motion investigation into infringement notices issued to public transport users which identified among other issues the lax oversight of the authorisation of ticket inspectors and the reporting of incidents.

I found that the Department of Transport failed to identify and appropriately action non-compliance by authorised officers with their conditions of authorisation, despite having more than sufficient legislative power to do so. I also determined that the statutory requirement for accredited transport operators to record and notify the department of a broad range of incidents involving authorised officers and commuters was not being met by operators, or enforced by the department. As a result only three incidents were reported over a two year period in which nearly 370,000 infringements were issued. I made 14 recommendations of which 13 were accepted by the department one under consideration.

### **Outcome**

Since the commencement of my investigation the process for authorising and disciplining officers has been amended. The department held meetings with transport providers to develop criteria for reporting incidents and the department's legal team receives monthly reports which include data on complaints. This has resulted in 609 reports having been received in six months.

## Prisons – Failure to comply with their obligations

Prisons are highly regulated by legislation, Director's Instructions and Commissioner's requirements.<sup>12</sup> I have found that Corrections Victoria and prisons frequently fail to comply with their obligations

### Case study – Tarrengower Prison

In February 2010 my office received a whistleblower disclosure concerning the conduct of a prison officer at Tarrengower Prison.

My investigation, completed this year, uncovered a long standing pattern of behaviour by the officer including:

- permitting prisoners to have access to confidential prison documentation
- employing prisoners to perform administrative functions on his behalf
- failing to verify the accuracy of the prisoners' work
- failing to conduct searches in accordance with the Director's Instructions and allowing the falsification of prison records.

A series of ongoing complaints and concerns regarding the officer's conduct, including concerns raised at a local level and with the General Manager over a lengthy period of time, were not adequately addressed. In one instance, the Office of Correctional Services Review conducted an investigation which found there was 'evidence of a pattern of inappropriate behaviour by' the officer. It recommended the officer be referred to the Department of Justice (the department) Human Resources unit for investigation of possible misconduct. However no substantive investigation was conducted. In addition, the supervisor did not adequately monitor the officer's activities.

### Outcome

I made a number of recommendations to the department concerning the suitability of the officer's employment, management at the prison, policies, training and auditing. These were accepted. The department's most recent advice indicates that the staff member's employment has ceased and that 'a number of local operating procedures have been amended and re-issued'.<sup>13</sup>

<sup>12</sup> The *Corrections Act 1986*, Commissioner's requirements index for Prisons, and Prison Director's Instructions regulate the detention of prisoners, including the handling of prisoners' property and disciplinary processes in prisons.

<sup>13</sup> Department of Justice, letter, 12 August 2011.

## Freedom of Information

The purpose of the *Freedom of Information Act 1982* (the Act) is to enable greater transparency in the dealings of government agencies, by providing a means for the appropriate release of information held by government agencies.

Unfortunately, I continue to see departments and agencies applying the Act as an information protection system. I regularly identify:

- significant delays in processing requests
- restrictive interpretations of the Act
- administrative actions that are contrary to or simply disregard the Attorney-General's guidelines<sup>14</sup> and the administrative recommendations from my 2006 review.<sup>15</sup>

In my view, the object and purpose of the legislation is not being followed consistently by departments and agencies and this is undermining the effectiveness of the Act. Some clear trends are emerging:

- complaints about local councils have increased<sup>16</sup>
- many agencies do not comply with the requirements of the *Public Records Act 1973*
- agencies, particularly departments, are failing to meet statutory timelines and appear intent on restricting access to information on often misguided grounds.

In response to my concerns, some departments have signalled their intention to implement systemic and structural reforms to improve service delivery in this area. Unfortunately, such intentions have lapsed in the past and I revisit and report on this same issue each year.

The Attorney General published guidelines in 2009<sup>17</sup> setting out the responsibilities and obligations of government agencies in complying with the Act. These guidelines state:

- the culture in which Freedom of Information (FOI) responsibilities are managed is a well established measure of accountability of a government and it is the expectation of government that the culture is one of openness and integrity
- FOI officers must make decisions not only in accordance with the Act but also consistent with principles of good administrative decision-making more generally
- timely responses to FOI requests are fundamental to the purpose of FOI and delays in processing requests undermine its usefulness.

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<sup>14</sup> Victorian Attorney-General, *Freedom of Information Guidelines*, December 2009. These establish the principle that the administration of freedom of information is to reflect a culture of openness and integrity.

<sup>15</sup> Victorian Ombudsman, *Review of the Freedom of Information Act*, June 2006.

<sup>16</sup> An increase of 3.7 per cent since last financial year (2009-10).

<sup>17</sup> *Attorney-General Guidelines on the Responsibilities and Obligations of Principal Officers and Agencies*, December 2009.



The Department of Justice is the lead agency in this area. My role relates to instances where an applicant complains about issues such as delay, cost or failure to locate relevant documents. Complaints received by my office often identify failures in statutory duties under the Act. It is not my role to obtain documents for a complainant, but rather to make enquiries as to the actions taken by an agency in processing the FOI request, and to identify issues and remedies. Nevertheless, my intervention can result in the release of documents. Over the years, applicants have reported that the involvement of my office has positively affected the outcome of their requests. For example, this year, a journalist advised my office that '[y]our inquiries have at this point led to noticeable improvements in the way my requests have been handled by the agency'.

My review of the Act in 2006 revealed that delay in processing FOI requests was still a regular occurrence within Victorian departments.<sup>18</sup> I also expressed concern about the poor quality of reasons for decisions, the poor level of assistance to applicants and other internal practices. Five years after that review, non-compliance with the Act persists.

#### **Case study – Failure to locate documents**

A journalist requested from the Department of Planning and Community Development (the department) under FOI all notes and reports from a meeting held in June 2009 between the Halim Group and then Planning Minister Justin Madden regarding the proposed re-development of the Hotel Windsor. The department advised in its decision letter it was unable to locate any relevant documents.

#### **Outcome**

My investigators inspected the department's FOI files and located handwritten notes taken at the meeting and other potentially relevant documents which were subsequently released in a de-identified form to the applicant. The department's explanation was that the handwritten notes were simply an 'aid de memoire'.<sup>19</sup>

The department has accepted that notwithstanding the notes were taken for personal purposes of an individual officer they should have been placed on the relevant file. The department has since engaged the Public Records Office to assist in enhancing note taking and file keeping policies or procedures.<sup>20</sup>

<sup>18</sup> Victorian Ombudsman, *Review of the Freedom of Information Act 1982*, op. cit.

<sup>19</sup> Department of Planning and Community Development, letter, 12 August 2011.

<sup>20</sup> *ibid.*

### **Case study – Delays and poor record keeping**

A complaint was made to my office following 13 FOI requests by two members of Parliament to Victoria Police. The complainant alleged breaches of sections 14, 21 (delay) and 25A of the Act.

#### **Outcome**

I identified unreasonable delay in the processing of five FOI requests of between three and 11 months before a decision was provided to the complainant and poor record keeping standards.

### **Case study – Failure to search diligently**

A complainant sought information under the FOI Act in relation to the building depreciation schedules for the local airport. The Warrnambool council could not locate the schedules, although its FOI decision provided information that was considered by the council to be sufficient. Subsequently the council advised the complainant that it could not locate the schedules although it believed that they might be at the council's archival storage facility.

I considered that the council failed to conduct a diligent and thorough search as required by section 27(1)(e) of the Act. I also considered that the freedom of information decision was defective in that it failed to advise the complainant of his statutory entitlement to an internal review or his entitlement to complain to the Ombudsman as required by sections 27(1)(d) and (e) of the Act.

#### **Outcome**

As a result of my enquiries a copy of the relevant documentation was subsequently provided to the complainant.

### **Case study – Records prematurely destroyed**

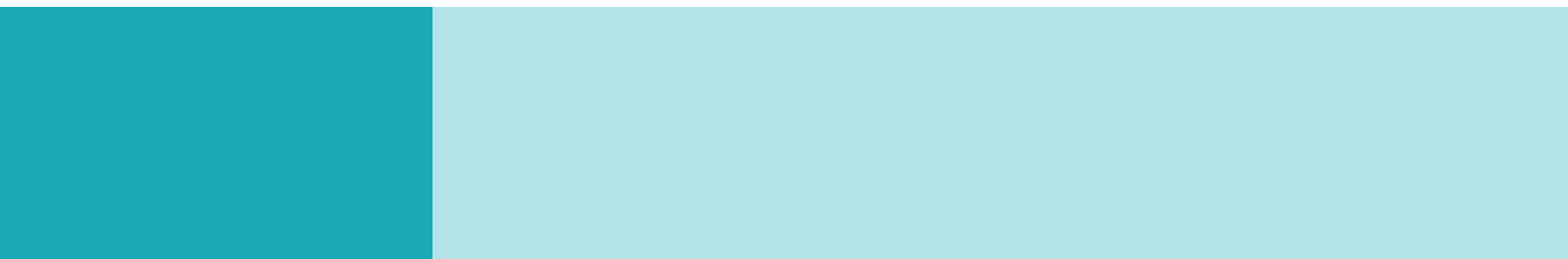
A PhD student at the University of Melbourne applied for login records to her university server account and the logins to her student email account from December 2008 to May 2009. The university advised that these records ‘no longer exist’. The complainant brought proceedings at VCAT. VCAT then asked me to ensure that a thorough and diligent search for the records had taken place.

### **Outcome**

My investigators found that some login records were ‘... being retained only for a matter of weeks’, which contravened:

- the *Public Records Act 1973*
- advice from the Public Record Office Victoria (PROV).

Following my investigation the university reported it is continuing to consult with PROV and informed the relevant areas within the university of records disposal requirements.



# 4 Poor procurement management

Remedying the problem

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## 4 Poor procurement management

Over the past six years, I tabled in Parliament a number of reports that identified instances of poor procurement practices in relation to the expenditure of public funds by public sector agencies.<sup>21</sup> Despite the resources and guidance made available to the public sector by the Victorian Government Purchasing Board for managing procurement, my investigations have highlighted a number of recurring themes:

- officers routinely breaching their financial delegations, and managers frequently failing to detect these breaches
- contractors often engaged without a competitive tender process, sometimes as a result of a personal association
- invoices and purchases frequently manipulated in order to avoid reporting requirements triggered by a full purchase amount
- poor record keeping practices leading to a lack of documentation regarding what in some instances are multi-million dollar contracts
- rushed procurement processes leading to shortcuts being taken and errors being made
- procurement processes manipulated to achieve a pre-determined outcome
- lack of oversight of officers creating opportunities for corrupt conduct.

The following case study is an example of an agency's failure in procurement management through poor record keeping practices.

### Case study – Poor recording keeping

A whistleblower disclosure was received by my office and referred to Parks Victoria which subsequently undertook an investigation into the conduct of one of its staff members. Many of the allegations – including that a contractor was engaged to remove trees without following the government purchasing guidelines, and that public resources were diverted for private use – were substantiated. However poor record keeping by Parks Victoria made it difficult to substantiate a number of other allegations. For example, asset registers were not sufficiently maintained.

It was also found that soon after the contract in question had been originally awarded, questions had been raised and disciplinary action recommended, but action was not taken by the responsible supervisor.

<sup>21</sup> For example: Victorian Ombudsman,  
– *Investigation into the Office of Housing's tender process for the cleaning and gardening maintenance contract – CNG 2007*, October 2007.  
– *Probity controls in public hospitals for the procurement of non-clinical goods and services*, August 2008.  
– *A report of investigations into the City of Port Phillip*, August 2009.  
– *Investigation into the tendering and contracting of information and technology services within Victoria Police*, November 2009.  
– *Corrupt conduct by public officers in procurement*, June 2011.

This case illustrates three conditions that allow misconduct to flourish:

- disregard for probity rules
- lax record keeping
- lack of will on the part of supervisors.

Agencies need to ensure strict compliance with probity processes, proper record keeping and firm oversight if opportunities for misconduct are to be reduced.

Proper record keeping is frequently undervalued. Records are evidence and track government expenditure. Lax record keeping can create the opportunity for misconduct and corruption as demonstrated in the following case study.

### **Case study – Destruction of financial documents**

In my report into ‘corrupt conduct by public officers in procurement’<sup>22</sup>, I identified that several public officers from Victorian Government schools and Arts Victoria breached their obligations under the *Public Records Act 1973* by destroying financial documents relating to their purchases from a toner cartridge supplier. The Public Record Office of Victoria’s ‘Disposal Authority’ states that all public bodies should keep principal accounting records relating to the management of an agency’s revenue and expenditure for seven years after the completion of the financial year in which the record was created. This includes invoices, receipts and orders for the payment of money.

Invoices inspected by my officers demonstrated that it was the practice of the toner cartridge supplier to send two invoices to public officers. One invoice listed the quantity and model of the toner cartridges ordered and total amount due. The second invoice listed the gifts associated with the purchase and carries a zero balance with no requirement for payment.

### **Outcome**

My investigation determined that the destruction of invoices by a number of public officers, particularly the one specifying the ‘gift’, were deliberate attempts to disguise and conceal gifts received from the toner cartridge supplier.

<sup>22</sup> Victorian Ombudsman, *Corrupt conduct by public officers in procurement*, op. cit.

Adherence to probity processes and firm oversight are also frequently found to be deficient. The following case illustrates this point.

#### **Case study – WorkSafe’s incentive payment system**

Throughout 2010, staff at one of WorkSafe’s six agents, CGU, systematically rorted WorkSafe’s incentive payment system. The incentive in question was paid by WorkSafe in return for timely payment of medical and like accounts. Having fallen behind in account processing several CGU employees delayed processing such accounts, keeping the unprocessed accounts hidden in a cupboard to avoid detection. When the practice was uncovered by CGU in October 2010, 10,000 accounts were found secreted in a cupboard. The incentive payments CGU obtained over the period of this manipulation was in the vicinity of \$1,000,000 and WorkSafe advised that ‘this sum was repaid to WorkSafe and penalties of \$2,800,000 were also imposed on CGU’.<sup>23</sup>

#### **Outcome**

My investigation found that CGU’s internal record keeping procedures were deficient, permitting an inappropriate practice to develop and go undetected for nearly a year.

It also found that WorkSafe, in overseeing its agents, failed to establish record keeping procedures that would have prevented this deception. WorkSafe also erred in permitting the creation of a system where organisations that stand to gain a benefit in return for complying with set criteria, have control of the paper trail evidencing whether they have complied with those criteria or not. This created the incentive and the capacity to manipulate records.

## **Remedying the problem**

Procurement processes that are not properly overseen and documented are vulnerable to mismanagement, manipulation and possible corruption. A consistent theme amongst these case studies is a lack of routine scrutiny and oversight, both of individual officers, and of procurement and probity processes in general.

Despite the examples highlighted in my reports over recent years, some public bodies have failed to heed these lessons. This failure must be addressed at a senior level if damage to the public’s confidence in government is to be avoided.

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<sup>23</sup> WorkSafe, letter, 12 August 2011.



## 5 Conflict of interest

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## 5 Conflict of interest

Conflict of interest continues to be poorly understood throughout the public sector. This is despite my two specific reports dealing with the issue in 2008<sup>24</sup> and my concerns expressed in a number of subsequent reports.<sup>25</sup> In fact, many investigation reports I have tabled since I took office have identified conflict of interest issues.<sup>26</sup>

The legitimacy of the state relies on public confidence in public officials to act fairly and impartially and in the best interests of the community. Conflict of interest plays a key role in this regard.

In 2008 I drew attention to the increasingly complex interconnections between the public sector, business and not-for-profit sectors, including outsourcing public/private partnerships, self-regulation and sponsorships.<sup>27</sup> I noted that the interchange of personnel between the public and private sectors was also contributing to a degree of breakdown in traditional public sector employment cultures and attendant obligations and loyalties. With the fluidity of the labour market, this trend is continuing. As such it creates an environment for conflicts to occur.

The particular areas of concern I have raised include:

- secondary employment and private business interests
- employment and business activities after leaving the public sector
- employment and private business interests of family members, friends, and associates
- membership of community groups and organisations
- inappropriate/personal relationships.<sup>28</sup>

Where the above matters are not identified and declared by staff and/or managed by agencies, corrupt conduct can result. It is not enough that the person or agency has not profited from the conflict.

Not recognising a conflict or failing to manage a conflict appropriately creates opportunities for corruption. Failure to identify and act on a conflict is therefore, at best, improper or, at worst, criminal.<sup>29</sup>

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24 Victorian Ombudsman, *Conflict of Interest in the public sector*, March 2008; *Conflict of Interest in local government*, March 2008.

25 Victorian Ombudsman, *Annual Report 2007-08*, page 13.  
Victorian Ombudsman *Annual Report 2008-09*, page 67.  
Victorian Ombudsman, *Ombudsman's recommendations – Report on their implementation*, February 2010.  
Victorian Ombudsman, *Annual Report 2009-10 Part 1*.  
Victorian Ombudsman, *Ombudsman's recommendations second report on their implementation*, October 2010.

26 Victorian Ombudsman, *Brookland Greens Estate – Investigation into methane gas leaks*, October 2009.  
Victorian Ombudsman, *Investigation into the Department of Human Services – Child Protection Program*, November 2009.  
Victorian Ombudsman, *Own motion investigation into Child Protection – out of home care*, May 2010.  
These reports reviewed systems that have a critical role in protecting members of the public which I found were compromised by dual roles.

27 Victorian Ombudsman, *Conflict of Interest in the public sector*, op. cit.

28 Victoria Ombudsman, *Annual Report 2010 Part 1*, page 70.

29 ibid, page 12.

### Case study – Public versus private interests

I received a public interest disclosure under the *Whistleblowers Protection Act 2001* which alleged that an elected councillor at Hume City Council had engaged in illegal conduct involving a take-away food planning permit.

It was alleged that at a meeting between developers and the representatives of a private company, a private individual said that a councillor had accepted \$5,000 to modify the conditions on the planning permit. I determined this to be a public interest disclosure and investigated the matter.

My investigation established that:

- the councillor and the private individual were involved in business together
- the business was proposed to be conducted at the same address as the take-away food planning permit
- at the request of the individual, the councillor complained about the permit conditions to a Council Director
- the councillor did not declare his private business interest to the council via his annual register of interests declaration.

### Outcome

My investigation did not confirm any payment of \$5,000. However I considered that the councillor had a conflict of interest between his private business associations and interests and his role as a public officer. He ignored this conflict by involving himself in the planning permit on behalf of the private individual. Whilst the councillor spoke to the Director about this matter, the planning permit conditions did not change.

I made 14 recommendations in my report *Conflict of interest in the public sector* and 17 in my report *Conflict of interest in local government*.<sup>30</sup> I reported on their implementation in 2010.<sup>31</sup>

While my reports generated developments in policy and procedure, a key conclusion – the need to develop an ethical culture – lags. I consider that an ethical culture is the single most important factor that ensures that the public sector retains public trust. A commitment to ethical conduct must therefore be supported at every level of the organisation and in each and every task performed.

<sup>30</sup> Victorian Ombudsman, *Conflict of Interest in the public sector; Conflict of Interest in local government*; op. cit.

<sup>31</sup> Victorian Ombudsman, *Ombudsman's recommendations – Report on their implementation*, op. cit.

The following concerning areas remain:

- handling of complaints by local government
- using contractors interchangeably with public sector employees for core government functions
- managing gifts
- conflicting institutional structures
- identifying nepotism.

## Local government

I continue to receive complaints alleging conflicts of interest on the part of council staff as the following case study illustrates.

### Case study – Lack of awareness

I received a complaint under the *Whistleblowers Protection Act 2001* alleging that two staff members of the Kingston City Council (the council) had engaged in the following improper conduct. A council officer:

- favoured certain suppliers on the basis of personal relationships
- accepted gifts in breach of council policy
- misused council resources by arranging for other council officers to install an air-conditioning unit at his private residence during working hours.

The same council officer and another officer used council resources such as vehicles and mulch to operate a private landscaping business on weekends.

I referred the investigation to the council to investigate. That investigation substantiated the allegations in respect of the council officer's partiality in awarding contracts to friends and family.

The council officer stated that he was not provided with an induction for his role and had no knowledge of council policies or any code of conduct. He also asserted that because the conflicts of interest were not brought to his attention he was not responsible.

### Outcome

The council took disciplinary action against the officer which led to his dismissal.

## Use of contractors

A significant vulnerability for the public sector arises in the use of contractors who may be carrying out duties normally undertaken by ongoing public sector employees. The use of specialist skills for defined purposes is a valid management strategy. However there are risks when contractors begin to undertake roles that require a proper understanding of public sector ethics, including the core concept of conflict of interest.

In 2008 I drew attention to the conflict that arose at Major Projects Victoria in the context of use of contractors.<sup>32</sup> I continue to find conflicts in choice of contractors.

### Case study – The University of Melbourne

The University of Melbourne referred a disclosure to my office for determination under the *Whistleblowers Protection Act 2001* (the Act). The allegations included that a university manager had engaged her brother to undertake gardening / landscaping work for the university. I determined the matter to be a public interest disclosure and referred it to the university to investigate.

The university's investigation substantiated that the employee dishonestly manipulated processes to ensure that her brother was awarded the work. The subject did this by, for example, obtaining false quotes to support her decision to award the contract to her brother. The subject also arranged for her brother's invoices to be paid in advance.

The manager's actions were contrary to university policies including the university's Code of Conduct which stated 'Staff should aim to avoid being placed in a situation where there may be a conflict between the interests of the university and their own personal interests or those of family and friends'.

The university then commenced disciplinary action against the manager but before the final penalty of termination was invoked, the manager resigned.<sup>33</sup>

<sup>32</sup> Victorian Ombudsman, *Conflict of interest in the public sector*, op. cit., pages 56 and 57.

<sup>33</sup> University of Melbourne, letter, 11 August 2011.

## Gifts

In 2008, I discussed the issue of gifts at length, drawing attention to their propensity to influence decisions and create conflicts.<sup>34</sup> I raised these matters later in 2008 outlining how a preferred contractor for a hospital obtained \$830,000 of work whilst hosting staff from the hospital's Engineering Department at numerous events including the Rugby World Cup, AFL Football, Australian Open Tennis, and the Australian Formula One Grand Prix amongst others.<sup>35</sup>

The acceptance of gifts continues to be an issue. For instance, in my investigation into procurement by public officers I identified that Arts Victoria, a number of Victorian schools and a prison had used public money inappropriately in the purchase of toner cartridges by accepting gifts.<sup>36</sup> In many instances I found that a lack of management and auditing provided an environment which allowed this conduct to go undetected.

## Conflicting institutional structures

My investigations have also identified instances where the institutional arrangements themselves are conflicted. In my view, conflict of interest issues need to be considered by government when designing public institutions to ensure the retention of public trust in the legitimacy of these institutions.

When the community experiences adverse events it will critically examine the integrity of the public bodies in managing potential conflicts. This was particularly evident in two of my recent reports.<sup>37</sup> The unwillingness of the public sector to either accept or deal with these conflicts has led to serious risks to public safety and the protection of vulnerable citizens.

The methane gas emergency at the Brookland Greens Estate occurred in the context of the City of Casey's having dual responsibilities as the owner of the landfill and as the responsible planning authority. The City of Casey had another dual role: it was both the applicant for the landfill planning permit and the responsible authority for issuing the permit. Similarly, Environment Protection Authority (EPA) officers acted as both adviser and assessor in the works approval process. Both bodies had clear conflicts of interest.

I made a number of recommendations in this report, all of which were accepted by the agencies concerned. The EPA, in particular, has responded to my report with a significant effort to improve its practices.

At a policy level I remain concerned that, with each new project, legislators and departmental officers may neglect the need to build in a structure that ensures responsible authorities do not have conflicting interests.

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<sup>34</sup> Victorian Ombudsman, *Conflict of Interest in the public sector*, op. cit., pages 48 and 49.

<sup>35</sup> Victorian Ombudsman, *Probity controls in public hospitals*, op. cit.

<sup>36</sup> Victorian Ombudsman, *Corrupt conduct by public officers in procurement*, op. cit.

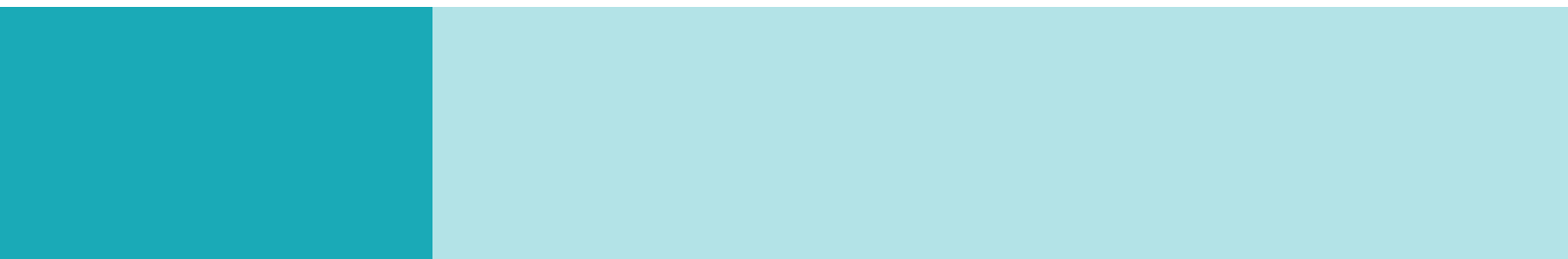
<sup>37</sup> Victorian Ombudsman, *Brookland Greens Estate – Investigation into methane gas leaks*, op. cit.; Victorian Ombudsman, *Own motion investigation into child protection – out of home care*, op. cit.

## Nepotism

I am concerned at the frequency with which I receive allegations of public officers awarding contracts or offering employment to friends and family. This is contrary to all procurement and employment practices that are acceptable within the public sector.

I received a number of such allegations regarding educational facilities during the year. The devolution of decision making in these environments combined with pressing operational demands sometimes seems to lead to a propensity to 'bend the rules'. I have encountered these situations in both universities and in government schools.

I have generally found that universities have appropriate procedures in place. However problems emerge when staff are either not aware of their obligations or they have not appreciated the importance of compliance. Schools are a different case. During the year I became concerned that a number of Victorian schools did not have adequate procedures in place to deal with conflicts of interest in relation to employment decisions. I therefore wrote to the Secretary of the Department of Education and Early Childhood Development regarding my concerns and he subsequently agreed to the introduction of new guidance for staff in relation to these matters.





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## 6 Protecting vulnerable people

Since my office was established in 1973, it has been protecting the rights of vulnerable people by investigating and reporting on injustices in public administration.

On 1 January 2008 with the introduction of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (the Charter)<sup>38</sup> a specific section was included in the *Ombudsman Act 1973* (the Ombudsman Act) to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter.

This amendment to the Ombudsman Act<sup>39</sup> provided specific recognition of the practice established by the 1973 Act whereby the Ombudsman takes into consideration human rights values in respect of complaints dealt with. For example, the Act provides that I may take action where I am of the opinion that the administrative action complained about is wrong.

Over the years I have found that human rights are addressed by the provision of real assistance to complainants and others affected by practices or policies that I have investigated. These matters came to my attention through a variety of means including:

- complaints to this office
- observations made during site inspections or other visits
- systemic problems identified during investigations of specific concerns.

### Investigating rights

During the past year, my office has investigated a range of human rights concerns including:

- recognition and equality before the law
- the protection of families and children
- the right to liberty and security of the person
- freedom from torture, and degrading, inhumane and cruel treatment.

I have also received complaints about the mistreatment of people with disabilities including people who are cognitively impaired who reside in disability residential facilities. These complaints were referred to my office by carers or oversight bodies, such as the Office of the Public Advocate.

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<sup>38</sup> op. cit.

<sup>39</sup> *Ombudsman Act 1973*, section 23.

**Case study – Assault of a disability accommodation services resident**

Following a complaint by the Office of the Public Advocate, I established that a person residing in a community residential unit, who is unable to speak because of a cognitive impairment, and also suffers from epilepsy and spasticity, had sustained a serious carpet burn injury as a result of his treatment by two staff members.

**Outcome**

I identified that the Department of Human Services did not adequately investigate the incident. I made a number of recommendations to the department, including that disciplinary action be taken against the staff involved, and that the department reinforce to all staff and community service organisations their obligations under the Charter and the department's incident reporting procedures and investigation guidelines.<sup>40</sup>

**Case study – Legal representation for a person under an administration order**

My office received a complaint involving a represented person whose legal and financial affairs were administered by State Trustees. The complainant wished to oppose an application for a guardianship order by the Office of the Public Advocate. The complainant had been refused legal aid and State Trustees rejected their request for funds to engage legal representation. The decision taken by State Trustees involved complex considerations which included considering their interests in the outcome and permitting expenditure of the represented person's funds for reasonable costs and preserving their financial assets.

**Outcome**

After enquiries by my office, State Trustees reversed its decision and permitted expenditure of the funds for legal representation. The complainant lost the case and a guardianship order was made.

<sup>40</sup> Victorian Ombudsman, *Ombudsman investigation – Assault of a Disability Services client by Department of Human Services staff*, March 2011.

### **Case study – Failure to protect young people in custody**

In October 2010 I reported on an investigation into conditions at the Melbourne Youth Justice Precinct (the Precinct)<sup>41</sup>, where children and young people aged between 10 and 21 are held in custody. I identified appalling conditions in the Precinct, including: health and safety risks, such as hanging points, electrical wiring, unhygienic conditions and other hazards. There was evidence that staff had incited assaults between detainees and had used excessive force when retraining them. I also found that there was overcrowding and non-segregation of sentenced and non-sentenced and different aged detainees. These significant concerns demonstrated little regard for human rights, and in particular a lack of attention to the protection of children and young people. I concluded that the unacceptable conditions I found at this custodial facility demonstrated the Department of Human Services failed to meet its obligations under the Charter.

The number and nature, of complaints to my office involving people who reside in a range of protected or restricted environments is concerning. The complaints often involve society's most vulnerable including: children; persons with physical or intellectual disabilities; persons with serious mental health conditions in care or receiving services; persons in aged care facilities; and prisoners.

## **The protection of children**

While I have reported on cases where child protection failed in its duty to protect children, many frontline child protection workers devote themselves to the task of protecting children with great care and effort, often in very difficult circumstances. Below is one of many instances where department staff were prompt and effective in responding to the needs of vulnerable children.

### **Case study – Appropriate action taken by the department**

My office was contacted by a 16 year old child known to the department who feared for her safety in her out of home care placement and subsequently fled interstate with no accommodation arrangements. My enquiries confirmed that the department was aware that the child had fled interstate with an older male and was at risk.

#### **Outcome**

My office established that the department had taken appropriate action in seeking an Intervention Order against the older male on behalf of the child and getting a warrant through the Children's Court to assist in returning her to Victoria.

<sup>41</sup> Victorian Ombudsman, *Whistleblowers Protection Act 2001 Investigation into conditions at the Melbourne Youth Justice Precinct*, October 2010.

In November 2009 I reported to Parliament about failures of the Department of Human Services' (the department's) child protection program.<sup>42</sup> That report confirmed that over 22 per cent of child protection cases were unallocated, the figure was over 59 per cent in one region. This indicated a failure by the department to manage what can only be called a crisis with 2,197 children not allocated to a protective worker. In May 2010, I highlighted many of the same failures when I reported on out of home care.<sup>43</sup> Most concerning were the number of cases of physical and sexual abuse suffered by children in out of home care due to the lack of supervision of placements, screening of carers and regulating community service organisations by the department. Despite my reports, failures continue to emerge with recent figures still indicating a high percentage of unallocated cases.<sup>44</sup>

### **Case study – Allegations of sexual abuse in a foster care placement**

Parents contacted my office concerning their child who had been sexually abused in a foster care placement. My enquiries established that a carer, providing care to children over a ten year period through a number of community service organisations, had admitted to police in late 2010 that he had sexually abused three children, including the child in question.

#### **Outcome**

I concluded that several 7 – 8 year old children had been placed with the carer, although he was only trained and approved to care for adolescents aged 16 – 18 years.

I identified deficiencies in the screening checks of the carer and record keeping by community service organisations; including the failure by one agency to undertake and retain the results of a criminal record check.

I established that the department also failed to identify that the carer had access to a young granddaughter. It was not until enquiries were made by my office that the department sought to ascertain the child's safety.

I also found:

- numerous warning signs were ignored, including one agency refusing to employ the carer on the grounds that he was 'sleazy'
- the Minister had been misinformed by the department that the carer was 'registered'
- a Quality of Care review process was not undertaken, in spite of a number of incidents resulting in the decision to cease placing children with the carer.

<sup>42</sup> Victorian Ombudsman, *Investigation into the Department of Human Services – Child Protection Program*, op. cit.

<sup>43</sup> Victorian Ombudsman, *Own motion investigation into Child Protection – out of home care*, op. cit.

<sup>44</sup> 30 June 2011 – 7.8 per cent of cases unallocated, Department of Human Services, letter, 12 August 2011.

Following my enquiries:

- the department determined the carer had never been placed on the Carer Register as required
- an audit established that a number of other individuals providing care to children had not been placed on the Carer Register.

The protection of children is complex. It requires:

- the need for support from a range of government agencies
- a less adversarial court environment
- strategies to prevent the need for matters to escalate to a 'protection' concern and, importantly,
- an understanding of the numerous complications involved in child protection matters.

The Department has recently advised that:

A major reorganisation of the child protection workforce led by the Industry, Workforce and Strategy Division will provide more child protection workers for frontline practice with children and families, and a streamlined administrative hierarchy.<sup>45</sup>

I note the government has launched a Protecting Victoria's Vulnerable Children Inquiry,<sup>46</sup> to investigate the systemic problems in child protection and recommend improvements. The inquiry is due to report to the Minister in November 2011.

## **The Department of Human Services' relationship with community service organisations**

In March 2011 I wrote to the department expressing my concerns regarding the Community Service Organisation's (CSO) management and oversight of the out of home care giver referred to in the previous case study. My enquiries into this matter also identified a number of failures in the department's regulation and oversight of the CSO. These included a failure to properly investigate the CSO's management of the carer, or to verify the information provided in reports regarding the carer, including those provided to my office and the Minister.

In light of these concerns I asked the department why the following recommendation made in my *Own motion investigation into Child Protection – out of home care May 2010*, was not reconsidered:

Transfer the function of registering community service organisations to an independent Office which has no reliance on the services being provided by the agency being registered.

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<sup>45</sup> Department of Human Services, letter, 12 August 2011.

<sup>46</sup> Protecting Vulnerable Children Inquiry, [www.childprotectioninquiry.vic.gov.au](http://www.childprotectioninquiry.vic.gov.au).

The department's response advised that the 'practice issues that have occurred in this case are the result of non-compliance with service and performance standards by an individual agency' and that it is addressing these with the agency.

Despite this response, I remain concerned that there is an inherent conflict between the department's duty to regulate CSOs and its reliance on their services.

## Sex offender register

My report about the Sex Offender Register, tabled in Parliament this year, evidences the concerning lack of communication and collaboration between the agencies charged with responsibilities in this area.<sup>47</sup>

My investigation found that children were exposed to unacceptable risk from registered sex offenders due to the failure of Victoria Police to report to the Department of Human Services (the department) when it became aware that registered sex offenders had access to children. My investigation revealed that Victoria Police and the department had different approaches to the concept of risk in relation to offenders on the Sex Offenders Register.

In addition, when the department became aware that over 700 children were exposed to registered sex offenders without being reported as required by Victoria Police, it was hampered in its investigation by Corrections Victoria. Corrections Victoria delayed providing critical information regarding the most serious offenders to the department.

As I reported, I consider it unacceptable that the safety and protection of children was caught up in bureaucratic procedures that prolonged the process of providing critical information.

In my view children were exposed to this risk due to a lack of shared understanding between the department and Victoria Police on the concept of 'risk' and the failure of both these agencies and Corrections Victoria to share responsibility for ensuring all were contributing to the protection of children. The agencies have since undertaken to develop a model to promote greater collaboration in relation to the prevention of sexual abuse of children. I have recently been advised that:

- the Minister for Corrections has signed two Ministerial Authorities delegating power to Corrections Victoria officers to exchange relevant information on registrants with the Chief Commissioner of Police and the Secretary to the Department of Human Services<sup>48</sup>
- a clear process has been developed to facilitate the timely provision of registrant assessment reports by Corrections Victoria to the Department of Human Services and Victoria Police.<sup>49</sup>

<sup>47</sup> Victorian Ombudsman, *Whistleblowers Protection Act 2001 – Investigation into the failure of agencies to manage registered sex offenders*, February 2011.

<sup>48</sup> Department of Justice, letter, 12 August 2011 and Minister of Police and Emergency Service, letter, 14 July 2011.

<sup>49</sup> Department of Justice, letter, op. cit.

I recommended that the *Sex Offenders Registration Act 2004* be reviewed by the Law Reform Commission. That review is still in progress at the time of writing and an information paper has been released by the Law Reform Commission with the deadline for submission of 29 July 2011.



## 7 Corruption and serious misconduct

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## 7 Corruption and serious misconduct

No matter how many systems, controls, policies and procedures public bodies have in place, there will always be opportunities for public officers to engage in improper conduct. It is important that persons who have knowledge of improper conduct by public officers or public bodies have a mechanism by which they can bring that conduct to notice. It is also important that there is a system in place which enables serious wrongdoing to be investigated and action taken to ensure it does not happen again.

### Whistleblower legislation

Individuals who come forward with information expect that their confidentiality will be maintained and, where appropriate, their allegations will be acted upon. Where a protected disclosure is made under the *Whistleblowers Protection Act 2001* (the Act) whistleblowers are entitled to confidentiality and support. When I determine that the allegation is a public interest disclosure, an investigation is undertaken by my office, or by agencies on my referral.

It is important that public sector agencies which may receive a whistleblower disclosure understand their obligations under the Act. It is just as important that individuals understand their ability to make a disclosure under the Act and have access to information on how to make a disclosure.

To ensure that individuals and public sector agencies have access to information in relation to the Act, I have made available such information on my website at: [www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au).

### The aim of the legislation

The Act is an important part of the integrity framework of the state. Its purpose is to encourage disclosures of improper conduct; protect people who make those disclosures; and ensure that those disclosures are investigated and dealt with.<sup>50</sup>

I am responsible for assessing, managing and investigating whistleblower disclosures. I also developed whistleblower guidelines to help public bodies handle disclosures and to comply with their obligations under the Act. These guidelines are located on my website.

### Educating agencies about whistleblowing

I continue to provide education for public bodies to increase their awareness on the provisions of the Act and the role of the Protected Disclosure Coordinator. Over the past year my office has provided seven whistleblower workshops for 96 public agency officers and individual advice and support to agencies when required.

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<sup>50</sup> *Whistleblowers Protection Act 2001*, s1.

Protected Disclosure Coordinators are central to the management of whistleblower matters. Some agencies have a tendency to select staff for the role with no understanding of what it entails; and rotate this role between staff on a regular basis. I consider that this approach diminishes an agency's awareness of its obligations to whistleblowers under the Act.

## Statistics and trends

This year I received a large number of complaints under the Act. Of the 145 complaints received I determined 41 to be public interest disclosures: my office investigated 23 of these, and 15 were referred back to the agency concerned for investigation.

I reported to Parliament on a number of my whistleblower investigations as I considered it to be in the public interest:

- *Investigations into an allegation of improper conduct within RMIT's School of Engineering (TAFE) – Aerospace, July 2010*
- *Investigation into conditions at the Melbourne Youth Precinct, October 2010*
- *Investigation of allegations of improper conduct by a councillor at the Hume City Council, February 2011*
- *Investigation into the failure of agencies to manage registered sex offenders, February 2011*
- *The Brotherhood – Risks associated with secretive organisations, March 2011*
- *Investigation into the improper release of autopsy information by a Victorian Institute of Forensic Medicine employee, May 2011*
- *Investigation into an allegation about Victoria Police crime statistics, June 2011.*

These reports constitute more than half of the total number of reports I have tabled in Parliament this year which demonstrates the important role the Act plays in protecting the public interest both in terms of the integrity of our institutions and in contributing to improving public administration.

The following chart provides the total disclosures including those that were more appropriately dealt with under other legislation such as the *Ombudsman Act 1973*.

Table 1: Number of Whistleblower matters handled each year since 2006-07					
PID/PD Table	2006-07	2007-08	2008-09	2009-10	2010-11
<b>Disclosures</b>					
Total disclosures received	84	114	96	174	145
Public Interest Disclosure (PID)	21	18	28	28	41
Protected Disclosure (PD)	9	18	20	15	60
<b>Investigation of PID</b>					
By Ombudsman	14	10	12	14	23
By Public Body	6	8	13	14	15
By Auditor-General	1	0	1	0	1
By Chief Commissioner	0	0	1	0	1
By Director, Office of Police Integrity	0	0	0	0	0
Not investigated	0	0	1	0	1

The Act requires that, before I investigate a disclosure, I must be satisfied that the disclosure shows or tends to show that a public officer or body has engaged in improper conduct. Increasingly I am receiving credible complaints about serious allegations, with an increase of nearly 50 per cent in public interest disclosure determinations over the past year.

Under the Act I am able to refer matters back to an agency for investigation. However my experience over recent years has shown inordinate delay in investigating matters by some agencies and failure to report back adequately on progress being made in these investigations to my office. I am not confident in some agencies' ability to take adequate action. While my limited resources will not allow me to conduct all investigations, my preference is to investigate as many matters as I am able to.

## Serious misconduct

This year my investigations of whistleblowers' disclosures have identified a number of recurring themes including:

- conflict of interest
- acceptance of gifts and hospitality
- bribes by public officers
- inadequate purchasing processes
- poor management practices.<sup>51</sup>

<sup>51</sup> Victorian Ombudsman, *Investigation into conditions at the Melbourne Youth Precinct*, op. cit.

## Conflict of interest

Conflict of interest, or a perceived conflict, features frequently in whistleblower complaints. For example, conflict of interest was a significant concern in my investigation into the conduct of a Councillor at Hume City Council.<sup>52</sup>

### Case study – Conflict of interest at a university

In 2010 I received a disclosure under the Act about a senior academic in university who had appointed a relation by marriage to a teaching position. The senior academic did not advertise the position, interview other applicants or declare the relationship.

### Outcome

As a result of my investigation and recommendations the senior academic formally acknowledged the relationship and removed himself from involvement in administering the appointee's ongoing employment. He also received counselling from the university.

## Corrupt conduct including bribery

A number of complaints to my office have involved tertiary academic staff acting corruptly, including accepting bribes from students. The following case studies are examples:

### Case study – Improper conduct by a team leader<sup>53</sup>

This investigation arose as a result of allegations of improper conduct by a team leader in respect of their teaching and program administration. I concluded that a team leader at RMIT in the School of Engineering (TAFE) – Aerospace assisted students to cheat in two examinations. This resulted in three students achieving marks well beyond their academic ability and allowed them to progress their studies in an advanced diploma and in one instance, to graduate.

<sup>52</sup> Victorian Ombudsman, *Investigation of allegations of improper conduct by a councillor at the Hume City Council*, February 2011.

<sup>53</sup> Victorian Ombudsman, *Whistleblowers Protection Act 2001 – Investigation into an allegation of improper conduct within RMIT's School of Engineering (TAFE) – Aerospace*, July 2010.

### Case study – Deakin and Swinburne Universities

At both of these institutions, my investigations showed that academic staff had approached failing students and offered to change their results in exchange for cash payments. At Swinburne University, a staff member approached a student who had performed unsatisfactorily at an examination offering to provide the student with a pass mark for an exam in exchange for \$1,500.<sup>54</sup> However the university advised that the student did not receive a pass mark for the subject.<sup>55</sup> The staff member requested the student locate the pen in which he had executed the original exam, and then gave the student the original examination paper and the correct answers. The student made corrections and handed the paper back to the staff member. The staff member subsequently admitted to the allegations and his employment was terminated by the university.<sup>56</sup>

At Deakin University, a staff member approached a failing student and requested \$1,000 in exchange for a pass in the subject. The staff member made full admissions and is no longer employed by the university.

Both of these matters were reported by the students involved to senior staff who took immediate action.

## Proposed amendments to the legislation

After more than seven years experience with the Act, I consider it essential that it be simplified to provide greater clarity to both whistleblowers and agencies. The Act should be solely concerned with the protections given to whistleblowers, while investigations would be conducted by integrity bodies using the investigation powers provided by their empowering legislation, in my case the *Ombudsman Act 1973*. This is a position I have advocated over a number of years.

I have also identified anomalies in the *Ombudsman Act 1973* in relation to persons and bodies performing public functions which are not subject to the jurisdiction. At present I have no jurisdiction over local councillors, Ministers, Ministerial advisers, Parliamentary officers, electoral officers and limited jurisdiction to investigate complaints regarding the Local Government Inspectorate (the inspectorate), the body responsible for investigating alleged breaches of the *Local Government Act 1989* by councillors although they can be summoned as witnesses to an Ombudsman investigation.

In my view, these anomalies and shortcomings require prompt attention.

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<sup>54</sup> Swinburne University, letter, 12 August 2011.

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*

## 8 Complaint handling

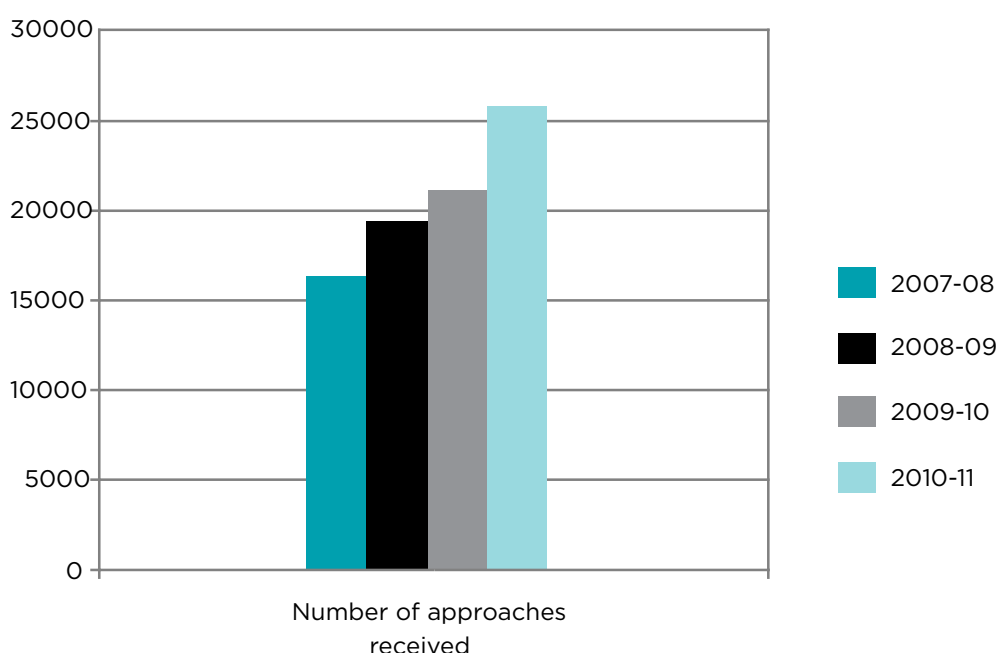
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## 8 Complaint handling

This year my office has seen an increase of 21.27 per cent in approaches to my office since last financial year (2009-10). The increase in the number of approaches is a continuing trend. The figure and table below highlight the increasing number of approaches since 2007-08.

An approach is where someone contacts my office for assistance. If for example the query lies outside my jurisdiction, the person will be referred to a more appropriate body. If a jurisdictional matter is raised my office will take the appropriate course of action and address the complaint.

**Figure 1: Number of approaches received in 2010-11**



**Table 2: Number of approaches received in 2010-11**

Time period	No. of approaches received
2007-08	16,344
2008-09	19,452
2009-10	21,074
2010-11	25,557



## Department of Justice

The Department of Justice was the agency about which I received the highest number of complaints. I received 3,272<sup>57</sup> complaints about the Department of Justice in 2010-11, representing 24.34 per cent of the total number of complaints made to my office.

This was an increase of 575 complaints compared to the previous year.<sup>58</sup> The bulk of this increase came from a rise in complaints from prisoners; of the 575 additional complaints, 271 were related to correctional facilities. This increase in complaints is consistent with a rise in prisoner numbers. The most common complaints relate to delay, property and health concerns.

Consistent with previous years the two correctional facilities I received the largest number of jurisdictional complaints from were Port Phillip Prison (690) and the Metropolitan Remand Centre (324).

## Local government

In 2010-11 my office received 3,048 complaints regarding local government, an increase of 3.9 per cent over the previous financial year.

Complaints regarding local government accounted for nearly a quarter of all matters referred to my office in 2010-11. Common themes among these complaints included:

- unreasonable or excessive enforcement action
- failure to act on complaints
- poor procurement and contract management practices
- failure to maintain infrastructure, in particular, roads
- poor decision making and delays in planning matters.

In February 2011 I tabled two reports in Parliament in which I examined some of the functions of Local Government, its officers and councillors:

- *Whistleblowers Protection Act (2001) – Investigation into allegations of improper conduct by a councillor at the Hume City Council*, February 2011
- *Ombudsman Investigation into the probity of The Hotel Windsor redevelopment*, February 2011.

<sup>57</sup> Excluding Victoria Police.

<sup>58</sup> 2009-10.

## Department of Human Services

Complaints regarding child protection have increased by 32 per cent, up from 511 in 2009-10 to 673 last year. Complainants have raised concerns regarding:

- the adequacy of investigations of reports of abuse
- court orders allowed to lapse due to administrative oversights
- access arrangements for children in care
- screening of carers
- abuse of children in care
- delays in providing support and assistance to families and carers
- poor communication.

Many of these complaints reflect the themes identified in my previous reports and demonstrate the need for sustained efforts to improve the performance of the child protection system. One hundred and thirteen complaints concerning child protection raised concerns about delays in communication generally or in the handling of complaints specifically. Many of these complaints could have been prevented by more effective communication.

Complaints regarding the Office of Housing increased 19 per cent from 525 complaints received in 2009-10 to 626 received in 2010-11. Complaints related to a range of issues including: the maintenance of properties; waiting times for public housing; and dissatisfaction with assessments of applicants' eligibility for public housing. While the number of complaints has increased the nature of the matters raised has remained consistent over time. The majority of these complaints are resolved through contact with the Office of Housing's Complaints Management Unit.

I received a 37 per cent increase in complaints about Victoria's three Youth Justice Centres – Malmsbury, Parkville and Melbourne from 79 complaints in 2009-10 to 108 complaints in 2010-11. Most concerned day-to-day issues such as the quality of meals; visiting arrangements; measures taken against detainees for poor behaviour; and the adequacy of facilities within the centres. I also received a small number of allegations of unnecessary force being used by staff when restraining detainees.

In one instance an allegation of assault against an officer was substantiated leading to the termination of the officer's employment. These allegations demonstrate the need to increase the external oversight of the youth justice system that I concluded was necessary in my report.<sup>59</sup>

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<sup>59</sup> Victorian Ombudsman, *Whistleblowers Protection Act 2001 Investigation into conditions at the Melbourne Youth Justice Precinct*, op. cit.

## VicRoads

VicRoads is the roads and licensing regulatory body established under the *Transport Act 1983*. It manages the service delivery for 3.7 million licensed drivers and 4.9 million registered vehicles in Victoria.

In 2009-10 I received 596 complaints about VicRoads. This year that figure increased by 10.5 per cent to 659 complaints: 18.67 per cent of these complaints led to further enquiries being made by my officers.

Complaints about VicRoads account for 4.9 per cent of the total number of jurisdictional complaints received by my office. This makes VicRoads the third largest body complained about.

The most common areas of complaint this year were:

Table 3: VicRoads complaints	
Issue	Total No. of complaints
Licensing	107
Registration	91
Delayed/No Response	51
Charges/Fines	50
Road Management	49
Delay	46
Failure to Act/Provide	40
Inadequate Remedy	31
Incorrect	29
Inadequate Processes	28
Enforcement Action	25

Complaints about delayed responses, or VicRoads' failure to respond, have since jumped from the ninth most common VicRoads complaint, to the third most common issue.

VicRoads has advised that 'a number of initiatives have been introduced recently in the registration and licensing business to improve correspondence management and the timeliness of advice in response to customer enquiries. These include fewer entry points to provide better control of incoming items, improved instruction to staff regarding escalation procedures and a single contact point for staff requiring assistance with policy enquiries'.<sup>60</sup>

<sup>60</sup> VicRoads, letter, 11 August 2011.

## State Trustees

State Trustees Limited (State Trustees) is a state-owned trustee company and government business enterprise that provides estate planning, executor and trustee services to Victorians. State Trustees manages represented persons' financial and legal affairs under administration orders made by the Victorian Civil and Administrative Tribunal. It acts as an administrator for approximately 9,000 people with a disability, illness or injury.

Complaints received by my office this year regarding State Trustees increased from 226 complaints received in 2009-10 to 284 complaints received in 2010-11. Included among the 284 complaints I received was one complaint under the *Whistleblowers Protection Act 2001*, which was found to be unsubstantiated. Common complaints received by my office concerned:

- financial assistance
- delay
- debt
- facilities controlled by State Trustees.

I am concerned that complaints to my office are increasing. This is particularly the case when issues complained about concern State Trustees' core business, such as financial assistance, debt, and facilities controlled by State Trustees.

## WorkSafe

This year I initiated an investigation on my own motion about the record keeping practices of WorkSafe agents as a result of complaints received by my office relating to delays in service to injured workers.<sup>61</sup>

My investigation identified that the record keeping practices at all agents were poor. Staff, including State Managers, had little if any knowledge of the *Public Records Act 1973* and the standards set out by the Public Record Office Victoria. My investigation also found that there was insufficient monitoring and oversight of its agents by WorkSafe which led to poor case management practices.

The poor standard of record keeping of WorkSafe agents was compounded by the inadequate information technology systems used by WorkSafe.

The following table is a breakdown of WorkSafe complaints received by my office this year showing an increase in complaints of 35 per cent:

Table 4: WorkSafe complaints		
Area	2009-10	2010-11
Total WorkSafe complaints	327	442
WorkSafe Agents	207	274
WorkSafe Assist	5	2
Self insurers	6	12

<sup>61</sup> Victorian Ombudsman, *Investigation into record keeping failures by WorkSafe agents*, May 2011.

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## 9 Education

My outreach program improves the access of all Victorians to my office by providing the community and public sector agencies with information about my role, how they can access my office and what they can expect in the course of my investigating a complaint. My office is not specifically funded for this purpose.

In 2010-11 my officers delivered 125 outreach activities consisting of:

- 57 presentations
- 12 public sector workshops
- 3 regional information sessions
- 18 external events
- 10 information mail-outs
- 18 promotional drop-offs
- 7 correctional officer presentations.

### Regional awareness

By regularly visiting all regions in Victoria, my Education Coordinator ensures that those residing outside metropolitan Melbourne understand how to access my office.

### Agency education

My officers met with a number of organisations as part of the outreach program this year including:

- legal centres
- health services
- seniors groups
- local councils
- Victorian government agencies
- TAFE and universities
- Migrant resource centres
- CALD support groups
- Indigenous services.

### Prison officer induction program

My office has an important role in educating new prison officer recruits on the role of the Ombudsman and the Victorian *Charter of Human Rights and Responsibilities Act 2006*. In 2010-11 my office provided seven induction presentations in both public and private prisons.

## Public sector workshops

My office has also provided professional workshops to Victorian agencies, free of charge, since 2007. In 2010-11 twelve workshops were delivered on complaint handling and whistleblowers legislation.

The learning objectives of the workshop include:

### *Complaint handling for front-line staff*

- understand the Ombudsman's good practice principles of complaint handling
- identify the elements of a good complaint handling system
- familiarise the participants with the complaint handling system at Ombudsman Victoria
- introduce the participants to the unreasonable complaint conduct manual
- provide strategies for managing unreasonable complaint conduct.

### *Whistleblowers: improving public sector administration*

- understand the aims of the *Whistleblowers Protection Act 2001*
- use the Ombudsman's guidelines for whistleblower matters
- identify the elements of a good system for dealing with whistleblower matters
- understand the role of the Ombudsman, the public body and the individual with regard to whistleblower matters
- discuss the issues surrounding the investigation of protected and public interest disclosures.

## Australian Research Council project with Monash University Law School

Since 2009 my office has made a contribution to an Australian Research Council project on management practices in closed environments being conducted by the Monash University Law School. Together with my office, five other partner organisations that are also oversight bodies with external scrutiny responsibilities for closed environments are collaborating on this important project.<sup>62</sup>

Over the last year the project has been examining current management practices in closed environments such as: risk-based classifications to various levels of control; the use of restraints/force and restricted regimes; and the operation of complaints and disciplinary mechanisms. The university will be reporting in December 2011.

<sup>62</sup> Commonwealth Ombudsman, Office of Police Integrity (Vic), Office of the Public Advocate (Vic), Human Rights and Equal Opportunity Commission (Vic), and the Office of the Inspector of Custodial Services (WA).

## Global Handbook on Research and Practice in Corruption

In March 2010 my office was invited to contribute a chapter in the 'Global Handbook on Research and Practice in Corruption'.<sup>63</sup> The book is due to be published by the end of 2011 and will include information and research on corruption and its prevention. My office has provided analysis and comment on innovative approaches to whistleblowing.

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<sup>63</sup> *Global Handbook on Research and Corruption*, Edward Elgar Publishing Limited.



# Ombudsman's Reports 2004-11

## 2011

Investigation into prisoner access to health care  
August 2011

Investigation into an allegation about Victoria Police  
crime statistics  
June 2011

Corrupt conduct by public officers in procurement  
June 2011

Investigation into record keeping failures by WorkSafe  
agents  
May 2011

*Whistleblowers Protection Act 2001* Investigation into  
the improper release of autopsy information by a  
Victorian Institute of Forensic Medicine employee  
May 2011

Ombudsman investigation – Assault of a Disability  
Services client by Department of Human Services staff  
March 2011

The Brotherhood – Risks associated with secretive  
organisations  
March 2011

Ombudsman investigation into the probity of The  
Hotel Windsor redevelopment  
February 2011

*Whistleblowers Protection Act 2001* Investigation  
into the failure of agencies to manage registered sex  
offenders  
February 2011

*Whistleblowers Protection Act 2001* Investigation into  
allegations of improper conduct by a councillor at the  
Hume City Council  
February 2011

## 2010

Investigation into the issuing of infringement notices  
to public transport users and related matters  
December 2010

Ombudsman's recommendations second report on  
their implementation  
October 2010

*Whistleblowers Protection Act 2001* Investigation into  
conditions at the Melbourne Youth Justice Precinct  
October 2010

*Whistleblowers Protection Act 2001* Investigation  
into an allegation of improper conduct within RMIT's  
School of Engineering (TAFE) – Aerospace  
July 2010

Ombudsman investigation into the probity of the  
Kew Residential Services and St Kilda Triangle  
developments  
June 2010

Own motion investigation into Child Protection – out  
of home care  
May 2010

Report of an investigation into Local Government  
Victoria's response to the Inspectors of Municipal  
Administration's report on the City of Ballarat  
April 2010

*Whistleblowers Protection Act 2001* Investigation into  
the disclosure of information by a councillor of the  
City of Casey  
March 2010

Ombudsman's recommendations – Report on their  
implementation  
February 2010

## 2009

Investigation into the handling of drug exhibits at the  
Victoria Police Forensic Services Centre  
December 2009

Own motion investigation into the Department of  
Human Services – Child Protection Program  
November 2009

Own motion investigation into the tendering and  
contracting of information and technology services  
within Victoria Police  
November 2009

Brookland Greens Estate – Investigation into methane  
gas leaks  
October 2009

A report of investigations into the City of Port Phillip  
August 2009

An investigation into the Transport Accident  
Commission's and the Victorian WorkCover Authority's  
administrative processes for medical practitioner  
billing  
July 2009

*Whistleblowers Protection Act 2001* Conflict of  
interest and abuse of power by a building inspector at  
Brimbank City Council  
June 2009

*Whistleblowers Protection Act 2001* Investigation  
into the alleged improper conduct of councillors at  
Brimbank City Council  
May 2009

Investigation into corporate governance at Moorabool  
Shire Council  
April 2009

Crime statistics and police numbers  
March 2009

## 2008

*Whistleblowers Protection Act 2001* Report of an investigation into issues at Bayside Health  
October 2008

Probity controls in public hospitals for the procurement of non-clinical goods and services  
August 2008

Investigation into contraband entering a prison and related issues  
June 2008

Conflict of interest in local government  
March 2008

Conflict of interest in the public sector  
March 2008

## 2007

Investigation into VicRoads' driver licensing arrangements  
December 2007

Investigation into the disclosure of electronic communications addressed to the Member for Evelyn and related matters  
November 2007

Investigation into the use of excessive force at the Melbourne Custody Centre  
November 2007

Investigation into the Office of Housing's tender process for the cleaning and gardening maintenance contract – CNG 2007  
October 2007

Investigation into a disclosure about WorkSafe's and Victoria Police's handling of a bullying and harassment complaint  
April 2007

Own motion investigation into the policies and procedures of the planning department at the City of Greater Geelong  
February 2007

## 2006

Conditions for persons in custody  
July 2006

Review of the *Freedom of Information Act 1982*  
June 2006

Investigation into parking infringement notices issued by Melbourne City Council  
April 2006

Improving responses to allegations involving sexual assault  
March 2006

## 2005

Investigation into the handling, storage and transfer of prisoner property in Victorian prisons  
December 2005

*Whistleblowers Protection Act 2001* Ombudsman's guidelines  
October 2005

Own motion investigation into VicRoads registration practices  
June 2005

Complaint handling guide for the Victorian Public Sector 2005  
May 2005

Review of the *Freedom of Information Act 1982*  
Discussion paper  
May 2005

Review of complaint handling in Victorian universities  
May 2005

Investigation into the conduct of council officers in the administration of the Shire of Melton  
March 2005

Discussion paper on improving responses to sexual abuse allegations  
February 2005

## 2004

Essendon Rental Housing Co-operative (ERHC)  
December 2004

Complaint about the Medical Practitioners Board of Victoria  
December 2004

Ceja task force drug related corruption – second interim report of Ombudsman Victoria  
June 2004