

**LEGISLATIVE ACTION PAPER  
OFFICE OF THE OMBUDSMAN**



**Introduction**

In February, 1992 the Minister of Justice tabled "Government Accountability: a Legislative Action Paper on Access to Government" (Tabled Document 33 - 12(2)). This Paper proposed a bill which would go beyond conventional access to information legislation and include elements found in Ombudsman legislation in other jurisdictions.

The Standing Committee on Legislation (SCOL) undertook a review which included public hearings throughout the Northwest Territories and a review of legislation in other countries and other Canadian jurisdictions. The Committee tabled its report on March 1, 1993 and recommended:

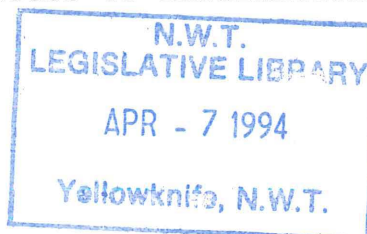
1. That the Minister of Justice proceed on a priority basis with the preparation of a bill which would establish the right of access by the public to information held by government institutions; and
2. That the Minister of Justice develop a legislative action paper outlining a proposal for the creation of an Ombudsman for the Northwest Territories.

The Committee found that opinion was divided on the need for an office of the Ombudsman, and throughout the review process, the Committee received many requests for more details about what an Ombudsman is supposed to do. In its report, SCOL concluded that a second Legislative Action Paper should be prepared for tabling, which would contain specific options, a focus on the potential powers, duties and jurisdiction of the Ombudsman, a model for community access, and a plan for coordinating Ombudsman activities with the office of the Official Languages Commissioner and Access to Information legislation.

**Access to Information**

In the Winter Session, the Minister for Justice will be introducing draft legislation to provide for an Access to Information and Protection of Privacy regime. This draft legislation includes provisions, now fairly standard across Canada, for an Access and Privacy Commissioner. He or she would be an official accountable to the Legislative Assembly who receives and makes recommendations in respect of complaints and requests for review of decisions of a department or other government agency relating to access to information or the protection of privacy.

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## Office of Ombudsman

There is some overlap between the functions of an Access and Privacy Commissioner and an Ombudsman. Indeed, the Access and Privacy Commissioner is a type of Ombudsman. However, the duties of the former are much more specific, being restricted to matters of access to information and protection of privacy, whereas the jurisdiction of an Ombudsman can allow for recommendations addressing broad issues of "fairness" in the treatment of individuals by government, usually in the context of particular complaints.

A request for access to information by an individual may be linked to a grievance that he or she has been treated unfairly by government, but a successful access application will not necessarily address the grievance. An Ombudsman, however, can recommend a resolution which addresses and goes to the heart of the grievance.

Indeed, it is likely that for the average person, the flexibility and range of options available to an Ombudsman will make the services of that office more useful than those available from the office of the Access and Privacy Commissioner.

Therefore, with the establishment of the Office of Access and Privacy Commissioner, it makes sense to add the duties of Ombudsman to those of the Access and Privacy Commissioner.

These functions are administered together in two Canadian provinces, Manitoba and New Brunswick, and also in Australia and New Zealand.

Note, however, that the Access and Privacy Commissioner does not get involved in a complaint under Access to Information and Protection of Privacy legislation until a request for information or correction of personal information has been made and dealt with by the Department or Agency in question.

### **Official Languages Commissioner**

The Official Languages Commissioner is indeed an Ombudsman, but with a mandate which is much narrower than that normally associated with the office of Ombudsman.

The Official Languages Commissioner is responsible for:

- ° promoting Official Languages to increase public awareness of the needs and aspirations of Official Language groups in the NWT;

- monitoring language services and programs within institutions of the Legislative Assembly and GNWT, to ensure they adequately meet the obligations set out in the Official Languages Act and any other Act or regulation relating to the status and use of Official Languages;
- resolving complaints that appropriate services and programs are not available or that a person's rights have been infringed or denied; and
- making recommendations to institutions of the Legislative Assembly and GNWT to improve language services and programs or to amend the Official Languages Act or any act or regulation relating to the status and use of Official Languages.

The demand for coordination of the functions of the Access and Privacy Commissioner, Ombudsman and Official Languages Commissioner leads to a number of options.

Option #1 A complete integration of the three functions, with one administration and one official, vested with the duties of all three positions.

Option #2 A partial integration, with a joint administration, but the Official Languages Commissioner would be vested only with the duties of that office.

Option #3 The Official Languages Commissioner would maintain a separate office and administration, and coordination would be dealt with on an ad hoc basis between the Official Languages Commissioner and the Ombudsman/Access and Privacy Commissioner.

Option #1 has obvious cost advantages, but the disadvantage of a blurring of roles; the public might perceive this to be a downgrading of a commitment to official languages.

Option #2 has similar cost advantages, together with the advantages in dedicating a Commissioner to official languages.

Option #3 has the advantage of dedicating an office exclusively to official languages.

## Role of the Ombudsman

The International Bar Association in 1974 defined the Ombudsman as:

*An office provided for by the constitution or by action of the legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his/her own motion, and who has the power to investigate, recommend corrective action and issue reports.*

The office of Ombudsman originated in Sweden and has been adopted throughout the World. It has been adapted to the particular circumstances of differing jurisdictions.

The common principles applying to the office are:

- ° *The Ombudsman must be independent.*

This covers questions such as: who is eligible, who appoints, term of appointment and who can remove the Ombudsman and under what circumstances.

- ° *The Office must be adequately resourced.*

How can it be assured within the system of government budgeting that the Ombudsman will have the resources to do his or her work?

- ° *The Ombudsman must be accessible to the public.*

What measures can be introduced to ensure maximum accessibility to the public? This usually means that formality in the making of complaints is discouraged; the Ombudsman may initiate an investigation without a complaint and non-governmental organizations, MLA's and the Legislature itself can require an investigation by the Ombudsman.

- ° *The Ombudsman complements - not replaces - existing institutions in ensuring that the grievances of the public are addressed.*

Thus, the Ombudsman does not investigate complaints when legal and other remedies are available, but is there to provide a remedy when administrative and other avenues of recourse are unavailable.

- *The Office of Ombudsman is a resource to the public administration.*

The Ombudsman is not an adversary of the bureaucracy. Indeed, good relations with the bureaucracy are essential. A properly functioning Ombudsman facilitates public confidence in the fairness of the public administration, and the intervention of the Ombudsman should improve the efficiency and effectiveness of the bureaucracy.

The model being considered for the NWT is that which has been adopted by the provinces. The first Ombudsman was established in Alberta in 1967, and thereafter every province except PEI introduced Ombudsman legislation. (However, Newfoundland repealed its legislation in 1990.)

This model also blends well with proposed Access to Information and Protection of Privacy legislation. For example, both the Ombudsman and Access and Privacy Commissioner have the power to recommend solutions, not enforce decisions, and Cabinet and Legislative Assembly decisions are not reviewable.

The central features of this model are:

- The Ombudsman is not a "human rights commission" with powers deriving from provincial human rights legislation;
- The mandate of the Ombudsman covers only the public sector, not the private sector;
- A complaint must be based on an act or omission of a territorial government agency, official or employee - jurisdiction does not extend to federal agencies, officials or employees;
- The Ombudsman has no powers with respect to the RCMP because it is a federal institution and there is a process of public grievance;
- The courts and court administrations are excluded from the jurisdiction of the Ombudsman;
- Complaints arising from the action or inaction of a lawyer acting on behalf of or giving advice to an agency, official or employee are exempted from the jurisdiction of the Ombudsman;

## Office of Ombudsman

- ° The main function of the Ombudsman is to investigate complaints of individuals concerning fairness in the treatment of individuals by government agencies and officials and employees of government - complaints concerning the action or inaction of the Legislative Assembly, Cabinet or members of the Legislative Assembly are outside the jurisdiction of the Ombudsman;
- ° The Ombudsman can only recommend corrective action - the Ombudsman has no powers of enforcement;
- ° The Ombudsman may also act in the absence of a complaint and conduct an investigation, recommend corrective action and issue a report;
- ° The Office is established by territorial statute, and does not have constitutional protection;
- ° The Ombudsman is independent and reports to the Legislative Assembly, not the Executive;
- ° Generally speaking, the Ombudsman has no jurisdiction when there is a right of appeal under other legislation, but the fact that there has been an appeal does not in itself remove the jurisdiction of the Ombudsman.

### **Community Accessibility**

Accessibility to the Ombudsman in the NWT will be enhanced by the system of community based resources being established to facilitate access to the Access to Information and Protection of Privacy regime. Individuals will assist individuals at the community level to make applications under the Access and Privacy legislation. They will be paid on a fee for service basis. They could also assist people in submitting grievances to the Ombudsman.

### **Finances**

The costs of the Ombudsman office are significantly reduced if the duties of the Ombudsman are added to those of the Access and Privacy Commissioner. The costs, additional to those estimated for the Access and Privacy Commissioner, will basically be in the area of the cost to the Ombudsman's office (and the corresponding costs to departments) of conducting additional investigations.

Assuming ten additional investigations at \$10,000 per investigation will add \$100,000 to the budget. This does not include the additional administrative costs to the office of the Commissioner/Ombudsman based on the larger volume of complaints and investigations than those estimated to result from Access to Information complaints.

**Description of Ombudsman Legislation**

A description of the elements of Ombudsman legislation is attached as Appendix A.

**Recommended Course of Action**

1. If Access and Privacy legislation is enacted and it provides for the office of Access and Privacy Commissioner, Ombudsman legislation should be developed on the understanding that the duties of Access and Privacy Commissioner and Ombudsman would be exercised by the same person and administrative resources shared.
2. Ombudsman legislation would not be proclaimed until at least two (2) years after the introduction of the Access and Privacy regime.
3. Decisions on whether the office of Official Languages Commissioner should be merged with the Access and Privacy Commissioner cum Ombudsman should be postponed until the effectiveness of merging the Ombudsman and Access and Privacy Commissioner had been assessed.

## **Description of Ombudsman Legislation**

The following description of an NWT Ombudsman Act is based upon similar Acts from the provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. The description is organized into headings, and prominent sections are emphasized. Where unique, references are made to corresponding sections from provincial Ombudsman Acts.

### **N.W.T. OMBUDSMAN ACT**

#### **Interpretation**

The terms used in the Act will be defined, especially "department", "agency" or other description of institutions subject to the investigative powers of the Ombudsman.

#### **Appointment of Ombudsman**

The Ombudsman shall be appointed as an officer of the Legislative Assembly to exercise the powers and preform the duties prescribed by the Act.

The Commissioner shall, on the recommendation of the Legislative Assembly, appoint the Ombudsman.

The Ombudsman shall be appointed for a specified term (e.g. five to seven years) and may be reappointed for a further term.

The Ombudsman must be a Canadian citizen.

#### **Remuneration**

The Ombudsman shall be paid out of the Consolidated Revenue Fund, a salary at a rate fixed by the Commissioner. [Coordinate with the Access and Privacy Bill.]

The salary of the Ombudsman shall not be reduced except on resolution of the Legislative Assembly.

The Ombudsman shall be reimbursed for reasonable travelling and out of pocket expenses necessarily incurred in the discharge of the Ombudsman's duties.

The Ombudsman shall not hold another office or engage in any other employment (except possibly the office of Access and Privacy Commissioner and/or Language Commissioner.)



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### Resignation

Resignation of the Ombudsman may be effected at any time by giving written notice to the Speaker of the Legislative Assembly or the Clerk of the Legislative Assembly if there is no Speaker or if the Speaker is absent from the Northwest Territories.

### Removal or Suspension

The Commissioner on a resolution of the Legislative Assembly carried by a vote of 2/3 of the members of the Assembly voting thereon, may remove the Ombudsman from office or suspend the Ombudsman for reason of disability, neglect of duty, misconduct or bankruptcy.

When the Legislative Assembly is not in session, the Commissioner may suspend the Ombudsman for reason of disability, neglect of duty, misconduct or bankruptcy proved to the satisfaction of the Commissioner, but the suspension shall not continue beyond the end of the next ensuing session of the Legislative Assembly.

Where the Office of the Ombudsman is vacant, or the Ombudsman is suspended, the Commissioner shall appoint an acting Ombudsman to hold office until another Ombudsman is appointed or the suspension has been dealt with in the Assembly.

### Oath of Office

The Ombudsman shall, before entering upon the duties of the Office of the Ombudsman take and subscribe before the Speaker of the Legislative Assembly or the Clerk of the Legislative Assembly an oath that he will faithfully and impartially perform the duties of the Ombudsman and not divulge confidential information received by him except in accordance with the Act.

### Office of the Ombudsman

The Office of the Ombudsman shall consist of the Ombudsman, and such persons or positions as are required to assist the Ombudsman in the efficient administration of this Act.

The application of *The Public Service Act* and *The Financial Administration Act* to the Ombudsman and staff of the Office will be described.

Every person holding an office or appointment under the Ombudsman shall, before beginning the duties assigned, take an oath.

**Confidentiality**

The Ombudsman and every person employed under the Ombudsman shall, subject to this Act, maintain confidentiality in respect of all matters that come to their knowledge in the performance of their duties under this Act.

However, the Ombudsman may disclose in a report made by the Ombudsman under this Act, any matter that the Ombudsman considers necessary to disclose in order to establish grounds for the Ombudsman's conclusions and recommendations.

**Powers and Duties of Ombudsman in matters of Administration**

The Ombudsman, on complaint or on the Ombudsman's own initiative, may investigate

- (a) a decision or recommendation made;
- (b) an act done or omitted; or
- (c) a procedure used by a department or agency or by any officer, employee or member whereby a person is or may be aggrieved.

The powers and duties conferred on the Ombudsman may be exercised and performed notwithstanding a provision in an Act to the effect that

- (a) a decision, recommendation or act is final;
- (b) no appeal lies in respect of it; or
- (c) no proceeding or decision of the authority whose decision, recommendation or act it is shall be challenged, reviewed, quashed or called into question.

The Legislative Assembly or any of its committees may at any time refer a matter to the Ombudsman for investigation and report and the Ombudsman shall subject to any special directions, investigate the matter and report back as the Ombudsman thinks fit.

**Jurisdiction of Ombudsman**

Nothing in this Act authorizes the Ombudsman to investigate:

- any decision, recommendation, act or omission where there is under any Act a right of appeal or objection or a right to apply for a review on the merits of the case to any court or to any tribunal constituted by or under any Act until after that right of appeal or objection or application has been exercised or until after the time prescribed for the exercise of that right has expired, or

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any decision, recommendation, act or omission of any person acting as a solicitor for a department or agency or acting as counsel to the department or agency in relation to a proceeding.

If any question arises as to whether the Ombudsman has jurisdiction to investigate any case or class of cases under this Act, the Ombudsman may apply to the Supreme Court of the Northwest Territories for a declaratory order determining the question.

### **Complaint to Ombudsman**

Provincial Acts usually provide that every complaint must be made in writing. It may be desirable to modify this in the NWT, and to provide for complaints to be made on behalf of persons who are unable to act without assistance.

Notwithstanding any enactment, when any letter written by or on behalf of a person confined to a federal or a territorial correctional institution or to a hospital or other like facility, or by a person in the custody of another person for any reason, is addressed to the Ombudsman, it shall be mailed or forwarded immediately, unopened, to the Ombudsman by the person in charge; and a letter from the Ombudsman to such a person shall be forwarded to that person in a like manner.

### **Refusal to Investigate**

The Ombudsman may exercise the discretionary power to refuse to investigate or cease to investigate any complaint for certain reasons such as delay in bringing the complaint, the trivial nature of the complaint, lack of interest by the complainant if the complaint is brought on behalf of another person and it is not in the public interest to pursue the matter.

In any case where the Ombudsman decides not to investigate or further investigate a complaint, the complainant shall be informed of that decision in writing and may be informed of the reasons.

### **Ombudsman to notify**

Before investigating any matter under this Act, the Ombudsman shall inform the deputy minister or administrative head, as the case may be, of the intention to make the investigation.

The Ombudsman may exercise the discretionary power to consult with any Minister who is affected by the investigation any time during or after the investigation.

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If, during or after an investigation, the Ombudsman is of the opinion that there is evidence of any breach of duty or misconduct on the part of any officer or employee, the Ombudsman shall refer the matter to the deputy minister or administrative head, as the case may be.

### **Private Investigations**

Every investigation by the Ombudsman under this Act shall be conducted in private.

Information, either oral or written, considered appropriate may be received from any person at the discretion of the Ombudsman.

It is not necessary for the Ombudsman to hold any hearing and no person is entitled as of right to be heard by the Ombudsman, but if at any time it appears to the Ombudsman that there is sufficient grounds for the making of a report or recommendation in respect of any matter that may adversely affect any department or agency, they must be given the opportunity to make representations in respect of the matter.

### **Power to obtain Information**

The Ombudsman may:

at any time enter, remain on and inspect all of the premises occupied by a department or agency, converse in private with any person there and otherwise investigate matters within the jurisdiction of the Ombudsman;

require a person to furnish information or produce a document or thing in that person's possession or control that relates to an investigation at a time and place specified by the Ombudsman whether or not that person is past or present member or employee and whether or not the document or thing is in the custody or under the control of the department or agency;

make copies of information furnished or a document or thing produced pursuant to the exercise of these powers;

summon and examine on oath any person who the Ombudsman believes is able to give information relevant to an investigation, whether or not that person is a complainant or a member or employee of a department or agency, and for that purpose may administer an oath; and

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receive and accept, on oath or otherwise, whether or not it would be admissible in court, evidence which the Ombudsman considers appropriate.

Where the Ombudsman obtains a document or thing under these powers and the department or agency requests its return, the Ombudsman shall within 48 hours after receiving the request return it, but the Ombudsman may again require its production in accordance with these powers. [BC]

### **Restriction on Investigation by Minister**

Consistent with other provincial legislation, the Ombudsman would not be able to enter premises, require an answer to be given or a document or thing produced, if the Minister of Justice certified and reported to the Legislative Assembly that it might:

- (a) interfere with or impede the investigation or detection of an offence;
- (b) result in or involve the disclosure of deliberations of the Executive Council; or
- (c) result in or involve the disclosure of proceedings of the Executive Council or a committee of it, relating to matters of a secret or confidential nature and that the disclosure would be contrary or prejudicial to the public interest.

However, a rule of law that authorizes or requires the withholding of a document or thing, or the refusal to disclose a matter in answer to a question, on the ground that the production or disclosure would be injurious to the public interest does not apply to production of the document or thing or the disclosure of the matter to the Ombudsman.

Where a person is bound to maintain confidentiality in respect of a matter only by virtue of an oath under the Public Service Act or a rule of law referred to in subsection (2), that person shall supply information, answer any question or produce any document or things on the request of the Ombudsman, unless the Minister of Justice certifies as above. [BC]

However, the legislation can recognize that there are cases where other legislation imposes a duty to maintain secrecy or non-disclosure which this legislation does not over-ride.

**Defence for certain Offenses**

Except for perjury, no statement in the course of an investigation is admissible as evidence in any court or other proceedings.

No person is guilty of an offence against any other Act by reason of compliance with any request or requirement of the Ombudsman to furnish information or produce any document or thing or by answering any question in any investigation of the Ombudsman.

**Witness and Information Expenses**

Where any person is required by the Ombudsman to attend before the Ombudsman for the purpose of providing evidence, the person is entitled to the same fees, allowances, and expenses as if that person were a witness in the Supreme Court of the Northwest territories, and the provisions of any Act, regulation or rule in that behalf apply accordingly.

**Procedure after Investigation**

The Ombudsman after conducting an investigation shall report to the Minister and administrative head of a department or agency and make any recommendation the Ombudsman considers appropriate when the Ombudsman concludes that:

- ° a decision, recommendation, act or omission that was the subject matter of the investigation was
  - (i) contrary to law;
  - (ii) unjust, oppressive or improperly discriminatory;
  - (iii) made, done or omitted pursuant to a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory;
  - (iv) based in whole or in part on a mistake of law or fact or on irrelevant grounds or considerations;
  - (v) - related to the application of arbitrary, unreasonable or unfair procedures; or
  - (vi) otherwise wrong;
- ° in doing or omitting an act or in making or acting on a decision or recommendation, a department or agency
  - (i) did so for an improper purpose;
  - (ii) failed to give adequate and appropriate reasons in relation to the nature of the matter; or
  - (iii) was negligent or acted improperly; or
- ° there was unreasonable delay in dealing with the subject matter of the investigation.

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The Ombudsman may recommend that

- (a) a matter be referred to the appropriate authority for further consideration;
- (b) an act be remedied;
- (c) an omission or delay be rectified;
- (d) a decision or recommendation be cancelled or varied;
- (e) reasons be given;
- (f) a practice, procedure or course of conduct be altered;
- (g) an enactment or other rule of law be reconsidered; or
- (h) any other steps be taken.

### **Department or Agency to notify Ombudsman of Steps Taken**

The Ombudsman may request to be notified within a specified time of the steps that have been taken or are proposed to be taken to give effect to the recommendations or report.

If within a reasonable time after a request by the Ombudsman has been made, no action is taken that the Ombudsman believes adequate or appropriate, the Ombudsman may after considering any reasons given, submit a report to the Commissioner and after that, may make such report to the Legislative Assembly respecting the matter as the Ombudsman considers appropriate.

The Ombudsman shall attach to every report sent to the Commissioner or the Legislative Assembly, a copy of any comments made by or on behalf of the authority concerned.

Where the Ombudsman makes a recommendation or report, the Ombudsman shall inform the complainant within a reasonable time of the result of the investigation.

### **Ombudsman not subject to Review**

No proceeding of the Ombudsman shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of the Ombudsman is liable to be challenged, reviewed, quashed or called in question in any court.

### **Proceedings Privileged**

No proceedings lie against the Ombudsman, or against any person holding any office or appointment under the Ombudsman, for anything that person may do or report or say in the course of the exercise or intended exercise of that person's duties under this Act, unless it is shown that person acted in bad faith.

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The Ombudsman and any person holding any office or appointment, shall not be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to that person's knowledge in the course performing duties as defined by this Act.

### **Delegation**

The Ombudsman may in writing delegate to any person or class of persons any of the Ombudsman's powers or duties under this Act, except the power of delegation or to make a report under this Act.

A delegation under this section is revocable at will and does not prevent the exercise at any time by the Ombudsman of a power so delegated.

A delegation may be made subject to terms the Ombudsman considers appropriate.

Where the Ombudsman by whom a delegation is made ceases to hold office, the delegation continues in effect so long as the delegate continues in office or until revoked by a succeeding Ombudsman.

A person purporting to exercise power of the Ombudsman by virtue of a delegation under this section shall, when requested to do so, produce evidence of that person's authority to exercise the power.

### **Annual Report**

The Ombudsman shall report annually on the affairs of the Office of the Ombudsman to the Speaker of the Legislative Assembly, who shall cause the report to be laid before the Legislative Assembly as soon as possible.

Where the Ombudsman considers it to be in the public interest or in the interest of a person or department or agency, the Ombudsman may make a special report to the Legislative Assembly or comment publicly respecting a matter relating generally to the exercise of the duties of the Ombudsman under this Act or to a particular case investigated by the Ombudsman.

### **Rules**

The Commission on the recommendation of the Legislative Assembly shall make rules for the guidance of the Ombudsman in the exercise of the Ombudsman's powers and performance of duties as defined by this Act. Rules shall be tabled in the Legislative



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Assembly at the first opportunity and the Legislative Assembly shall have thirty (30) days to review and comment, prior to them coming into effect.

Subject to this Act and any rules made as above, the Ombudsman may determine procedure and the procedure for those persons employed under the Ombudsman in the exercise of the powers conferred and the performance of duties imposed by this Act.

### Offenses

Any person is guilty of an offence and is liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment to a term not exceeding three months or to fine and imprisonment who:

- (a) without lawful justification or excuse, intentionally obstructs, hinders or resists the Ombudsman or another person in the exercise of power or duties under this Act;
- (b) without lawful justification or excuse, refuses or intentionally fails to comply with a lawful requirement of the Ombudsman or another person under this Act;
- (c) intentionally makes a false statement to or misleads or attempts to mislead the Ombudsman or another person in the exercise of powers or duties under this Act; or
- (d) violates an oath taken under this Act.

### Additions to Schedule

The Commissioner may by order add to the Schedule of departments and agencies.

### Other Remedies

The provisions of this Act are in addition to the provisions of any other Act or rule of law under which any remedy, right of appeal or objection is provided for any person, or any procedure is provided for inquiry into or investigation of any matter and nothing in this Act limits or affects any such remedy, right of appeal, objection or procedure.