



ACT Ombudsman
ANNUAL REPORT 2002-03



Australian Capital Territory

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8 September 2003

Mr Jon Stanhope MLA
Attorney-General
Australian Capital Territory Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Attorney-General,

I am pleased to provide you with the fourteenth Australian Capital Territory (ACT) Ombudsman's Annual Report for tabling in the Legislative Assembly. The Report covers the period from 1st July 2002 to 30th June 2003.

This Report has been prepared under section 8(5)(a) of the *Annual Reports (Government Agencies) Act 1995* and in accordance with the requirements referred to in the Chief Minister's Annual Report Directions in as far as they relate to this office. It has been prepared in conformity with other legislation applicable to the preparation of the Annual Report by the ACT Ombudsman.

I hereby certify that the attached Annual Report is an honest and accurate account and that all material information on the operations of the ACT Ombudsman during 2002-03 has been included and that it complies with the Chief Minister's Annual Report Directions.

Section 14 of the *Annual Reports (Government Agencies) Act 1995* requires that you cause a copy of the Report to be laid before the Legislative Assembly within six sitting days of receiving the Report.

Yours sincerely

Prof John McMillan
Australian Capital Territory Ombudsman

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FROM THE OMBUDSMAN

My term as Australian Capital Territory Ombudsman commenced in March 2003. The position is a fulfilling one. As a lifetime resident of the Territory, I have a deep interest in ACT law and government. The ACT Ombudsman is but one element of a worthy system of administrative law and public sector accountability that is now a mainstay of ACT government. It is a system to be cherished, and I look forward to continuing a fine tradition.

A special feature of the office of ACT Ombudsman is that the position is presently held by the Commonwealth Ombudsman. The roots of this arrangement pre-date ACT self-government, when the administration of the ACT was undertaken by Commonwealth agencies that were subject to Ombudsman oversight from 1977. All governments have continued the dual role of Commonwealth and ACT Ombudsman, and in my view the arrangement works well. For the ACT government administration, it has meant a connection to a system of external oversight with greater resources, experience, research capacity and tradition than would otherwise be possible in the ACT. For the Commonwealth, it has meant that the Ombudsman is exposed to a greater diversity of government administration, embracing areas of major jurisdictional importance to State Ombudsmen: examples are the community policing, correctives services and public housing functions in the ACT.

The emphasis given in this report to the theory of complaint handling provides a good example of the benefits that stem from an integrated ACT and Commonwealth Ombudsman role. The office of Ombudsman, in handling each year tens of thousands of complaints across a varied spectrum of government decision-making, has accumulated both wisdom and expertise in how that function should be discharged. Many of the lessons to be learnt are discussed in this report. A special lesson is that good relations between government agencies and the public are best fostered when the agency itself has established an effective system of internal complaint handling. My office has been working closely with ACT agencies over the past year in establishing and monitoring internal complaint arrangements.

Much of the period covered by this report fell within the term of my predecessor, Mr Ron McLeod. I acknowledge his contribution to much of what is reported. It is well-known that Mr McLeod's close connection with ACT affairs continued thereafter, in his appointment to conduct the Inquiry into the Operational Response to the January 2003 Bushfires in the ACT.

Complaint trends

There continues to be a downward trend in the number of complaints received by the ACT Ombudsman. This year, my office received 447 complaints about ACT departments and agencies and 513 complaints about ACT Policing. The largest number of complaints about a single agency involved Housing ACT,

with 137 new complaints received in 2002-03 compared with 139 last year. Other agencies that accounted for significant numbers of complaints included ACT Corrective Services (54 new complaints, up 20% from last year) and Road User Services (46 complaints, down 22%).

My office saw an increase in complaints about Children's, Youth and Family Services within the Department of Education, Youth and Family Services (26 complaints compared with 15 last year), Planning and Land Management (33, up from 22) and the Department of Treasury (13, up from 5). We received significantly fewer complaints about the Legal Aid Office (ACT) and the ACT Magistrates Court.

The number of complaints received has remained relatively stable given that complaints about ACTEW are generally no longer within my office's jurisdiction and are dealt with by the Essential Services Consumer Council. This year, I received four complaints about ActewAGL in comparison to the 37 lodged in the previous year.

The steady downward trend in the number of complaints in part reflects the capacity of agencies to resolve a high proportion of complaints in the first instance. When an agency has established an effective internal system of complaint handling, it is appropriate that the Ombudsman should (as a general rule) first require a complainant to utilise that system before an investigation is undertaken by the Ombudsman. The formalisation and implementation of agency complaint-handling policies and procedures is therefore a matter on which I will continue to focus in the next year. I am equally concerned to ensure that agencies promulgate their complaint handling policies sufficiently: the fact that many complainants still contact my office first suggests that there is room for improvement in agency practice.

ACT bushfires

In January 2003, the ACT faced firestorms and a disaster of previously unparalleled proportions. Dealing with the after-effects has required a sustained government response. My office has received very few complaints regarding the recovery program being administered by departments and agencies. It is encouraging to report that those few complaints have been responded to by agencies with sensitivity and without requiring me to express a view as to whether or not there has been defective administration.

Office of the Community Advocate

Last year's annual report identified that the Ombudsman and the Community Advocate would work on a protocol to outline my office's jurisdiction to investigate complaints and other review mechanisms available in relation to the Office of the Community Advocate (OCA). Following discussion, it was agreed that the protocol should set out the principles and practice that my office would follow upon receipt of a complaint about OCA; the protocol provides for the Community and Health Services Complaints Commissioner to

have an opportunity to determine if the complaint is a matter that falls within his jurisdiction. Where the complaint does not, my office may, if warranted, investigate OCA's administrative actions. However, should the complainant be seeking a merits review of a decision made by OCA, the matter will be referred to the appropriate tribunal.

Both the Community Advocate and I agree that this understanding reflects the operation of the Ombudsman Act and allows for each complaint to be considered appropriately. Further, in order to appreciate more fully the nature of each other's role and function, we have agreed that our staff should participate in cross-jurisdictional training about the legislation we administer.

The complexity of disputes

In an era of complex government, complaints to my office sometimes have a similar dimension. Generally, there has been an increase in complaints that are of a higher order of difficulty to investigate or that broach systemic issues in public administration. Increased complexity generally means that investigations take longer to resolve. This subject is also taken up in another way in this report, which provides statistics on the number of issues closed and remedies achieved, not just on the number of complaints closed.

Another side to the complexity of government disputes is that not all aspects of a dispute may fall within the jurisdiction of the Ombudsman. This can be problematic when, as is increasingly the case, there are multiple oversight mechanisms, each with a responsibility for addressing a different aspect of a dispute. However, it is part of the professionalism of an Ombudsman's office that it should take account of that complexity and fashion a response accordingly. A case handled this year by my office provides an example of how this can be done.

Another oversight agency in the ACT referred to my office a complaint it had received concerning a problem that involved two ACT agencies. One of those agencies was subject to my jurisdiction, and the other to the jurisdiction of the other oversight agency. I took the view that the complaint might not be resolved adequately if we each dealt separately with the different elements of the dispute. My proposal, which was agreed to by all parties, was that it would be preferable in the first instance for the dispute to go to mediation, attended by the complainant and both of the ACT agencies to the dispute. It seemed to me that there was a greater likelihood of an agreement and overall settlement being reached more expeditiously by this approach. This result was achieved without my office having to formulate a view as to whether there was defective administration by the ACT agency subject to my jurisdiction. Helpfully, that agency agreed to approach an independent mediation service and to pay the associated costs.

I believe that this example demonstrates how the Ombudsman can play a useful role in brokering arrangements that help to resolve a complaint, even when faced with dealing with a disparate range of agencies and review

mechanisms. In this sense, it may be possible for my office to act as a “one stop shop” for investigating or referring complaints. This theme of a clearinghouse function is also something that I have reported against this year, particularly with reference to the 675 general inquiries my ACT office received.

The future

Many challenges lie ahead for my office, particularly as the roles of government agencies and departments change. An example is the recent creation of the ACT Planning and Land Authority (ACTPLA) and the Planning and Land Council to replace respectively Planning and Land Management (PALM) and the Commissioner for Land and Planning. I note that ACTPLA has been created to be “at arm’s length from Government and capable of advocating a long term, strategic approach to planning for Canberra, free from direct, day-to-day political involvement”. Accordingly, ACTPLA will be performing “most of its functions in its own right, rather than as a delegate of the Minister for Planning of the Executive of Government”.¹

A new administrative system can at times result in increased complaints, as the community comes to terms with new processes and there are the inevitable teething problems.

Similarly, the establishment of the ACT’s first prison may present challenges to the administration of corrective services. However, I am satisfied that the nature of the professional relationship between my office and the senior executive of Corrective Services, and the ACT Public Service generally, is such that our input regarding administrative practices will continue to be welcomed and considered appropriately.

I have not issued any formal reports on investigations in 2002-03.

Finally, I am pleased to report that the professional and respectful relationship between my office and ACT departments and agencies has continued and is nurtured through ongoing contact and discussion. This makes it possible to achieve a more successful resolution to the complaints that my office receives from members of the public.

Professor John McMillan
Australian Capital Territory Ombudsman

¹ “ACT Planning and Land Authority: Its Role in the Planning and Land Management System”, 2003.

OVERVIEW: AUSTRALIAN CAPITAL TERRITORY OMBUDSMAN

Introduction

The role of the Ombudsman is to consider complaints about the administrative actions of government agencies and to encourage the improvement of public administration by recommending changes to agencies' decisions, policies and procedures. In a more general sense, my office also provides advice to government on legislative and policy reform.

Legislation

The office undertakes this role under the *Ombudsman Act 1989* as well as having specific responsibilities under the *Freedom of Information Act 1989*, *Public Interest Disclosure Act 1994* and the *Complaints (Australian Federal Police) Act 1981* (Cth). Links to this legislation can be found at our website: <http://act.ombudsman.gov.au>

General inquiries

On a day-to-day basis my staff handle many general inquiries to determine whether an issue is in the nature of a complaint that falls within jurisdiction. To this extent my office undertakes a valuable role for the ACT community by acting as a clearinghouse for general inquiries, directing people to the correct agency that can deal with a grievance when it is not within the jurisdiction of the Ombudsman. Accordingly, one of the goals found in our business plan is:

Where referring a person to another agency, ensure that the referral is appropriate and the agency contact information is correct.

During the year ending 30 June 2003, we dealt with 675 general inquiries, received in writing, by email or by telephone. Many of these inquiries were outside the jurisdiction of the Ombudsman and my staff were adept at finding the correct agency to which to refer the person who contacted my office. These included the Community and Health Services Complaints Commissioner, other State or Territory Ombudsman offices, industry or specialist Ombudsman and other complaint handling agencies.

The following is an example of a cross-jurisdictional inquiry, which illustrates the clearinghouse function my office provides for people unsure of where to take their concerns.

CASE STUDY: GENERAL INQUIRY

Mr A emailed the Ombudsman asking why a Pathology service provider did not provide results directly to patients, given that X-ray service providers did so.

In response, we advised Mr A that the issue he was raising did not fall within the Ombudsman's jurisdiction but rather fell under the *Health Records (Privacy and Access) Act 1997* which, amongst other things, provided for consumers of health services to have an adequate opportunity to access information held about them in medical records. We suggested that Mr A take up his proposal with the Pathology service provider in the first instance and if he was not satisfied, he could then take the matter up with the Community and Health Services Complaints Commissioner.

How complaints to the Ombudsman are handled

Under the *Ombudsman Act 1989*, the Ombudsman can investigate complaints about administrative actions of government agencies. Complaints may be lodged by individuals, groups, representative bodies or organisations and can be made orally (by telephone or in person) or in writing (by letter, email, facsimile or internet). Anonymous complaints may be accepted. The Ombudsman is also authorised to receive "whistleblower" complaints under the *Public Interest Disclosure Act 1994*.

Complaint investigations are carried out impartially and independently, and are handled in private in accordance with the above legislation and the Information Privacy Principles contained in the *Privacy Act 1988* (Cth). Investigations are conducted in accordance with detailed written procedures, including a Service Charter and an investigation manual. Most investigations are conducted by telephone or personal contact and are completed quickly, with the results communicated clearly to both complainants and agencies.

The key values that underpin all Ombudsman investigations are:

- Independence;
- Impartiality;
- Integrity;
- Accessibility;
- Professionalism; and
- Teamwork.

If an administrative action complained about is found to be defective, the Ombudsman can make recommendations to the agency in question to achieve a fair and equitable outcome. In this context, "defective administration" is generally defined to include action that:

- appears to be contrary to law;
- is unreasonable, unjust or oppressive;
- is improperly discriminatory;

- is in accordance with a rule of law, a legislative provision or practice, which itself is unreasonable, unjust, oppressive or improperly discriminatory;
- is based wholly or partly on a mistake of law or fact; or
- is otherwise in all the circumstances wrong.

Decisions not to deal with a complaint at the outset

Where a person makes a complaint to the Ombudsman which has not earlier been taken up with the relevant agency, we will often suggest that the complainant first raise the matter with the agency. In 45% of issues closed during the reporting year, we declined to investigate the complaint at the outset. In the majority of such cases, this was because the complainants had not first approached the agency. This discretion not to investigate a complaint is provided for by subsection 6(2) of the *Ombudsman Act 1989*. I believe that it is in accordance with good dispute resolution principles that an agency should be given the first opportunity to consider a complaint and resolve it, where appropriate. If my office declines to investigate at the outset, we remind complainants that they can approach the Ombudsman again if they remain dissatisfied with the agency's response to a complaint. At that point, we will consider what action to take, if any. The following example illustrates this approach.

CASE STUDY: DECISION NOT TO INVESTIGATE

Mr B, a full time university student, had moved into an ACT Housing property over the Christmas holidays. During that period he had obtained some seasonal work and had declared the income on his ACT Housing application. He told my office that he was contacted by ACT Housing and informed that he must provide an Employment Separation Certificate to prove he was no longer working, otherwise the income would be used to calculate his rental liability.

Mr B believed that the possibility that his seasonal income might be used to calculate his rental liability was unfair, given that other agencies did not use this income to determine other financial support he received.

We asked Mr B if he had used ACT Housing's internal review process. As he had not, we advised that he should use this process first.

We are sometimes unable to pursue a complaint because the *Ombudsman Act 1989* requires mandatory referrals to other statutory review agencies, namely to the Commissioner for the Environment, the Community and Health Services Complaints Commissioner and the Essential Services Consumer Council.

On other occasions, we cannot investigate because the issue raised by the complaint is outside the jurisdiction of the Ombudsman. For example, some approaches to my office were made by people believing that they had been treated unfairly during interviews for promotion by an agency. While the agency may have been within the jurisdiction of my office, the Ombudsman is not authorised to investigate complaints about action taken in relation to the

promotion, termination of appointment or discipline of, or the payment of remuneration to, a person employed in the ACT Public Service. This exemption is provided for by subsection 5(2)(d) of the *Ombudsman Act 1989*.

Preliminary inquiries

Many of the complaints to my office are dealt with as preliminary inquiries – a stage in our complaint-handling process that allows us to determine whether a complaint is within jurisdiction, whether an investigation is required or whether the complaint can be resolved by informal inquiries.

The purpose of a preliminary inquiry was explained in the Explanatory Memorandum to the *Ombudsman Amendment Bill 1983 (Cth)*, as a procedure that enables "...the extent of investigation [to] be better matched to the nature of the complaint, with the least possible demand on all parties' resources."

It is pleasing to note that in 42% of issues dealt with as preliminary inquiries, we were able to obtain a remedy for complainants, with the co-operation of agencies. This also reflects the capacity of my office to distil a complainant's concerns, raise them with the agency and facilitate an outcome impartially without formal consideration of whether or not there has been defective administration or the need for more formal consideration.

CASE STUDY: PRELIMINARY INQUIRY

Ms C moved to Victoria and as required changed her vehicle registration from ACT to Victoria and handed in her registration plates. She wrote to Road User Services (RUS) and requested a refund of her registration and third party premiums. A month later she contacted the Ombudsman's office because she had not received the refund that she believed was owed to her.

My Investigation Officer contacted RUS, which then contacted the relevant Victorian authority. RUS was advised that Victoria did not have any record of the plates being surrendered. However, RUS advised that if the complainant could provide the receipt received for surrender of the plates, or alternatively, lodge a statutory declaration stating that the plates had been surrendered, the refund would be issued. Ms C was advised of the steps she could take to receive her refund.

COMPLAINT INVESTIGATIONS AND OUTCOMES

Investigations

In addition to the preliminary inquiries (151) dealt with by my office during the financial year, there were 130 issues on which an investigation was conducted and closed. Many of those issues were dealt with informally, but in some cases there was a need to conduct a more formal investigation. The decision to investigate a matter more formally may be reached on the basis of a number of factors, including:

- The need to gain access to agency records containing third-party information. By issuing a formal notice to produce documents, I can formally protect an agency from any allegations that it has breached another party's privacy or confidence.
- The serious nature of the allegations made by a complainant, which may warrant a formal investigation in order to test the veracity of both the complainant's allegations and the agency's handling of a matter.
- The protracted nature of a complaint, which can best be resolved by having an impartial body unravel the events, determine whether there has been defective administration, and, if appropriate, make recommendations.
- The possibility that the issues complained about might have an impact upon a group of people, beyond the complainant's individual circumstances.

Where I believe that criticism, either implied or direct, of an agency's action is warranted, I am required to provide an agency with the opportunity to make a submission prior to completing the investigation.² Once the agency has had that opportunity, it is open to me to form the view, where it is warranted, that an agency action constitutes defective administration, as defined earlier in this report.

The following case study is an example of an investigation conducted to determine whether an agency's action was defective, by being based partly on a mistake of fact.

CASE STUDY: A QUESTION OF THE FACTS

Mr D visited the office and complained that a government agency had sought to rely on inaccurate information in its submission before a tribunal. In particular, Mr D stated that the agency had relied on certain events that had been previously disproved by an investigation by this office. He provided the agency's submission purporting to represent the disproved events as facts. It was decided that the complaint warranted investigation.

>> Continued on next page

² This is also the case should I propose to criticise a person. Further information can be found at subsection 6(6) of the *Ombudsman Act 1989*.

CASE STUDY: A QUESTION OF THE FACTS (Continued)

The agency was contacted and advised that, on the basis of our previous investigation, it appeared that the agency had misrepresented the circumstances in its submission to the tribunal. The agency was asked to comment on our view and to indicate what steps it considered might resolve the matter.

The agency accepted our conclusion and replied that it would withdraw the particulars before the tribunal (which had not yet considered the matter) and resubmit new particulars without the error of fact.

In summary, investigations are conducted to determine whether agencies have acted fairly, reasonably and in accordance with their legislation, policies and procedures.

Suggestions and recommendations

Expressing a view that there has been defective administration is not an end in itself. A principal role of the Ombudsman is to improve public administration, and there are times when suggestions and recommendations are made to achieve this. The success of this function is based upon my office's capacity to make suggestions and recommendations that are:

- commensurate with the agency's role, function, powers and within its resources to implement; and
- likely to reduce the likelihood of further administrative problems.

In my view, suggestions and recommendations should strike a proper balance between achieving appropriate outcomes for complainants and moving towards good administrative practice. The following discussion of complaint themes for this year provides examples of suggestions that were made, since no formal recommendations were issued during the year.

Complaint themes

Summary

Each year we receive a variety of complaints across a range of issues from the straightforward to the complex. Generally, it is not possible to identify significant trends within the complaints because of the diversity of issues raised and the relatively small numbers received about individual agencies.

It is nevertheless possible to discern some common themes in our handling of complaints about departments and agencies. Those issues which stand out over the year include the importance of ensuring that the community understands administrative processes, and what is expected of them when applying for a "benefit" or permission to undertake some activity; the importance of accountability and transparency in administrative decision-making; and the value of a written statement of reasons for a decision.

Although a number of case examples are detailed in this chapter, they should not be interpreted as indicating agency-wide problems; rather, they are illustrations of some of the themes in complaints handled by my office. I would like to think that complaints are an exception to agency practice, yet provide a useful reminder to those administering government policy of the ever-present risk of error.

Agency complaint handling

In 1997, my office published *A Good Practice Guide for Effective Complaint Handling*, which in part reflected on the need for agencies to have effective complaint-handling systems. The Guide was a result of findings at the time that few Commonwealth agencies openly provided opportunities for clients to make complaints; complaints when received were dealt with in an ad hoc fashion and there was a general misunderstanding of what principles should underpin a complaints system.

However, the introduction of complaint-handling systems has produced benefits for agencies, and has instilled an understanding that complaints are part of the continuous improvement loop that enables change.³ My office remains an integral part of that continuous loop, but I remain concerned that agencies need to consolidate and formalise their own complaint-handling mechanisms.

Accordingly, complaints to my office can provide useful intelligence to agencies about potential weaknesses in their procedures. Complaints also highlight instances where agency processes have failed to take individual circumstances into account. Complaints can also be a reminder to agencies that there are at least two sides to every story.

The usefulness of a complaint to an agency and to the person making the complaint is dependent upon the agency's complaint-handling system. The absence of complaint-handling policies and procedures can result in complaints being ignored, languishing or escalating into formal disputes. In the absence of suitable guidance, complaint handling may be ad hoc, lack consistency in management and resolution, as well as lack appropriate impartiality and accountability. An unhealthy cycle may arise, whereby a complaint can produce a further complaint about "how my complaint was handled".

For example, in the course of an investigation of a complaint about the Department of Education, Youth and Family Services, the Department advised that it did not currently have a complaint-handling system, but was in the process of drafting one. We ceased our investigation when the Department agreed to mediation with the complainant and to consult my office on the development of its policy and procedures for handling complaints.

³ Dee, B "When a complaint is a gift", *The Australian Standard*, May 2000.

The Department of Education, Youth and Family Services has provided me with its draft policy on which I have provided some preliminary comments. While some aspects may require further consideration, it has been pleasing to see the careful consideration of the subject, particularly with respect to the proposed complaint form and the Department's interest in collecting data to monitor its own performance. The new policy and procedures were finalised after the end of the financial year, and are now being implemented by the Department.

It is my view that generally departments or agencies should have the first opportunity to resolve complaints. This approach is consistent with the provisions of the *Ombudsman Act 1989*. However, where there is no clear, enunciated policy and procedure that is readily available to the general public, it is more likely that a department or agency will not be given the opportunity to deal with the matter first. In such circumstances, my office could not necessarily be satisfied that the complaint would be dealt with appropriately or effectively.

Accordingly, I have written to the Chief Executives of a number of government departments and asked for their cooperation in my consideration of this issue. Initially, I have asked them to provide copies of their complaint-handling policies and procedures, where they are in place.

Understanding administrative procedures

A key element of good administrative practice is to ensure that the community understands processes and what is expected of them when applying for a government "benefit" or for permission to undertake some activity. The provision of accurate information benefits both the agency and the applicant, reducing the potential for multiple exchanges to obtain the necessary information required to make a decision.

CASE STUDY: ALL THE INFORMATION?

Ms E was a partner in a small business and lived in ACT Housing accommodation. Ms E's rental rebate came up for review and she was accordingly asked to provide information about the income she received from this business. In reply, she provided a profit and loss statement, balance sheet and the previous year's tax return.

Initially, the application for the continuation of the rental rebate was declined. ACT Housing initially attributed all of the income of the partnership to Ms E. When Ms E drew this error to ACT Housing's attention and asked for reconsideration she was advised that the financial information provided was insufficient because a certified registered accountant had not prepared it. The documents certified by an accountant were to be provided the following working day, when a decision would be made. She contacted ACT Housing again to ask for an extension of time to supply the information and was advised that the full rent would be deducted, but when the certified statements were supplied, she would receive a refund if the rental rebate were granted.

>> Continued on next page

CASE STUDY: ALL THE INFORMATION? (Continued)

Ms E approached the Ombudsman for assistance and the complaint was investigated. We discovered that while ACT Housing Policy documents clearly stated that a certified registered accountant must certify financial statements, this requirement was not listed on either the rental rebate form or the accompanying covering letter. Furthermore, given ACT Housing's error in the original decision by attributing all of the partnership income to Ms E, my office formed the opinion that it was unreasonable for ACT Housing not to have granted an extension to the current rate of rental rebate.

As a result of our investigation, ACT Housing agreed to amend its rental rebate application form and covering letter to include the requirement to provide appropriately certified statements when providing financial information about self-employment.

Providing complete information upfront to applicants can also reduce the likelihood of double handling and delays, as the following case study demonstrates.

CASE STUDY: DELAYS

Ms F was an owner/builder of a house constructed in 1996, which she was in the process of selling. She was not aware that she needed to have both a certificate of occupancy for the building and a certificate of compliance with the lease conditions before she could sell the house. With the settlement date approaching Ms F approached ACT Planning and Land Management (PALM) to get the relevant documents. Despite the required inspections being carried out during construction, ACT Building, Plumbing and Electrical Control had not issued a certificate of occupancy for the dwelling, as there were a number of minor matters identified at the last inspection that needed to be addressed. After a further inspection, the certificate of occupancy was issued.

To enable the sale of the property at the settlement date and the issue of a certificate of compliance, Ms F agreed to pay fines totalling \$1800 relating to the start and finish date of construction, as if the building had just been completed. PALM advised that if she could provide a statutory declaration from the contracted builder regarding the completion of building, PALM would refund the fine. The statutory declaration was supplied but the refund was not received. After three months, Ms F contacted PALM and was advised that further documents would be required to refund the fine.

Amongst other things, Ms F complained that PALM was dragging the matter out and that it should have asked for all the documents it needed in the first place.

The complaint was investigated and PALM admitted that the matter had not been handled in a timely manner and it had sufficient evidence and records to refund the fine. In response, PALM agreed to expedite the refund and provide a letter of explanation and an apology.

The paper trail

The administrative principles of transparency and accountability form the basis of good decision-making. In my view it is paramount that agencies record all significant contact with clients, the information used to make

decisions, as well as the reasons for those decisions. Both the new and long-serving public servant can benefit from a reminder about recording such information as well as the principles of good record maintenance and management, as the following case study illustrates.

CASE STUDY: NO DEFECTIVE ADMINISTRATION BUT PRACTICES HAVE SLIPPED

Mr G approached the Ombudsman, as he believed it was unreasonable for ACT Housing to ask him to re-apply to purchase his house, given the passage of time. He also complained that the property had been revalued at a higher price. As a part of the investigation my office obtained the file in relation to negotiations about the sale.

While we formed the view that there was no defective administration, it was noted that the file infrequently recorded when incoming documents were received, folioing was inconsistent and file notes were not signed and dated. It was suggested that files be reviewed regularly to ensure that they were appropriately notated and folioed so that the outside observer could have a clear understanding of the sequence of events.

The Commonwealth Attorney-General's Department has recommended the following information be recorded when providing oral advice to clients:

- name or identifier of the officer giving advice, and if possible, the name of the person to whom the advice was given;
- date and time the advice was given;
- questions asked, as this can be crucial for determining whether the agency ought to have known that the client was intending to rely on the advice given and whether the inquiry was 'serious'; and
- responses given and whether there was any qualification of the response such as advice that the client should submit a claim.⁴

Good record-keeping is invaluable to the agency, the client and my office. For the agency, it can support its actions, be the basis for providing reasons, enable effective quality assurance activities, and promote good decision-making. For the client, good record-keeping provides a record of events that can be accessed under the *Freedom of Information Act 1989*, about which he or she can then seek clarification or review if necessary. For my office, it provides the essential information for considering whether or not there has been proper administration. In the absence of such records, the investigation becomes a question of determining the more probable explanation, which may be difficult or impossible to decide.

Part of the paper trail involves keeping records up-to-date, which ensures that when further action is taken, it can be taken in light of the most recent information. This is particularly true where the information is held by one agency and acted upon by another. Failure to maintain the currency of information can have a serious impact for an individual who is not in a position

⁴ See Commonwealth Ombudsman, *Issues Relating to Oral Advice: CLIENTS BEWARE – A Report under Section 35A of the Ombudsman Act 1976*, December 1997, p. 44.

to prove easily that an agency's record is out-of-date or incomplete, as the following case shows.

CASE STUDY: CURRENCY OF INFORMATION

Mr H was arrested on the basis of five outstanding commitment warrants, as it appeared in the first instance that Mr H had failed to pay overdue interstate fines. Mr H was placed initially in the City Watch House and then later detained in the Belconnen Remand Centre (BRC), totalling 7 days of detention. During this time, Mr H claimed that he had served a sentence for the outstanding fines. With access to legal advice, Mr H was able to indicate that he had correspondence to support his claim that the warrants had been expunged. His relatives obtained the letter, which was provided to BRC and Mr H was released.

In response to our inquiries, the Ombudsman was advised that the Magistrates Court had reissued the warrants, following reconciliation, under which Mr H was arrested in error. The Magistrates Court, recognising its part in Mr H's unlawful detention, has agreed to discuss appropriate compensation with Mr H.

In that example, the negotiations regarding compensation are between the complainant and the Magistrates Court; the involvement of the Ombudsman has therefore concluded. However, should a person believe that the remedy offered by an agency is not reasonable, those concerns can also be brought to my attention.

Another aspect of the need for proper record-keeping relates to requests for documents under the *Freedom of Information Act 1989* (FOI). The FOI regime allows for complaints to the Ombudsman about an agency's processing and response to applications for FOI access. These issues are detailed in Chapter Four.

Decisions, decisions

Ultimately, a critical element of good administration is the quality of decision-making irrespective of whether the decision favours the applicant or not. My office's experience is that an individual is more likely to accept a negative decision when the reasoning behind the decision is clear and understandable. This point is brought out in the following example.

CASE STUDY: REASONS FOR DECISION

Mr I received a Parking Infringement Notice (PIN) and sought a review on the grounds that the signs in the parking bay were confusing. He provided photographs to support his claim. The reviewing officer decided that the PIN should not be withdrawn and advised Mr I accordingly.

Mr I complained to my office, alleging amongst other things that the decision was inadequate because he was not told the reasons for upholding the original PIN. Nor was the review process explained to him.

>> Continued on next page

CASE STUDY: REASONS FOR DECISION (Continued)

At face value it appeared that Mr I's concerns were reasonable and my office approached the Parking Review Office (PRO) to obtain an explanation about the review process and reasons for the decision. In response, the PRO provided a detailed history of its investigation and consideration of Mr I's claim that the signs were unclear, which indicated that the review had been well considered. Unfortunately, this had not been reflected in the letter of decision sent to Mr I.

The PRO recognised that there had been some deficiencies in its notification of decisions generally and had already conducted an internal review which resulted in improvements including a requirement that staff provide a more detailed response including an analysis of the facts and reasons for decisions. This internal review occurred after Mr I's PIN had been reconsidered.

As a result of the advice from the PRO, the investigation ceased as the cause of the complaint had been rectified by this office providing Mr I with the results of the investigation and reasons. At the systemic level, the PRO had already taken steps to improve its practices. Further, the PRO agreed to disseminate to its staff relevant excerpts from the Administrative Review Council's guidelines on the writing of reasons for decisions.

There are occasions where agencies do make decisions that contain errors that create confusion for clients. On such occasions the objective of my office's intervention is to have the agency correct the decision and to ensure that the complainant's rights of review are not adversely affected.

CASE STUDY: CORRECTING THE ERROR

Mr and Mrs J received a notice under the *Tree Protection (Interim Scheme) Act 2001* from Environment ACT regarding tree-damaging activity that would occur as part of the development of an adjoining block.

The complainants raised their concerns that the decision was flawed because the incorrect subsection of the Act had been quoted, the plan indicated trees that were in fact on the complainants' block and not on the site being developed, the letter indicated the month and year of the decision but not the day, and the information about appeal rights to the ACT Administrative Appeals Tribunal (AAT) was ambiguous.

Following my office's intervention, Environment ACT agreed to revise the format and wording of the decision, describing the general provisions of the relevant section of the Act, the date (including day) of the decision and a specified date for lodging appeals to the AAT. Further, street addresses along with block references would be included so that it would be easier for recipients to identify the trees that could be affected by the activity.

In response, Environment ACT wrote to the complainants, apologising for the errors and stating that it would not oppose a late appeal to the AAT, should the complainants wish to pursue the matter.

COMPLAINT INVESTIGATIONS AND OUTCOMES

This last case study exemplifies much of what my office seeks to achieve when dealing with complaints – an improvement in transparency and clarity of decision-making together with an identifiable trail of when decisions are made. Importantly, the case study also demonstrates an agency's willingness to improve its practices as a result of a complaint.

AUSTRALIAN CAPITAL TERRITORY COMMUNITY POLICING

The role of the Ombudsman in complaints about community policing

Policing services to the ACT are provided by the Australian Federal Police (AFP), through a purchase agreement between the AFP and the ACT Government. Members of the AFP assigned to ACT Police are engaged in community policing duties, under a range of ACT and Commonwealth laws. While those activities are unique to the policing issues for the region, complaints about AFP officers undertaking those duties are considered by my office under the same framework as complaints about the AFP's national and trans-national policing roles.

Under the *Complaints (Australian Federal Police) Act 1981* (Cth) ("the Complaints Act") responsibility for investigating complaints is shared between the AFP and my office. The Complaints Act provides for the management of certain types of complaints (defined as 'minor complaints') through the AFP Workplace Resolution Program. Complaints about serious conduct matters, or where practices and procedures appear to have been deficient, are investigated by AFP Internal Investigations in accordance with the provisions of the Complaints Act and Commissioner's Orders.

In all cases, a report about the actions taken by the AFP is forwarded to my office for independent review. These reports are scrutinised to determine whether:

- the scope of an investigation covers all issues raised by the complainant;
- all evidence has been obtained and considered;
- the report is complete and thorough;
- any new issues (particularly practice and procedures) have been identified; and
- recommendations are well targeted to the issues and represent a reasonable outcome for the complaint.

My office can also investigate a small number of complaints directly. These investigations occur when:

- practices and procedures are the central element of the complaint or issue;
- it is not appropriate for Internal Investigations to investigate the matter; or
- the investigation is initiated under my 'own initiative' powers.

Provided below is an overview of complaint numbers and activities for each of the three categories of complaints management.

Complaints overview

My office received 513 complaints about ACT Policing, compared with 444 complaints in the previous year, and 557 in 2000-01. Despite these fluctuations in complaint numbers, the number of issues raised in complaints about the AFP has steadily decreased in the past two years, as shown in the following table:

Year	Number of Complaints	Number of issues
2000-01	557	869
2001-02	444	820
2002-03	513	800

These figures suggest that while the number of people making complaints about the AFP is relatively stable, fewer concerns per individual complaint are being raised. Community policing issues for the ACT represent a relatively large percentage (70%) of all complaints made about the AFP this year, probably due to the greater degree of contact that occurs between the public and police in the community-policing role.

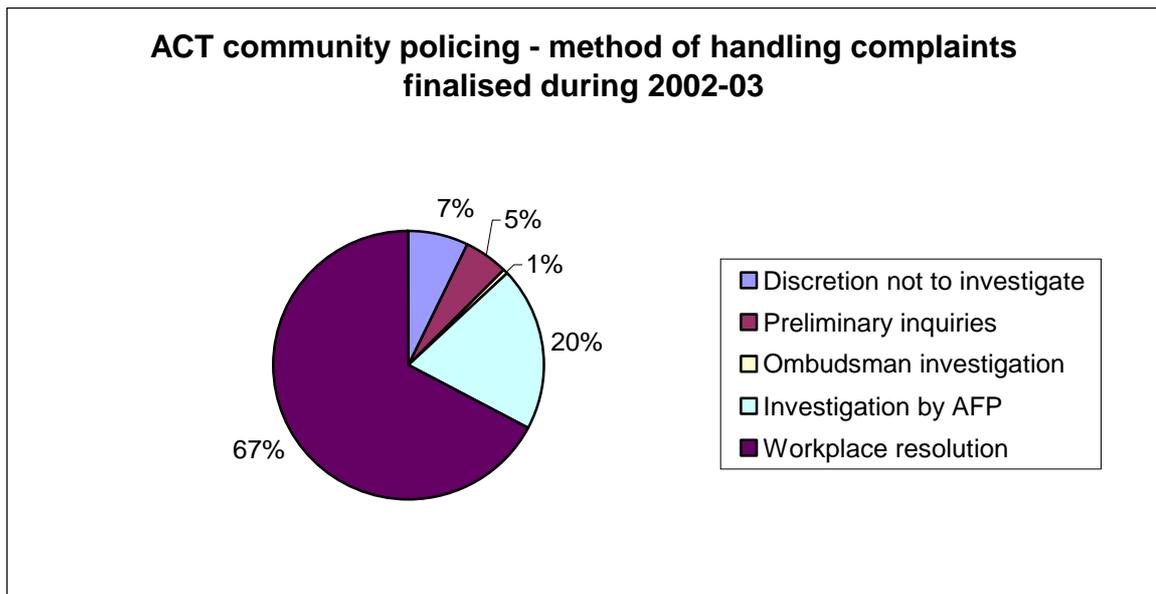
The majority of complaints concern the conduct or decisions of members of the AFP, with just 10% of complaints concerning practices and procedures. This outcome is consistent with the nature of community policing. I believe that this pattern of complaints places an obligation on ACT Policing to ensure its members continue to understand the implications of acting in accordance with the highest standards in their interaction with the public, who will not generally understand or be aware of the detail of police practices and procedures.

Complaints resolution

Workplace resolutions

The workplace resolution process is used by the AFP to assist in the resolution of 'minor complaints'. These might include service delivery complaints (typically allegations of member rudeness), or complaints where it appears that the complainant may not have understood police powers or procedures.

The proportion of complaints entering the workplace resolution process was 67%, with successful resolution occurring in 50% of total cases. Some cases in the workplace resolution stream also act as indicators for more systemic issues, even though the specific complaint may have been resolved through the conciliation process. Where a complaint leads to the identification of a systemic issue, that complaint is resolved as far as possible, and the issues are then managed under my own initiative investigation powers for more detailed examination.



Where a resolution was not possible, my staff have noted that the reasons were generally because of different expectations and opinions about policing practices, rather than the presence of systemic issues or poor conduct. In some cases, resolution was hampered by the lack of evidence to support any party's position in the complaint.

Where it appears that the workplace resolution stream has done all that is reasonable in resolving a complaint, a decision may be made not to investigate the matter further. This occurred in 37% of complaints in the workplace resolution process.

In all cases, the workplace resolution is undertaken by a supervisor from the relevant area of the AFP, or a nominated representative from the Professional Standards portfolio, using a conciliation model. The practice of appointing senior staff as conciliating officers gives the AFP the opportunity to understand service delivery issues and gain an insight into current issues in its policing practices. I continue to support this approach as an important management and accountability tool.

The following case study demonstrates the extent to which the workplace resolution process provides a mechanism for excellent customer service to be provided to members of the community, through willingness to spend time listening to the complainant's concerns and ensuring the provision of a sufficient explanation of events.

CASE STUDY: CONCILIATION

Ms K made a complaint to the AFP about her belief that AFP members were constantly harassing her by visiting her home. Ms K disclosed that she could not remember the nature of each visit due to her emotional and medical state at the time.

The AFP conciliating member made contact with Ms K and discussed the concerns expressed in her complaint. The conciliating member then arranged a time with Ms K to access AFP's records. The conciliating member provided Ms K with explanations for each contact the AFP had with her and the nature of each visit. Ms K reported that she felt listened to and that she appreciated the time spent with her explaining the AFP's actions. This complaint was successfully conciliated to the complainant's satisfaction.

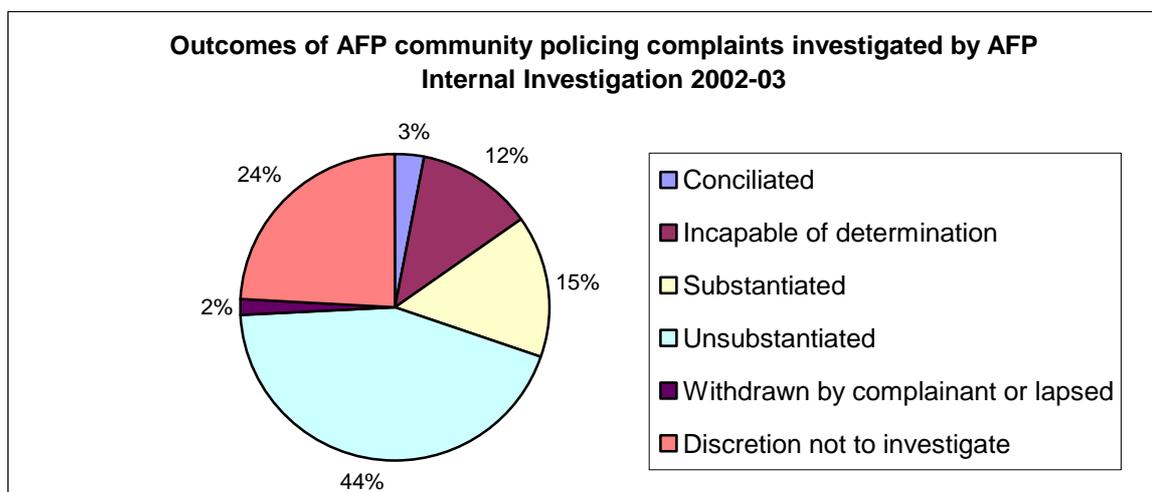
Internal Investigations

A percentage of complaints made about the AFP are deemed to be of a sufficiently serious nature to warrant investigation by the Internal Investigations area of the AFP.

From the total number of complaint issues complained of this year, 158 (20%) were investigated. These issues were generally characterised by concerns about:

- misuse of authority;
- inappropriate disclosure of information;
- bias or corruption; or
- theft.

Of the issues investigated, 69 (44%) were found unsubstantiated, 19 (12%) were incapable of determination, and a further 24 issues (15%) were determined to be substantiated. Of the remaining investigations, 3 (2%) were withdrawn by the complainant, and 5 (3%) achieved a conciliated outcome.



The Ombudsman's office declined to further investigate 38 matters (25%), for reasons including the ability of the complainant to raise the matter with a court or a tribunal, jurisdictional issues or other circumstances.

In most cases we found the AFP investigation reports displayed a comprehensive investigation and analysis, resulting in reasonable and appropriate recommendations. However, there were a small number of occasions where reports were returned to the AFP for further consideration of systemic issues and suggestions by my office, including amendments to guidelines for the management of bail information and changes to the guidelines for the care of persons in custody. My staff continue to work closely with the AFP to ensure that these systemic issues are addressed, regardless of the outcome of the individual complaint.

The following case study illustrates this approach of looking behind the facts of an incident to practices and procedures, especially where there was more than one agency involved.

CASE STUDY: INVESTIGATION

In 2001, Mr L was arrested in his flat for an alleged breach of bail. A sequence of administrative errors in managing the documents and information associated with his bail meant that Mr L was incorrectly arrested for failing to report during bail.

At arrest, the arresting officers again checked the bail conditions with AFP Communications and the City Watchhouse, but as the source information was still misleading (bail papers had been misfiled and computer records had been incorrectly updated), the terms of the arrest were again confirmed and Mr L remained in custody for a number of days.

As a result of an investigation into this matter, my office determined that the arresting officers had acted incorrectly, but in good faith. That is, the information supplied by other agencies to the AFP logically resulted in the arrest of Mr L, but that information was inaccurate.

This case resulted in a revision of the AFP Guideline for Best Practice for Bail and re-training of officers managing bail papers. This work is also continuing with interagency cooperation for information sharing between all relevant personnel responsible for bail and warrant information, to ensure that police officers have access to current and correct information.

Ombudsman's investigations

While the Complaints Act envisages that most complaints will be investigated by the AFP, there is also provision for the Ombudsman to investigate a complaint from the outset, where the matter:

- arises from AFP practices or procedures;
- is about the actions of the Internal Investigations area or is otherwise inappropriate for that area to investigate; or
- is an investigation instituted under my own initiative powers.

No investigations into ACT Policing were commenced under the first two categories, and I discuss progress on own initiative investigations below.

Own initiative investigations

This year has seen considerable staff changes in my office, and increased emphasis on the inspection roles in the Commonwealth jurisdiction. Resource constraints have impeded the office's ability to complete many of the own initiative investigations forecast in the previous Annual Report.

However, investigations still under active consideration include a review of the administrative review process for Traffic Infringement Notices issued in the ACT, and a review of the effectiveness of the Workplace Resolution process. I am also considering revisiting my previous investigations into property and exhibit management, and ACT policing of domestic violence.

Training and outreach activities

Staff from my office continued to contribute to integrity and recruit training for ACT Police during the year, presenting sessions about the role of the Ombudsman in the AFP's accountability regime. My office also co-sponsored the one-week residential integrity investigation program, and contributed to discussions about ethics and accountability in community policing.

PERFORMANCE REPORT

Resources

In 2002-03, the ACT Government paid an unaudited total of \$858,472 (including GST) to my office for provision of services. Monies are received directly from the ACT Government under a Memorandum of Understanding. Payments made, including GST, were:

<i>Ombudsman Act 1989</i>	\$404,123
<i>Complaints (Australian Federal Police) Act 1981 (Cth)</i>	<u>\$454,349</u>
Total	\$858,472

Performance Measures

The principal performance measures for the Ombudsman are:

- number of complaints received;
- number of complaints finalised;
- time taken to finalise complaints; and
- training and liaison contacts.

Number of complaints received

The “Complaints Received and Issues Finalised” table in the Statistics section sets out the complaints received in relation to departments and agencies, with a total of 447 complaints received for the year. I note that there was an overall reduction in complaints received by 6%, largely accounted for by the fall in new complaints about ActewAGL, now within the jurisdiction of the Essential Services Consumer Council.

Number of Complaints finalised

The “Complaints Received and Issues Finalised” table in the Statistics section sets out details of the complaints received and issues finalised in 2002-03. In total, 432 complaints with 510 issues about department and agencies were finalised during the year.

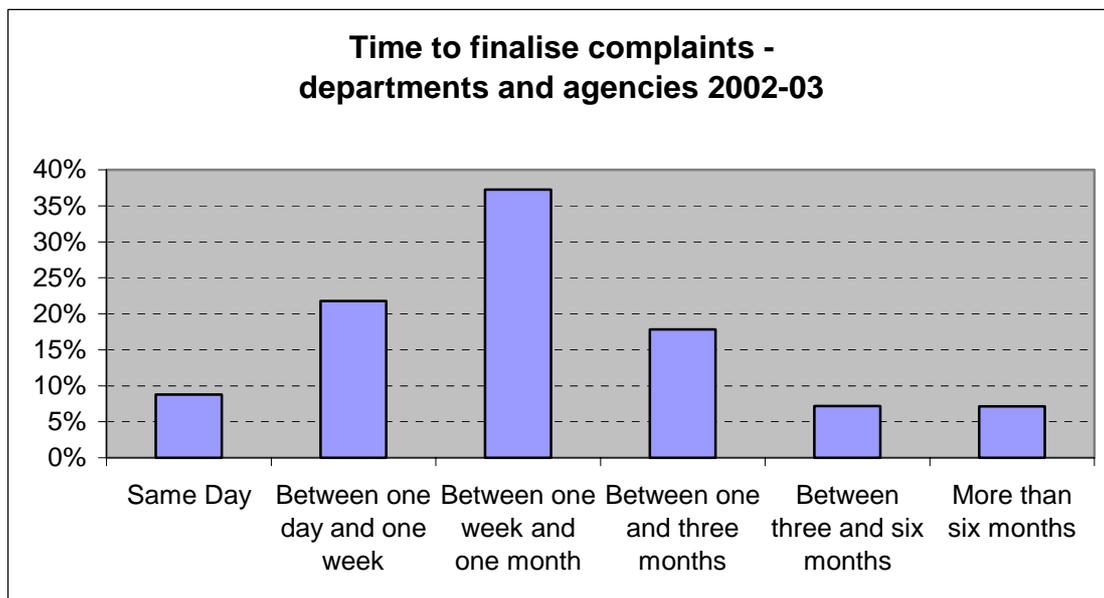
My officers exercised the discretion not to conduct preliminary inquiries or an investigation for 45% of those issues finalised. Thirty percent of issues were finalised by way of preliminary inquiries and 25% were formally investigated.

In 43% of issues investigated or dealt with as preliminary inquiries, we were able to achieve a remedy for the complainant, by way of agency explanation (increasing the complainant's understanding of why the agency was acting in the way that it was), expediting the matter, an apology, reconsideration of an earlier decision, or changes in administrative policy and procedure.

For 18% of issues investigated, my officers formed a view that there had been defective administration, while in 62% of investigations no defective administration was found in relation to the agency's actions. In the remainder of cases, it was not necessary to form a view as to whether defective administration had occurred for a variety of reasons, including the provision of a remedy by an agency during investigation, or the withdrawal of the complaint by the person making it.

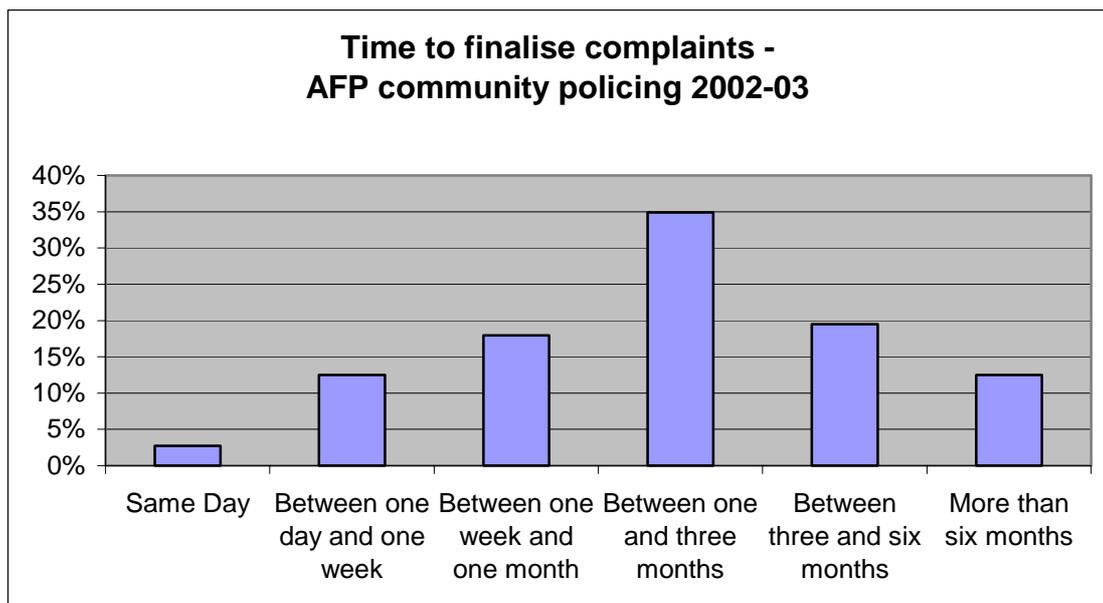
Time taken to finalise complaints

The chart below illustrates the time taken to finalise complaints about departments and agencies in 2002-03.



My office's major performance target for complaints about agencies is to finalise 90% of complaints within three months of receipt. In total, 432 complaints were finalised during 2002-03, of which 86% were completed within three months of receipt. This is a substantial improvement on the previous year, during which we finalised 77% of complaints within our performance target. Further, we reduced the proportion of complaints taking more than six months to complete. I am pleased with the steps made towards meeting our timeliness target, and am confident of maintaining this progress.

The following chart illustrates the time taken to finalise complaints about ACT Police in 2002-03. I am pleased that a third of all complaints were resolved within a month of receipt by my office (33%). The majority of complaints (88%) were resolved within six months, and the remaining 12% of complaints that extended beyond six months were characterised by the complexity of the matters being investigated. Further work needs to be done to reduce those taking more than six months to finalise.



Training and liaison contacts

As in previous years, my office continued to liaise with both government and community sector organisations with a view to better understanding our roles and areas of mutual interest and concern. These contacts were also intended to increase our effectiveness in responding to complaints made by members of the community with special needs. A number of informal meetings were held with individual agencies to discuss complaint handling and collection of statistics, and to ensure more beneficial use of the intelligence gathered by my office.

In particular, staff from my office met with representatives of statutory review agencies that have an interest in ACT correctional facilities. This included the Superintendent of Custodial Operations and the ACT Discrimination Commissioner, as well as representatives of the Community and Health Services Complaints Commissioner, the Community Advocate and ACT Corrective Services⁵. These discussions provided a useful opportunity to clarify agency roles and responsibilities, jurisdictional parameters and overlap and other issues of mutual interest.

The discussions resulted in agreement to produce a poster for use in ACT correctional facilities that described the role of each agency and how detainees could lodge complaints. I am encouraged by the willingness of ACT Corrective Services to facilitate the poster (illustrated below) being placed in correctional facilities.

⁵ Unfortunately, the Official Visitor was unable to be present on the day but had met with Ombudsman staff prior to the forum.



Other specific activities included:

- ongoing involvement with ACT Free Legal Advice Forum;
- meeting at the Chief Minister’s Department with Ambassador Charles Mbaka and his delegation from the Kenyan Ministry of Foreign Affairs;
- meetings with the Official Visitor, Community Advocate and Commissioner for Occupational Health and Safety as well as the Executive Director of ACTCOSS;
- a five-day Advanced Investigators Training course in April 2003 (attended by a number of senior officials from ACT agencies);
- presentation by the ACT Discrimination Commissioner on the role and function of the ACT Human Rights Office;
- presentation by the Deafness Resource Centre to ensure complaints staff can effectively deal with inquiries made by people with hearing impairments;
- presentation by Mental Illness Education to ensure complaints staff can effectively deal with inquiries made by people with mental illnesses;
- appearance before the Standing Committee on Community Services and Social Equity of the ACT Legislative Assembly; and
- comments on a range of departmental and agency submissions and discussion papers raising issues of administrative practice.

Freedom of Information

Complaints about the actions of agencies

Subsection 53(3) of the *Freedom of Information Act 1989*, requires the Ombudsman to report on complaints about the handling of Freedom of Information (FOI) requests by agencies.

This year, my office received 10 complaints in which the handling by agencies of requests made under FOI was raised as an issue. The most common theme was concern about delays in providing documents and/or reasons for exemption. Frequently our intervention seeks to have the agency expedite a response, as shown in the following case study.

CASE STUDY: MISSING FOI REQUEST

Ms M lodged an FOI application for documents held by the Director of Public Prosecutions. After 14 months without contact by the DPP, she made a complaint to the Ombudsman under the FOI Act.

The DPP was approached and advised that it did not have any record of the request being received. This office forwarded a copy of the request to the DPP, which expedited both an acknowledgement and decision in response to the request.

Freedom of Information requests to the Ombudsman

This year, my office received two FOI requests under section 14 of the *Freedom of Information Act 1989*. No fees or charges were collected from either applicant, and both matters resulted in all information requested being released.

There were no requests for internal review, and no applications for review of decisions were made to the Administrative Appeals Tribunal. Costs incurred by my office in processing FOI requests in 2002-03 totalled \$854.37.

Public interest disclosures (“whistleblowing”)

As provided for by the *Public Interest Disclosure Act 1994*, whistleblowers may make a public interest disclosure in certain ways, including to the Ombudsman. This year, I did not receive any new disclosures though I am continuing to investigate one matter.

Commissioner for the Environment

Section 23 of the *Commissioner for the Environment Act 1993* requires that ACT agencies report each year against:

- requests made by the Commissioner under section 18;
- details of any assistance requested;

- details of investigations carried out; and
- recommendations made and action take by the agency.

During the year, I did not receive any requests from the Commissioner to provide information to assist with his preparation of a state of the environment report.

Government Contractual Debts (Interest) Act 1994

The Ombudsman did not accrue any overdue debts during 2002-03, and therefore no payments of interest were made.

Reporting against the Service Charter standards

In the Service Charter, I have undertaken to provide in my Annual Report details of complaints received about our service and decisions, and steps taken to deal with them.

During the reporting period, we received six complaints about our service and finalised seven reviews of our complaint handling. Of the complaints received, five complainants disagreed with our decision or action and one was about our service delivery. Of the reviews finalised, the original decision was affirmed in four complaints, whereas in three matters, we reconsidered the matter or undertook further investigation.

Annual reporting guidelines

The Commonwealth Ombudsman provides ombudsman services to the Australian Capital Territory Government under a memorandum of understanding. The ACT Ombudsman is neither a Public Authority nor an Administrative Unit within the meaning of the *Annual Reports (Government Agencies) Act 1995*. Consequently, the ACT Ombudsman is unable to report against all aspects of the Chief Minister's Annual Reports Directions.

Elements on which reports cannot be provided mainly relate to areas where ACT Ombudsman functions are intrinsically interwoven with broader organisational operations, and include:

- Financial statements and financial reports;
- Whole of government issues;
- Staffing profile and human resource management issues;
- Capital works management;
- Asset management strategy; and
- Ecologically sustainable development.

STATISTICS

The tables on the following pages provide details about the complaints received and issued finalised for 2002-03.