



PARLIAMENT OF VICTORIA
Accountability and Oversight Committee

**Inquiry into
methodologies and
outcomes from Victorian
Ombudsman reports
tabled in the Parliament**

Parliament of Victoria
Accountability and Oversight Committee

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Committee functions

The Accountability and Oversight Committee is constituted under Section 6A of the *Parliamentary Committees Act 2003*. The Committee is also granted powers and responsibilities under the *Ombudsman Act 1973*.

Parliamentary Committees Act 2003, Section 6A **Accountability and Oversight Committee**

1. The functions of the Accountability and Oversight Committee are—
 - a. to monitor and review the performance of the functions and exercise of the powers of the Information Commissioner; and
 - b. to consider and investigate complaints concerning the Information Commissioner and the operation of the Office of the Victorian Information Commissioner; and
 - c. to report to both Houses of Parliament on any matter relating to—
 - i. the performance of the functions and the exercise of the powers of the Information Commissioner; and
 - ii. any complaint concerning the Information Commissioner and the operation of the Office of the Victorian Information Commissioner—
that requires the attention of Parliament; and
 - d. to examine the annual report of the Information Commissioner and any other reports by the Commissioner and report to Parliament on any matters it thinks fit concerning those reports; and
 - e. to inquire into matters concerning freedom of information referred to it by the Parliament and to report to Parliament on those matters;
 - f. to monitor and review the performance of the duties and functions of the Victorian Inspectorate in respect of Ombudsman officers or the Judicial Commission; and
 - g. to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Victorian Inspectorate in respect of Ombudsman officers or the Judicial Commission that require the attention of the Parliament; and
 - h. to examine any reports made by the Victorian Inspectorate in respect of Ombudsman officers or the Judicial Commission; and
 - i. the functions conferred on the Committee by the *Ombudsman Act 1973*; and
 - j. if so required or permitted under this Act, to inquire into, consider and report to Parliament on the operation of the *Judicial Commission of Victoria Act 2016*.
2. Despite anything to the contrary in subsection (1), the Accountability and Oversight Committee cannot—
 - a. reconsider a decision of the Information Commissioner or Public Access Deputy Commissioner in relation to a review of a particular matter; or
 - b. reconsider any recommendations or decisions of the Information Commissioner or Public Access Deputy Commissioner in relation to a complaint under the *Freedom of Information Act 1982*; or

- ba. reconsider any findings in relation to an investigation under the *Freedom of Information Act 1982*; or
- bb. reconsider the making of a public interest determination under the *Privacy and Data Protection Act 2014*; or
- bc. reconsider the approval of an information usage arrangement under the *Privacy and Data Protection Act 2014*; or
- bd. reconsider a decision to serve a compliance notice under the *Privacy and Data Protection Act 2014*; or
- c. investigate a matter relating to particular conduct the subject of any report made by the Victorian Inspectorate in respect of an Ombudsman officer; or
- d. review any decision to investigate, not to investigate or to discontinue an investigation of, a particular complaint made to the Victorian Inspectorate in accordance with the *Victorian Inspectorate Act 2011* in respect of an Ombudsman officer; or
- e. review any findings, recommendations, determinations or other decisions of the Victorian Inspectorate in relation to a particular complaint made to, or investigation conducted by, the Victorian Inspectorate in accordance with the *Victorian Inspectorate Act 2011* in respect of an Ombudsman officer; or
- f. disclose any information relating to the performance of a duty or function or exercise of a power by the Victorian Inspectorate which may—
 - i. prejudice any criminal proceedings or criminal investigations; or
 - ii. prejudice an investigation being conducted by the Ombudsman, the IBAC or the Victorian Inspectorate; or
 - iii. contravene any secrecy or confidentiality provision in any relevant Act; or
- g. investigate the conduct or capacity of a judicial officer or a non-judicial member of VCAT; or
- h. examine the merits or basis of a complaint or referral which is being or has been considered under the *Judicial Commission of Victoria Act 2016*; or
- i. reconsider the findings, recommendations, determinations or other decisions made or actions taken by the Judicial Commission or an investigating panel under the *Judicial Commission of Victoria Act 2016* in relation to a complaint, referral or investigation under that Act.

Ombudsman Act 1973, Section 26H
Oversight by Accountability and Oversight Committee

1. The functions of the Accountability and Oversight Committee under this Act are—
 - a. to monitor and review the performance of the duties and functions of the Ombudsman;
 - b. to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Ombudsman that requires the attention of the Parliament;
 - c. to examine any reports by the Ombudsman that are laid before a House of the Parliament.
2. Despite anything to the contrary in subsection (1), the Accountability and Oversight Committee cannot—

Committee functions

- a. investigate a matter relating to particular conduct the subject of any particular complaint, protected disclosure complaint, referred complaint or referred matter;
- b. review any decision to investigate, not to investigate or to discontinue an investigation of, a particular complaint, protected disclosure complaint, referred complaint or referred matter;
- c. review any findings, recommendations, determinations or other decisions of the Ombudsman in relation to a particular complaint, protected disclosure complaint, referred complaint or referred matter or an investigation conducted by the Ombudsman;
- d. disclose any information relating to the performance of a function or duty or the exercise of a power by the Ombudsman which may—
 - i. prejudice any criminal proceedings or criminal investigations, or investigations by the Ombudsman, the IBAC or the Victorian Inspectorate; or
 - ii. contravene any secrecy or confidentiality provision in any relevant Act.

Ombudsman Act 1973, Section 26I

Powers and procedures of Accountability and Oversight Committee

The powers and procedures of a Joint Investigatory Committee under the *Parliamentary Committees Act 2003* apply to the Accountability and Oversight Committee in the performance of its functions under this Act.

Committee membership



Mr Neil Angus MP
Chair
Forest Hill



Ms Jaclyn Symes MLC
Deputy Chair
Northern Victoria



Mr Michael Gidley MP
Mount Waverley



Hon Wade Noonan MP
Williamstown
(from February 2018)



Mr Luke O'Sullivan
Northern Victoria



Mr James Purcell MLC
Western Victoria



Mr Nick Staikos MP
Bentleigh
(until February 2018)



Hon Marsha Thomson MP
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This report is available on the Committee's website.

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Chair's foreword

I am pleased to present the report of the Victorian Parliament's Accountability and Oversight Committee on methodologies and outcomes from Victorian Ombudsman reports tabled in the Parliament.

This report examines the work of the Victorian Ombudsman, as an independent parliamentary officer, in initiating inquiries in the public interest without fear or favour.

As the Ombudsman told the Committee, responsible government is underpinned by the institutions of government that exist to serve the interests of the public. The Committee recognises that, while the Ombudsman cannot enforce her recommendations, she does monitor them and follows up on their progress. However, as Ms Glass told the Committee in her submission, to fully implement some of her recommendations will take long-term investment – beyond an electoral term – and sustained political will.

To date, the current Ombudsman has undertaken 30 investigations and own motion enquiries resulting in reports tabled in the Parliament, with over 125 recommendations made. In addition, during 2016-17 alone, the Ombudsman undertook twenty-five own motion enquiries and two investigations. Areas investigated by the Ombudsman ranged from care of patients in mental health facilities through to the transparency of local government decision making.

In terms of the response from Government departments and agencies to the Ombudsman's recommendations, a total of 50 per cent of recommendations made by the Ombudsman have been implemented, 38 per cent are in progress and the remaining 12 per cent are either accepted, partially accepted, in progress, no response required or not accepted.

The Committee has therefore sought to enhance the work of the Ombudsman by making three focused recommendations, that:

- the Victorian Ombudsman continue to report biennially to the Victorian Parliament on progress by agencies in implementing the Ombudsman's recommendations
- the Ombudsman Act be amended to require that Victorian Government departments, agencies and local councils subject to recommendations by the Victorian Ombudsman, submit to the Ombudsman an indicative short, medium and long term timeline by which agreed recommendations are expected to be implemented
- there be a legislative amendment that requires the Committee to hold regular hearings with the Ombudsman on the progress by government agencies and local councils in implementing recommendations made by the Ombudsman

These recommendations aim to provide greater accountability of government agencies and local councils when responding to the Ombudsman's recommendations.

The Ombudsman has also tabled in the Parliament, two reports into the implementation of her recommendations (June 2016 and July 2018). The Ombudsman's 2018 report on recommendations stated that the Ombudsman will re-investigate an issue to see whether the implementation of recommendations has effectively addressed the issue that led to the investigation.

The Ombudsman's report of July 2018 further referenced the investigation of a matter referred from the Legislative Council on 25 November 2015, involving an allegation that Australian Labor Party members of the Victorian Parliament misused members' electorate entitlements for party and political activities, in breach of the Parliament of Victoria's Members' Guide. This matter was not the focus of this inquiry and is being examined separately by Parliament's Legislative Council's Privileges Committee – in addition to investigation by Victoria Police.

This report comprises three chapters, which examine the Victorian Ombudsman's methodology for identifying issues for own motion enquiry and investigation, the Ombudsman's decision-making process for identifying systemic issues and what is in the public interest when investigating an authority's function, and the progress of government agencies in implementing recommendations contained in the Ombudsman's reports to the Victorian Parliament.

The Committee is grateful for the submissions received from the Victorian Ombudsman, the Department of Health and Human Services and the Department of Economic Development, Jobs, Transport and Resources. It was disappointing that other government departments did not provide a submission to the inquiry, despite the Committee individually writing to agency heads requesting a submission.

I would like to express my appreciation and thanks to all the people involved with the Committee in the production of this report: my Committee colleagues Ms Jaclyn Symes MLC (Deputy Chair), Mr Luke O'Sullivan MLC, Mr Michael Gidley MP, Mr James Purcell MLC, Hon Wade Noonan MP and Hon Marsha Thomson MP.

Finally, I wish to acknowledge the work of the Committee secretariat: executive officer Sean Coley, research officer Caitlin Grover, and administrative officer Sarah Catherall.

I commend this report to the Parliament.



Mr Neil Angus MP
Chair

Recommendations

4 Implementation of Victorian Ombudsman recommendations

RECOMMENDATION 1: That the Victorian Ombudsman continue to report biennially to the Victorian Parliament on progress by agencies in implementing the Ombudsman’s recommendations. 19

RECOMMENDATION 2: That the Ombudsman Act 1973 be amended to require that Victorian Government departments, agencies and local councils subject to recommendations by the Victorian Ombudsman, submit to the Ombudsman, an indicative timeline by which recommendations are expected to be implemented:

- in the short term (up to 12 months);
- in the medium term (1 to 3 years); or
- in the long term (over 3 years). 22

RECOMMENDATION 3: That the Victorian Government amend the Parliamentary Committees Act 2003 to provide a function to enable the Accountability and Oversight Committee to hold hearings into the status of implementation of Ombudsman recommendations by government agencies and local councils. 23

1.1 Background

This is the seventh report of the Victorian Parliament's Accountability and Oversight Committee (the Committee).

This report examines the methodologies of and outcomes from Victorian Ombudsman reports tabled in the Parliament.

1.2 The Accountability and Oversight Committee

The Committee was first established in February 2013 under the Parliamentary Committees Act 2003 as part of a new integrity regime in Victoria.¹

The Accountability and Oversight Committee was re-established in April 2015 in the 58th Parliament.

The Parliamentary Committees Act, the Ombudsman Act 1973 and the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017, all provide the Committee with powers to oversee the three integrity agencies the Committee has oversight over: the Victorian Ombudsman, Victorian Information Commissioner and the Victorian Inspector.

Under the legislation, the Committee is empowered to analyse the outputs of the Office of the Victorian information Commissioner (OVIC) and the Victorian Ombudsman and monitor their overall operational performance. In the case of the Victorian Inspectorate, the Committee oversees those aspects of the Victorian Inspectorate's work dealing with conduct of Victorian Ombudsman officers and OVIC officers.

1.3 The Committee's roles and responsibilities

The Committee's legislative functions include:

- monitoring and reviewing the performance — in respect of the functions and exercise of powers — of the Ombudsman and the OVIC
- considering and investigating complaints concerning the OVIC and the operation of the office of the OVIC
- examining the performance of the Victorian Inspectorate in relation to the Inspectorate's duties and functions in respect of the Ombudsman and Ombudsman officers and the Judicial Commission.

¹ *Parliamentary Committees Act 2003* (Vic), 110 of 2003.

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With the enactment of the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017, the Committee's role in relation to the Inspectorate was expanded to include the Inspectorate's duties and functions in respect of the Judicial Commission.²

1.4 Inquiry terms of reference

The inquiry, which was self-referenced by the Committee on 7 February 2018, required the Accountability and Oversight Committee to inquire into, consider and report, no later than 20 September 2018, on the following reference:

1. Assessing the methodologies used by the Victorian Ombudsman in identifying issues for investigation leading to own motion inquiries.
2. Examining the decision making process used by the Victorian Ombudsman in identifying any systemic issues with government departments, agencies and local councils, including determining what is in the public interest when investigating an authority's function.
3. Investigating progress of government agencies in implementing recommendations contained in the Ombudsman's reports to Parliament.

1.5 Evidence

In February 2018, the Committee advertised its Inquiry terms of reference and called for submissions. The Committee also wrote to the Victorian Ombudsman and Victorian Government departments requesting submissions. The Committee received and accepted submissions from the Victorian Ombudsman, the Department of Health and Human Services and the Department of Economic Development, Jobs, Transport and Resources. These submissions are available on the Committee's website (www.parliament.vic.gov.au/aoc).

The Committee also held a public hearing with the Victorian Ombudsman on 4 June 2018.

In her submission to the inquiry, the Ombudsman interpreted the terms of reference as being:

- the methodology applied in identifying issues for investigation
- the decision-making process for identifying systemic issues within government agencies
- the progress of government agencies in implementing the Ombudsman's recommendations.³

² Due to consequential amendments to the *Parliamentary Committees Act 2003* section 6A(1)(f).

³ Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 2.

1.6 Structure of the report

The report comprises four chapters. This chapter covers the role and responsibilities of the Committee and Victoria's oversight system generally.

The following three chapters examine the terms of reference in detail.

Chapter 2 examines the Victorian Ombudsman's methodology for identifying issues for own motion enquiry and investigation.

Chapter 3 examines the Victorian Ombudsman's decision-making process for identifying systemic issues and what is in the public interest when investigating an authority's function.

Chapter 4 examines the progress of government agencies in implementing recommendations contained in the Ombudsman's reports to the Victorian Parliament.

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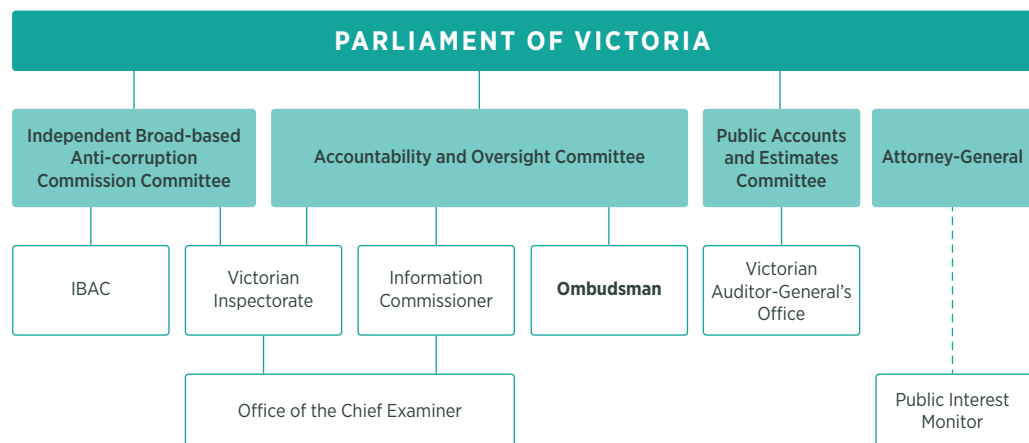
Victorian Ombudsman own motion enquiries and investigations

2.1 The Victorian Ombudsman

The Victorian Ombudsman investigates and resolves complaints concerning administrative actions taken by Victorian Government departments, public statutory authorities and by officers of municipal councils.

The Ombudsman’s functions contribute to state and local government agencies being accountable to the public and the Parliament.

The following diagram illustrates the role of the Ombudsman within Victoria’s overarching accountability and oversight framework.



2.2 Victorian Ombudsman’s own motion powers

The Victorian Ombudsman, Ms Deborah Glass, has own motion powers to conduct an enquiry or investigation into administrative action taken by an authority without receiving a complaint or a referral.⁴

2.2.1 Using own motion powers

The Ombudsman is most likely to use own motion powers when:

- there may be a systemic problem within an authority

⁴ *Ombudsman Act 1973* (Vic), 8414 of 1973, sections 13A and 16A.

- the administrative action affects a vulnerable person or community that may have limited capacity to complain themselves
- it is otherwise in the public interest to do so.⁵

2.2.2 Identifying issues

The process of identifying issues for own motion enquiry or investigation involves monitoring complaints data, assessing approaches to the Ombudsman and through staff meetings, according to the Ombudsman's submission.⁶

Where a potential systemic issue is identified, Ombudsman officers assess whether the issue may be resolved informally or warrants investigation.

2.2.3 Systemic issues

An issue is considered by the Ombudsman to be systemic if it has either a broad effect on the community or a disproportionate impact on specific groups within the community, and is of social importance.⁷

The Ombudsman's submission states that 'this is particularly the case where public administration appears to have an unintended effect on persons living with existing disadvantage or inadvertently contributes to a social, economic or legal inequity.'⁸

While systemic issues may impact on individuals in different ways, the Ombudsman's submission observes that they generally extend beyond one individual's interests and are often rooted in the policies, procedures and systems created by authorities to administer public services.⁹

When an enquiry or investigation is unnecessary

According to the Ombudsman, own motion enquiries typically take place before a matter proceeds to an own motion investigation.¹⁰

If an authority presents evidence that it knows about an issue under enquiry and is taking steps to address it, the Ombudsman is unlikely to undertake an investigation.¹¹

Similarly, an enquiry is unlikely to lead to an investigation if an authority agrees to change its policy or practice in response to enquiries from the Ombudsman's office.¹²

5 Victorian Ombudsman, *Own motion enquiries and investigations policy*, Office of the Ombudsman, Melbourne, p. 3.

6 Victorian Ombudsman, Submission No. 1, 16 April 2018, pp. 2-3.

7 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 2.

8 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 2.

9 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 2.

10 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 3.

11 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 3.

12 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 3.

In these circumstances, the Ombudsman’s office will monitor complaints to determine whether such implemented changes are effectively addressing the issue.¹³

The Ombudsman elaborated at the public hearing on 4 June 2018, on the reasons why she might decide against an investigation:

I may not investigate it because there is already something in motion that would remedy the issue. So it may be that there is a bill before Parliament, it may be there is already a lengthy discussion paper. It may be that there is a parliamentary committee looking at the issue and an inquiry is already on foot. There could be many possible reasons why I might say, “Well, an Ombudsman investigation is not going to add value at this point in time.”¹⁴

2.2.4 Proposing investigation

The Ombudsman’s submission to the Committee states that potential own motion issues are assessed by senior managers in the Ombudsman’s Office through the application of a matrix to determine the appropriate course of action. This process involves assessing an issue in relation to:

- the Ombudsman’s Strategic Framework
- the impact of the issue on demographic groups experiencing underlying disadvantage or barriers to administrative justice
- the effect on a person or persons’ human rights
- the risks of not investigating the issue, such as continued non-compliance with the law or an application of the law that leads to unintended consequences
- previous or current reports on the issue and the value of an investigation.¹⁵

According to the Ombudsman’s submission, this process also allows for consideration of alternatives to investigation, including the development of guidelines on best practice or holding discussions with stakeholders to identify options for resolution.¹⁶

The Committee is unable to benchmark the process by which the Ombudsman identifies issues to be investigated against other jurisdictions. This is because this information isn’t publicly available. Nonetheless, the Committee believes the Ombudsman’s approach to be sound.

¹³ Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 3.

¹⁴ Deborah Glass, Victorian Ombudsman, Office of the Ombudsman, *Transcript of evidence*, Melbourne, 4 June 2018, p. 3.

¹⁵ Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 4.

¹⁶ Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 5.

2.2.5 Limitations

The Ombudsman is prevented by legislation from conducting an own motion enquiry or investigation into the following:

- where a matter is suspected to involve corrupt conduct¹⁷
- administrative action taken under the Freedom of Information Act 1982¹⁸
- the terms and conditions of employment of a person employed by or in an authority unless the Ombudsman considers investigation necessary to avoid injustice¹⁹
- where a complainant can appeal to a tribunal, unless it is unreasonable for them to do so or where investigation is necessary to avoid injustice²⁰
- where a complainant can undertake court action.²¹

2.3 Investigations and enquiries of the Victorian Ombudsman

The following is a list of investigations and enquiries undertaken by the current Ombudsman during her tenure, which resulted in reports being tabled in the Victorian Parliament:

- *Investigation into allegations of improper conduct in the Office of Living Victoria*²² (5 August 2014)
 - Regarding an ongoing failure by the Office of Living Victoria to comply with Victorian Government procurement policies and poor handling of conflicts of interest.
- *Investigation following concerns raised by Community Visitors about a mental health facility* (15 October 2014)
 - Regarding allegations of excessive force on patients in a mental health facility and the refusal of access to incident reports despite patient consent.
- *Investigation into an incident of alleged excessive force used by authorised officers* (12 February 2015)
 - Regarding alleged heavy-handed conduct of authorised officers on the Victorian public transport network and the subsequent review process.

¹⁷ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 16A(2)

¹⁸ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 16A(3).

¹⁹ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 16A(4).

²⁰ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 16A(5).

²¹ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 16A(6).

²² Victorian Ombudsman, Publications, viewed 4 July 2018, <<https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports>>.

- *Councils and complaints – a report on current practice and issues* (25 February 2015)
 - A Good Practice Guide to assist councils to improve complaint handling practices and ensure greater consistency in dealing with complaints.
- *Investigation into Department of Health oversight of Mentone Gardens, a supported residential service* (15 April 2015)
 - Regarding the loss of funds put up by elderly residents to secure their accommodation and care in a supported residential service that went into liquidation.
- *Investigation into allegations of improper conduct by officers of VicRoads* (10 June 2015)
 - Regarding a protected disclosure complaint referred by Independent Broad-based Anti-corruption Commission (IBAC) that some VicRoads enforcement officers avoided fines for speeding by claiming unjustifiable exemptions, which were approved on no or minimal evidence.
- *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight* (25 June 2015)/*Phase 2 – incident reporting* (9 December 2015)
 - Regarding the abuse of people with disability and ongoing issues with the management of incidents of abuse and how they are reported.
- *Conflict of interest by an Executive Officer in the Department of Education and Training* (3 September 2015)
 - Regarding an Executive Officer who negotiated and accepted a job with a company while he was responsible for investigating it.
- *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (17 September 2015)
 - Regarding the impact of the growth in the prison population on the provision of rehabilitation services and the subsequent effect on levels of reoffending.
- *Investigation of a protected disclosure complaint regarding allegations of improper conduct by councillors associated with political donations* (25 November 2015)
 - Regarding a case referred by IBAC that a councillor had offered, or had been involved in offering, favourable planning application committee decisions in return for financial donations.
- *Investigation into public transport fare evasion enforcement* (26 May 2016)
 - Regarding whether public transport fare evasion enforcement is fair and equitable, particularly in relation to the lack of a real right of review and on-the-spot penalties.
- *Investigation into the misuse of council resources* (9 June 2016)
 - Regarding misuse of public property by local council officers, as well as the compliance with and enforcement of codes of conduct by local councils.

- *Investigation into Casey City Council's Special Charge Scheme for Market Lane* (22 June 2016)
 - Regarding a complaint about an interest charge levied by Casey City Council for the cost of sealing an unmade road.
- *Investigation into the management of complex workers compensation claims and WorkSafe oversight* (13 September 2016)
 - Regarding unreasonable decisions of WorkSafe agents, which resulted in delays or cessation in payments, as well as rejection of claims by workers entitled to compensation.
- *Investigation into the transparency of local government decision making* (7 February 2017)
 - Regarding the transparency of the decision-making processes of local government in the relation to the review of the *Local Government Act* (1989).
- *Investigation into the Registry of Births, Deaths and Marriages' handling of a complaint* (7 February 2017)
 - Regarding delays in the provision of birth certificates to the mother of twins and the delay in providing a death certificate for one of the twins who died at just over four months. Poor complaint handling processes, as well as poor record-keeping and service failures were also investigated.
- *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville* (7 February 2017)
 - Regarding the suitability of youth justice facilities and conditions therein, as well as trends in youth justice.
- *Investigation into allegations of improper conduct by officers at the Mount Buller and Mount Stirling Resort Management Board* (21 March 2017)
 - Regarding the use of public funds by some of the senior management and board of the Mount Buller and Mount Stirling resorts.
- *Apologies* (2 May 2017)
 - Regarding when and how apologies are given to resolve complaints and why they are not used more often in appropriate cases.
- *Report into allegations of conflict of interest of an officer at the Metropolitan Fire and Emergency Services Board* (20 June 2017)
 - Regarding a senior public official who hired her two sons and failed to declare the relationships, and also falsified their CVs and coached them prior to interview.
- *Investigation into Victorian government school expulsions* (22 August 2017)
 - Regarding the increasing level of school expulsions, their fairness and proportionality, as well as the over-representation of vulnerable groups.

- *Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system* (7 September 2017)
 - Regarding the availability and effectiveness of alcohol and other drug services following contact with the criminal justice system, particularly in rural and regional Victoria.
- *Investigation into the management and protection of disability group home residents by the Department of Health and Human Services and Autism Plus* (17 October 2017)
 - Regarding a series of reported sexual assaults by one resident on another in a group home for people with a disability.
- *Investigation into the management of maintenance claims against public housing tenants* (30 October 2017)
 - Regarding unfair management of maintenance claims against public housing tenants, including wrongly assessing debts beyond a tenant's liability, sending correspondence to an address the tenant is known to have left and using VCAT to determine a debt.
- *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (30 November 2017)
 - Regarding Australia's intention to ratify the Optional Protocol to the Convention Against Torture and the obligations this creates in relation to the treatment of people in prison.
- *Investigation into the financial support provided to kinship carers* (13 December 2017)
 - Regarding the discrepancy between financial support by the State for kinship carers compared to foster carers.
- *Investigation of a matter referred from the Legislative Council on 25 November 2015* (27 March 2018)
 - Regarding the use of staff budget entitlements by ALP Members of Parliament prior to the 2014 state election, contrary to Parliament's Members' Guide.
- *Investigation into Maribyrnong City Council's internal review practices for disability parking infringements* (30 April 2018)
 - Regarding a complaint by Western Community Legal Centre in relation to Maribyrnong City Council's unfair internal review processes for dealing with fines.
- *Investigation into child sex offender Robert Whitehead's involvement with Puffing Billy and other railway bodies* (25 June 2018)
 - Regarding the employment of a convicted sex offender by Puffing Billy in a position which involved working with children.

- *Investigation into the administration of the Fairness Fund for taxi and hire car licence holders* (14 June 2018)
 - Regarding the management of a fund established to provide assistance for taxi and hire car licence holders experiencing significant financial hardship.

The Ombudsman has also tabled in the Parliament, two reports into the implementation of her recommendations (June 2016 and July 2018).

3

How the Victorian Ombudsman identifies systemic issues and determines what is in the public interest

3.1 Victorian Ombudsman's discretion

The Ombudsman has discretion to decide whether to conduct an enquiry, to commence an investigation or to decline to consider an issue altogether, as noted in the submission.²³

Action may be considered unnecessary or unjustifiable by the Ombudsman if:

- an issue has already been sufficiently dealt with by another body
- proposed changes to legislation may remedy an issue
- an authority is acting to resolve an issue
- it would not be an appropriate use of resources to make enquiries or investigate.²⁴

3.2 The public interest

While noting that the 'public interest' is not readily defined, the Ombudsman explains in her submission that responsible government is underpinned by the institutions of government and the officials and agencies of government that exist for the public, to serve the interests of the public.²⁵

Accordingly, the Ombudsman aims to enhance the good order and functioning of the public service for the overall benefit of the Victorian community by enquiring into grievances about the administrative decisions and actions of State Government agencies and local government.²⁶

In the Ombudsman's submission, she noted the principle of fairness and the lawful and proportionate use of power and discretion, which form part of the Ombudsman's oversight and review of public authorities.²⁷

23 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 5.

24 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 6.

25 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 6.

26 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 6.

27 Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 6.

3.2.1 Types of matters in the public interest

Examples of systemic issues more likely to be investigated by the Ombudsman to serve the public interest include:

- repeated application of law that is inconsistent with the purposes or overarching policy of the law
- an action that is known to have occurred on numerous occasions which has not been remedied through enquiries
- blanket application of policy or law without consideration of legislative discretion
- patterns in decision-making that do not reflect the law or standards of good administrative practice
- matters that have a broad impact on groups of individuals or the wider population
- erroneous decisions that are likely to reoccur because they are based on an authority's policies, practices or system.²⁸

3.3 Own motion enquiries and investigations undertaken

The following table shows the number of own motion enquiries and investigations during the current Ombudsman's tenure.

	2014-15	2015-16	2016-17
Enquiries	14	15	25
Investigations	4	4	2

The following is a list of own motion investigations by the Ombudsman:

- The care of patients in mental health facilities (15 October 2014)
 - Regarding allegations of excessive force on patients in a mental health facility and the refusal of access to incident reports despite patient consent.
- The use of excessive force by authorised officers on public transport (12 February 2015)
 - Regarding alleged heavy-handed conduct of authorised officers on the Victorian public transport network and the subsequent review process.
- The handling of complaints by local councils (1 September 2016)
 - *A Good Practice Guide* to assist councils to improve complaint handling practices and ensure greater consistency in dealing with complaints.
- The rehabilitation and reintegration of prisoners (17 September 2017)

²⁸ Victorian Ombudsman, Submission No. 1, 16 April 2018, pp. 6-7.

- Regarding the impact of the growth in the prison population on the provision of rehabilitation services and the subsequent effect on levels of reoffending.
- The report and investigation of abuse in the disability sector, phase 1 (25 June 2015) and phase 2 (9 December 2015)
 - Regarding the abuse of people with disability and ongoing issues with the management of incidents of abuse and how they are reported.
- The level of financial support provided to kinship carers (13 December 2017)
 - Regarding the discrepancy between financial support by the State for kinship carers compared to foster carers.
- Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre (30 November 2017)
 - Regarding Australia’s intention to ratify the Optional Protocol to the Convention Against Torture and the obligations this creates in relation to the treatment of people in prison.
- Victorian government school expulsions (22 August 2017)
 - Regarding the increasing level of school expulsions, their fairness and proportionality, as well as the over-representation of vulnerable groups.
- The transparency of local government decision making (7 February 2017)
 - Regarding the transparency of the decision-making processes of local government in the relation to the review of the *Local Government Act* (1989).
- The management of complex workers compensation claims and WorkSafe oversight. (13 September 2016)
 - Regarding unreasonable decisions of WorkSafe agents, which resulted in delays or cessation in payments, as well as rejection of claims by workers entitled to compensation.
- Investigation into child sex offender Robert Whitehead’s involvement with Puffing Billy and other railway bodies (25 June 2018)
 - Regarding the employment of sex offender Robert Whitehead with Puffing Billy, which involved working with children, despite a conviction for offences against children.
- Investigation into the administration of the Fairness Fund for taxi and hire car licence holders (14 June 2018)
 - Regarding poor management of a fund established to provide assistance for licence holders experiencing significant hardship as a result of reforms to the taxi and hire car industry.²⁹

Of note, the number of enquiries and investigations is higher than the number of Ombudsman reports tabled in Parliament, as not each enquiry or investigation results in a tabled report.

²⁹ Victorian Ombudsman, Publications, viewed 4 July 2018, <<https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports>>.

3.4 Investigating an authority's function in the public interest

To demonstrate how the Ombudsman determines what is in the public interest when investigating an authority's function, the Ombudsman, in both her submission to the inquiry and at the public hearing on 4 June 2018, provided a case study of the 2016 investigation into WorkSafe Victoria.

The own motion investigation into WorkSafe's handling of complex workers compensation claims was prompted by a significant number of complaints to the Victorian Ombudsman. Upon investigating the issue, the Victorian Ombudsman found unreasonable decision-making by WorkSafe agents. This included maintaining unreasonable decisions at conciliation, making decisions contrary to binding medical panel decisions, allowing employers to improperly influence their decision-making and providing inadequate internal review processes.³⁰

This finding was supported by evidence showing that a high level of decisions by agents were overturned when disputed by complainants, with:

- 58.5 per cent of decisions disputed at conciliation changed
- between 64 and 75 per cent of decisions disputed at court overturned or changed
- 71 per cent of decisions referred to a medical panel overturned.³¹

The Ombudsman concluded that the rejection or termination of legitimate claims on the basis of unreasonable decision-making caused complainants distress and genuine hardship, and created unnecessary costs and delays in the administration of workers compensation complaints.³²

Subsequent recommendations by the Ombudsman, to the Victorian Government and to WorkSafe, sought to address the identified weaknesses through legislative change, implementing oversight systems and transparency measures, as well as agent staff training.³³

The Ombudsman's report notes that WorkSafe accepted the recommendations,³⁴ as did the Victorian Government.³⁵

³⁰ Victorian Ombudsman, *Investigation into the management of complex workers compensation claims and WorkSafe oversight*, Office of the Ombudsman, Melbourne, 2016, p. 7.

³¹ Victorian Ombudsman, *Investigation into the management of complex workers compensation claims and WorkSafe oversight*, Office of the Ombudsman, Melbourne, 2016, p. 8.

³² Victorian Ombudsman, *Investigation into the management of complex workers compensation claims and WorkSafe oversight*, Office of the Ombudsman, Melbourne, 2016, p. 8.

³³ Victorian Ombudsman, *Investigation into the management of complex workers compensation claims and WorkSafe oversight*, Office of the Ombudsman, Melbourne, 2016, p. 163.

³⁴ Victorian Ombudsman, *Investigation into the management of complex workers compensation claims and WorkSafe oversight*, Office of the Ombudsman, Melbourne, 2016, p. 163.

³⁵ Government Accepts Ombudsman's Recommendations 12 September 2016, media release, Minister for Finance Hon Robin Scott MP.

4 Implementation of Victorian Ombudsman recommendations

4.1 Victorian Ombudsman recommendations

The Ombudsman develops recommendations according to the findings of an investigation to address shortcomings and improve public administration.

In her submission, the Ombudsman explained the process by which recommendations are developed:

Toward the end of an own motion investigation, my office often meets with the relevant authority to discuss solutions and consider its views on potential recommendations I may make. The purpose of these meetings is to ensure the recommendations I am minded to make will address any shortcomings identified by the investigation, can be practically implemented and are sustainable.³⁶

A copy of the draft report is provided to the principal officer of the authority, who is asked to consider and respond to the recommendations.³⁷

At the Committee's public hearing on 4 June 2018, the Ombudsman stated: 'in the course of developing recommendations, I will initially put a draft recommendation and if an agency convinces me that it is not feasible, then actually I will change it. I will not stick to my guns if I think that a recommendation that I have originally drafted is not going to achieve the kind of change I think it should.'³⁸

4.1.1 Assessing the progress of recommendations

When an investigation is completed, the Ombudsman writes to the principal officer and provides a copy of the finalised report and requests an update on the implementation of accepted recommendations.³⁹

According to the submission, the Ombudsman may continue to request updates on the progress of accepted recommendations until the Ombudsman is satisfied that they have been implemented.⁴⁰

³⁶ Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 7.

³⁷ Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 7.

³⁸ Deborah Glass, Victorian Ombudsman, Office of the Ombudsman, *Transcript of evidence*, Melbourne, 4 June 2018, p. 9.

³⁹ Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 7.

⁴⁰ Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 7.

Evaluation of the implementation of accepted recommendations is made by the Ombudsman's Portfolios and Administrative Improvement team. This process involves:

- assessing the periodic updates provided by authorities against the recommendations made
- considering the currency of recommendations, including whether changes to legislation render it unnecessary to monitor the progress of a recommendation
- requesting information that evidences implementation of a recommendation, such as copies of internal policies and procedures, correspondence between members of the public and the authority, and reports or outcomes to [sic] audits commissioned as a result of my investigation
- meeting with authorities to receive a briefing on the action it has taken, or will be taking, to implement recommendations
- monitoring new approaches to the Ombudsman to consider whether further enquiries or investigation is warranted.⁴¹

The Ombudsman's 2018 report on recommendations stated that the Ombudsman will reinvestigate an issue to see whether the implementation of recommendations has effectively addressed an issue.⁴²

As noted in Chapter 3, this was the case with the 2016 investigation into WorkSafe Victoria's oversight of complex workers' compensation claims.

Although all 17 recommendations were accepted by WorkSafe Victoria, the Ombudsman's office continues to receive large numbers of complaints about these issues.

The Ombudsman stated, 'given the impact of the workers compensation system on the lives of some particularly vulnerable people, I believe it is incumbent on me to have another look at it.'⁴³

4.1.2 Recommendations of the Victorian Ombudsman are not binding

It is important to note that the Ombudsman's recommendations are not binding.⁴⁴ This point was made by Department of Economic Development, Jobs, Transport and Resources (DEDJTR) Secretary Richard Bolt, who stated in the department's submission to the Inquiry:

⁴¹ Victorian Ombudsman, Submission No. 1, 16 April 2018, p. 8.

⁴² Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2018, p. 4.

⁴³ Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2018, p. 4.

⁴⁴ Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2016, p. 5.

Recommendations made by the Ombudsman may not all be fully implemented, and in some situations, not implemented. This outcome is consistent with the role of the Ombudsman as an oversight agency that is not charged with directing agencies to implement prescribed practices.⁴⁵

This point has also been made by the Ombudsman who, in explaining the relationship between Ombudsman recommendations and government policy, stated:

I cannot enforce my recommendations - rightly so, as many involve policies and resources, and I am not responsible for government policy or the state budget. But I do monitor them, and as an independent officer of Parliament I can express views that may not be popular. To fully implement some of my recommendations will take long-term investment - beyond an electoral term - and sustained political will.⁴⁶

The Ombudsman made a similar point at the public hearing, where she stated:

Virtually all my recommendations involve some consideration of government policy, and I will be recommending changes in government policy and indeed legislation from time to time. What I do not do is control government policy of course, so it is a matter for governments to determine whether they agree with me or not.⁴⁷

4.2 Implementation of Victorian Ombudsman recommendations

As the 2018 report on recommendations observed, ‘the power of the Ombudsman ranges far beyond the decision to investigate public sector bodies and make formal recommendations for change: it extends to monitoring the acceptance and implementation of those recommendations.’⁴⁸

The biennial reports to Parliament on the progress by Government departments, agencies and local councils in implementing recommendations reflect this monitoring role and are part of the Ombudsman’s accountability mandate.⁴⁹

RECOMMENDATION 1: That the Victorian Ombudsman continue to report biennially to the Victorian Parliament on progress by agencies in implementing the Ombudsman’s recommendations.

The following table indicates the progress of implementation of Ombudsman recommendations in the Ombudsman’s 2016 Report on recommendations made to government agencies:

⁴⁵ Department of Economic Development, Jobs, Transport and Resources, Submission No. 2, 2018, p. 2.

⁴⁶ Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2018, p. 5.

⁴⁷ Deborah Glass, Victorian Ombudsman, Office of the Ombudsman, *Transcript of evidence*, Melbourne, 4 June 2018, p. 9.

⁴⁸ Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2018, p. 6.

⁴⁹ Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2018, p. 6.

Report	Number	Implemented	In progress	Under consideration
Investigation into Department of Health oversight of Mentone Gardens, a supported residential service	3	1	2	-
Investigation into allegations of improper conduct in the Office of Living Victoria	4	4	-	-
Investigations into allegations of improper conduct by officers of VicRoads	4	4	-	-
Conflict of interest by an Executive Officer in the Department of Education and Training	2	1	1	-
Investigation of a protected disclosure complaint regarding allegations of improper conduct by councillors associated with political donations	1	-	-	1
Investigation following concerns raised by Community Visitors about a mental health facility	2	2	-	-
Investigation into an incident of alleged excessive force by authorised officers	4	2	2	-
Councils and complaints – A report on current practice and issues	3	1	2	-
Investigation into the rehabilitation and reintegration of prisoners in Victoria	25	4	21	-
Reporting and investigation of allegations of abuse in the disability sector (two reports)	13	-	10	3
Total	61	19	38	4

In her 2016 report, the Ombudsman made the following observation in relation to the implementation of recommendations:

At the time of writing, most of the recommendations were still in progress, with further work required before they will be fully implemented. This is to be expected. Many of the recommendations involve long-term change, and some require responsibilities to be transferred between agencies. Some require additional budget funding or changes to legislation and policy. A number of recommendations, including those concerning authorised officers, local government complaints and the disability sector, have been awaiting the outcomes of other government or parliamentary reviews.⁵⁰

The following table indicates the progress on implementation of Ombudsman recommendations as detailed in the Ombudsman's 2018 Report on recommendations.

⁵⁰ Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2016, p. 21.

Report	Number	Implemented	In progress	Under consideration	Other
Investigation into public transport fare evasion enforcement	12	11	1	-	-
Investigation into the misuse of council resources	N/A				
Investigation into Casey City Council's Special Charge Scheme for Market Lane	7	7	-	-	-
Investigation into the management of complex workers compensation claims and WorkSafe oversight	17	15	2	-	-
Investigation into the transparency of local government decision making	6	-	-	-	3 partially accepted and in progress 1 partially accepted 1 accepted 1 no response sought
Investigation into the Registry of Births, Deaths and Marriages' handling of a complaint	3	3	-	-	-
Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville	N/A				
Investigation into allegations of improper conduct by officers at the Mount Buller and Mount Stirling Resort Management Board	14	12	1	-	1 accepted
Report into allegations of conflict of interest of an officer at the Metropolitan Fire and Emergency Services Board	3	1	2	-	-
Investigation into Victorian government school expulsions	8	7	1	-	-
Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system	N/A				
Investigation into the management and protection of disability group home residents by the Department of Health and Human Services and Autism Plus	5	1	4	-	-
Investigation into the management of maintenance claims against public housing tenants	18	1	17	-	-
Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre	19	5	13	-	1 not accepted
Investigation into the financial support provided to kinship carers	7	-	6	-	1 accepted and under consideration
Investigation of a matter referred from the Legislative Council on 25 November 2015*	6				6 accepted
Total	125	63	47	-	15

The Ombudsman's second report on recommendations, tabled in July 2018, referenced the investigation of a matter referred from the Legislative Council on 25 November 2015.

The Ombudsman noted that the Privileges Committee of the Legislative Council is currently undertaking an inquiry into matters relating to the misuse of electorate office staffing entitlements and that the committee is due to report its findings by 23 August 2018.⁵¹

The Ombudsman's office will seek an update on the implementation of these recommendations six months after the tabling of the report of the Privileges Committee.⁵²

Of the 125 public recommendations made between 1 April 2016 and 31 March 2018, the only one not accepted related to the implementation of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Ombudsman recommended that the practise of strip-searching women at the Dame Phyllis Frost Centre be ceased immediately.

The Department of Justice and Regulation's response to the Ombudsman's recommendation stated that, 'despite not accepting this recommendation, the department recognises that strip searching is an intrusive practice and is committed to implementing gender specific procedures.'

Further to this goal, the Department stated that it is currently considering an implementation plan for changes to this practise.⁵³

The report also noted that a response was not sought for a recommendation in the investigation into the transparency of local government decision making as it was made to all 79 local councils.⁵⁴

A total of 50 per cent of recommendations made by the Ombudsman to government departments, agencies and local councils, have been implemented, 38 per cent are in progress and 12 per cent are either accepted, partially accepted, partially accepted and in progress, no response was sought or not accepted.

RECOMMENDATION 2: That the Ombudsman Act 1973 be amended to require that Victorian Government departments, agencies and local councils subject to recommendations by the Victorian Ombudsman, submit to the Ombudsman, an indicative timeline by which recommendations are expected to be implemented:

- in the short term (up to 12 months);
- in the medium term (1 to 3 years); or
- in the long term (over 3 years).

⁵¹ Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2018, p. 73.

⁵² Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2018, p. 73.

⁵³ Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2018, p. 68.

⁵⁴ Victorian Ombudsman, *Report on recommendations*, Office of the Ombudsman, Melbourne, 2018, p. 7.

The Committee believes that the oversight function of the Committee could be strengthened by providing for a legislative function that enables the Committee to hold hearings with the Ombudsman on the progress by government agencies and local councils in implementing recommendations made by the Ombudsman.

This would be similar to the process in place for the Victorian Parliament's Public Accounts and Estimates Committee and the Victorian Auditor General's Office.

This function would enable the Committee to examine any obstacles to implementing recommendations and will provide greater accountability of government agencies and local councils when implementing the Ombudsman's recommendations.

RECOMMENDATION 3: That the Victorian Government amend the Parliamentary Committees Act 2003 to provide a function to enable the Accountability and Oversight Committee to hold hearings into the status of implementation of Ombudsman recommendations by government agencies and local councils.

4.2.1 Department of Health and Human Services

The Department of Health and Human Services (DHHS) made a submission about the 47 recommendations the Ombudsman made directed to the DHHS.

Secretary Kym Peake stated in her submission that 17 recommendations have been fully implemented, 13 are due to be completed by June 2018 and the remaining 17 are in the process of being implemented.⁵⁵

In December 2017, the Ombudsman tabled a report into the financial support provided to kinship carers, who were found to be receiving less support than foster carers.

DHHS accepted the recommendations and, in its submission, stated:

A new model of kinship care commenced on 1 March 2018. This model has improved the transparency of decision making relating to carer allowance payments and includes an early support package for new kinship placements, with flexible brokerage to help establish and support placements.⁵⁶

In response to the Ombudsman's report into the management of maintenance claims against public housing tenants, the Department stated:

To improve our social landlord responsibilities we are training our staff in the support of complex clients and victims of family violence we are social housing tenants. We have established a public housing advisory group, including external members, to monitor the implementation of new and improved social housing practices and tenancy support.⁵⁷

⁵⁵ Department of Health and Human Services, Submission No. 3, 3 May 2018, p. 1.

⁵⁶ Department of Health and Human Services, Submission No. 3, 3 May 2018, p. 2.

⁵⁷ Department of Health and Human Services, Submission No. 3, 3 May 2018, p. 2.

According to the submission, implementation of Ombudsman recommendations has strengthened the Department's delivery of services:

The department values the oversight and important role the Victorian Ombudsman plays in inquiring into the services we provide to vulnerable citizens of Victoria. We use the information gained from the Victorian Ombudsman's reports and recommendations as an integral part of our service and risk reviews, and quality and safety frameworks.⁵⁸

**Adopted by the Accountability and Oversight Committee
55 St Andrews Place, East Melbourne
6 August 2018**

58 Department of Health and Human Services, Submission No. 3, 3 May 2018, p. 1.