

SOUTH AUSTRALIA

OMBUDSMAN ACT, 1972

This Act is reprinted pursuant to the Acts Republication Act, 1967, and incorporates all amendments in force as at 10 March 1987.

The Commissioner of Statute Revision is authorized by the Acts Republication Act, 1967, to make textual alterations of various kinds to an Act in preparing it for reprint. These alterations do not affect the substantive law. A report has been prepared containing a comprehensive list of textual alterations made under the Acts Republication Act, 1967, in the preparation of this reprint. Copies of the report are available, on request from the office of the Commissioner of Statute Revision, 11th Floor, S.G.I.C. Building, Victoria Square, Adelaide.

SUMMARY OF PROVISIONS**PART I****PRELIMINARY**

- Section
1. Short title
3. Interpretation
5. Non-application of Act

PART II**THE OMBUDSMAN**

6. Appointment of Ombudsman
7. Ombudsman not to engage in any remunerative employment
8. Acting Ombudsman
9. Delegation
10. Term of office of the Ombudsman, etc.
11. Ombudsman is not a Public Service employee
12. Officers of the Ombudsman

PART III**INVESTIGATIONS**

13. Matters subject to investigation
15. Person who may make complaints
16. Time within which complaints must be made
17. Certain complaints need not be entertained, etc.
18. Procedure on investigations
19. Ombudsman to have powers of a Royal Commission
20. No obligation on persons to maintain secrecy
21. Protection for proceedings in Cabinet
22. Secrecy
23. Entry and inspection
24. Obstruction
25. Proceedings on the completion of an investigation
26. Publication of report of investigation
27. Report to complainant
28. Determination of the Ombudsman's jurisdiction

PART IV**MISCELLANEOUS**

29. Annual report
30. Protection of Ombudsman and officers
31. Summary procedure

OMBUDSMAN ACT, 1972

being

Ombudsman Act, 1972, No. 115 of 1972 [Assented to 23 November 1972]¹

as amended by

Ombudsman Act Amendment Act, 1974, No. 14 of 1974 [Assented to 4 April 1974];
Ombudsman Act Amendment Act, 1984, No. 5 of 1984 [Assented to 19 April 1984];
Ombudsman Act Amendment Act, 1985, No. 24 of 1985 [Assented to 28 March 1985]²;
Statutes Amendment (Remuneration) Act, 1985, No. 59 of 1985 [Assented to 30 May 1985]³;
Ombudsman Act Amendment Act, 1986, No. 103 of 1986 [Assented to 18 December 1986]⁴.

NOTE: Asterisks indicate repeal or deletion of text. For further explanation see Appendix.

An Act to provide for the appointment of an Ombudsman to investigate the exercise of the administrative powers of certain departments of the Public Service and other authorities; to provide for the powers, functions and duties of the Ombudsman; and for other purposes.

The Parliament of South Australia enacts as follows:

PART I

PRELIMINARY

1. This Act may be cited as the "Ombudsman Act, 1972".

Short title.

* * * * *

3. (1) In this Act, unless the contrary intention appears—

Interpretation.

"act" includes—

(a) an omission;

(b) a decision, proposal or recommendation (including a recommendation made to a Minister of the Crown),

and the circumstances surrounding an act:

"administrative act" means an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency but does not include—

(a) an act done in the discharge of a judicial authority or related to the execution of judicial process;

or

(b) an act done by a person in the capacity of legal adviser to the Crown:

¹ Came into operation 14 December 1972: *Gaz.* 14 December 1972, p. 2629.

² Came into operation 1 September 1985: *Gaz.* 29 August 1985, p. 604.

³ Came into operation 13 June 1985: *Gaz.* 13 June 1985, p. 2132.

⁴ Came into operation 10 March 1987: *Gaz.* 5 February 1987, p. 248.

“agency to which this Act applies” means—

- (a) a department (but not including a department or part of a department declared by proclamation to be a department or part of a department to which this Act does not apply);
- (b) an authority (not including an authority declared by proclamation to be an authority to which this Act does not apply);

or

- (c) a proclaimed council:

“authority” means—

- (a) a body created by an Act and constituted of—

- (i) a person appointed by the Governor or a Minister of the Crown;

or

- (ii) a number of members, some or all of whom are appointed by the Governor or a Minister of the Crown;

- (b) the Council of The University of Adelaide;

or

- (c) a body created under an Act and declared by proclamation to be an authority:

“complainant” in relation to an investigation means the person or persons whose complaint gave rise to that investigation:

“complaint” in relation to an administrative act, means a complaint that gives rise or may give rise to an investigation into that administrative act:

“council” means a council as defined for the purposes of the Local Government Act, 1934, and includes any body that is pursuant to an Act vested with the powers and functions of such a council:

“department” means an administrative unit of the Public Service:

“investigation” means an investigation by the Ombudsman under this Act in relation to an administrative act:

“officer of the Ombudsman” means—

- (a) a person employed in the Public Service and assigned to work in the office of the Ombudsman;

or

- (b) a person employed under section 12:

“principal officer” in relation to an agency to which this Act applies means—

- (a) where the agency is a department—the chief executive officer of the department;

- (b) where the agency is an authority—the person who constitutes the authority or, where the authority is constituted

of more than one person, the person who presides at meetings of the authority;

(c) where the agency is a proclaimed council—the mayor, chairman or other presiding officer of the council:

“proclaimed council” means a council for the time being declared by proclamation to be a council to which this Act applies:

“responsible Minister” in relation to an agency to which this Act applies means—

(a) where the agency is a department—the Minister responsible for that department;

(b) where the agency is an authority—the Minister responsible for the administration of the Act under which the authority is constituted;

(c) where the agency is a proclaimed council—the Minister responsible for administering the Local Government Act, 1934:

“the Ombudsman” includes a person acting in the office of the Ombudsman.

(2) For the purposes of this Act, a person engaged or employed in the administration of, or in the performance of functions in or on behalf of, an agency to which this Act applies is engaged in the work of that agency.

(3) The Governor may, by proclamation—

(a) declare a body created under an Act to be an authority;

(b) declare an authority to be, or not to be, an authority to which this Act applies;

(c) declare a department or part of a department to be a department or part of a department to which this Act does not apply;

(d) declare a council to be a council to which this Act applies;

(e) vary or revoke a proclamation previously made under this Act.

* * * * *

5. (1) This Act does not apply to or in relation to any Commission or tribunal for the time being declared by proclamation to be a Commission or tribunal to which this Act does not apply. Non-application of Act.

(2) This Act does not apply to or in relation to—

(a) any complaint to which the Police (Complaints and Disciplinary Proceedings) Act, 1985, applies;

or

(b) any matter to which that Act would apply if the matter were the subject of a complaint under that Act.

PART II

THE OMBUDSMAN

6. (1) The Governor may, by notice published in the *Gazette*, appoint a person to be the Ombudsman. Appointment of Ombudsman.

(2) Subject to subsection (2a), the terms and conditions of appointment and employment of the Ombudsman shall be as determined from time to time by the Governor.

(2a) The salary and allowances of the Ombudsman shall be as determined from time to time by the Remuneration Tribunal.

(3) This section is, without further appropriation, sufficient authority for the payment of the salary and allowances of the Ombudsman out of the General Revenue of the State.

Ombudsman not to engage in any remunerative employment.

7. The Ombudsman must not, without the consent of the Minister, engage in any remunerative employment or undertaking outside official duties.

Acting Ombudsman.

8. (1) If for any reason—

(a) the Ombudsman is temporarily unable to perform official duties;

or

(b) the office of the Ombudsman is temporarily vacant,

the Governor may, by notice published in the *Gazette*, appoint a person to act in the office of the Ombudsman and a person so appointed has, while so acting, all the powers, functions and duties of the Ombudsman.

(2) Subject to this Act, the terms and conditions of appointment and employment (including the salary and allowances) of the person appointed under subsection (1) shall be as determined, from time to time, by the Governor.

(3) This section is, without further appropriation, sufficient authority for the payment of the salary and allowances of an acting Ombudsman out of the General Revenue of the State.

Delegation.

9. (1) The Ombudsman may, by instrument in writing, delegate powers or functions under this Act (except this power of delegation) to any person.

(2) The Ombudsman may by instrument in writing revoke or vary any delegation given under subsection (1).

(3) The exercise or performance of any power or function by a delegate pursuant to subsection (1) does not affect the exercise or performance of that power or function by the Ombudsman.

Term of office of the Ombudsman, etc.

10. (1) The Ombudsman shall be appointed for a term expiring on the day on which he or she attains the age of 65 years.

(2) The Governor may remove the Ombudsman from office upon the presentation of an address from both Houses of Parliament seeking the Ombudsman's removal.

(3) The Governor may suspend the Ombudsman from office on the ground of incompetence or misbehaviour and, in that event—

(a) a full statement of the reason for the suspension must be laid before both Houses of Parliament within seven days of the suspension if Parliament is then in session or, if not, within seven days of the commencement of the next session of Parliament;

and

(b) if, at the expiration of one month from the date on which the statement was laid before Parliament, an address from both Houses of Parliament seeking the Ombudsman's removal has not been presented to the Governor, the Ombudsman must be restored to office.

(4) The office of Ombudsman becomes vacant if the Ombudsman—

- (a) dies;
- (b) attains the age of 65 years;
- (c) resigns by written notice delivered to the Governor;
- (d) is removed from office by the Governor under subsection (2);
- (e) becomes bankrupt or applies as a debtor to take the benefit of the laws relating to bankruptcy;
- (f) is convicted of an indictable offence or sentenced to imprisonment for an offence;
- (g) becomes a member of the Parliament of this State or any other State of the Commonwealth or of the Commonwealth or becomes a member of a Legislative Assembly of a Territory of the Commonwealth;

or

(h) becomes, in the opinion of the Governor, mentally or physically incapable of carrying out satisfactorily the duties of office.

(5) Except as is provided by this section, the Ombudsman shall not be removed or suspended from office, nor shall the office of the Ombudsman become vacant.

11. (1) The Ombudsman is not a Public Service employee.

Ombudsman is
not a Public
Service employee.

(2) If an Ombudsman was, immediately before appointment as such, employed in the Public Service, the Ombudsman retains existing and accruing rights in respect of leave.

12. (1) The Ombudsman's staff consists of—

Officers of the
Ombudsman.

(a) Public Service employees assigned to work in the office of the Ombudsman;

and

(b) if appointments have been made under subsection (3)—the persons holding those appointments.

(2) The Minister may, by notice in the *Gazette*—

(a) exclude Public Service employees on the Ombudsman's staff from specified provisions of the Government Management and Employment Act, 1985;

and

(b) if the Minister thinks that certain provisions should apply to such employees instead of those from which they are excluded under paragraph (a)—determine that those provisions will so apply,

and such a notice has effect in accordance with its terms.

(3) The Ombudsman may, with the consent of the Minister, appoint staff for the purposes of this Act.

(4) The terms and conditions of employment of a person appointed under subsection (3) will be determined by the Governor and such a person is not a Public Service employee.

PART III INVESTIGATIONS

Matters subject to investigation.

13. (1) Subject to this Act, the Ombudsman may investigate any administrative act.

(2) The Ombudsman may make such an investigation either on receipt of a complaint or on the Ombudsman's own initiative and, where a complaint is made, the Ombudsman may investigate an administrative act notwithstanding that, on the face of it, the complaint may not appear to relate to that administrative act.

(3) The Ombudsman must not investigate any administrative act where—

(a) the complainant is provided in relation to that administrative act with a right of appeal, reference or review to a court, tribunal, person or body under any enactment or by virtue of Her Majesty's prerogative;

or

(b) the complainant had a remedy by way of legal proceedings,

unless the Ombudsman is of the opinion that it is not reasonable, in the circumstances of the case, to expect that the complainant should resort or should have resorted to that appeal, reference, review or remedy.

(4) The Ombudsman may investigate any administrative act, notwithstanding any enactment that provides that that administrative act is final or not to be appealed against, challenged, reviewed, quashed or called into question.

* * * * *

Persons who may make complaints.

15. (1) A complaint in respect of an administrative act may be made by any person or body of persons.

(2) Where the person by whom a complaint in respect of an administrative act might have been made has died or is unable to make the complaint personally, the complaint may be made by a person who is, in the Ombudsman's opinion, a suitable representative of that person.

(3) A complaint in respect of an administrative act that could, apart from this subsection, be made by a person or body of persons may, with the consent of that person or body, be made on behalf of that person or body by a member of either House of Parliament and with the consent of that person or body that member may act on behalf of that person or body in and in connection with all matters relating to the matter of complaint.

(3a) Except as provided by this section, a complaint must not be entertained by the Ombudsman unless made by a person or body of persons directly affected by the administrative act to which the complaint relates.

(4) Notwithstanding any enactment prohibiting or restricting, or authorizing the imposition of prohibitions or restrictions on, communication, a person having the care or custody of another person shall not refuse or fail to take all steps necessary to facilitate any communication by that other person necessary for or incidental to a complaint under this Act and to ensure the privacy of that communication.

Penalty: \$500.

16. (1) Subject to this section a complaint under this Act must not be entertained by the Ombudsman if it is made after 12 months from the day on which the complainant first had notice of the matters alleged in the complaint unless the Ombudsman is of the opinion that, in all the circumstances of the case, it is proper to entertain the complaint.

Time within which complaints must be made.

(2) For the purposes of this section a complainant will be presumed to have had notice of the matters alleged in the complaint at the time he or she might reasonably be expected to have had such notice.

17. (1) The Ombudsman must not proceed with the investigation of a complaint if it appears that—

Certain complaints need not be entertained, etc.

(a) the person by or on whose behalf the complaint is made is an employee;

and

(b) the complaint relates to an administrative act done by another in the capacity of an employer of that person.

(2) The Ombudsman may refuse to entertain a complaint, or, having commenced to investigate a matter raised in a complaint, may refuse to continue the investigation if of the opinion—

(a) that the matter raised in the complaint is trivial;

(b) that the complaint is frivolous or vexatious or is not made in good faith;

(c) that the complainant or the person on whose behalf the complaint was made has not a sufficient personal interest in the matter raised in the complaint;

or

(d) that having regard to all the circumstances of the case, the investigation or the continuance of the investigation of the matter raised in the complaint, is unnecessary or unjustifiable.

(3) Where a complaint is made and the Ombudsman decides not to investigate the complaint, or to discontinue an investigation, the Ombudsman must inform the complainant of that decision and of the reasons for it.

18. (1) Notwithstanding any other provision of this Part, the Ombudsman may make a preliminary investigation of an administrative act to determine whether to proceed with a full investigation of that act.

Procedure on investigations.

(1a) The Ombudsman must, before proceeding with a full investigation of an administrative act, inform the principal officer of the relevant agency of the decision to proceed with such an investigation.

(2) Every investigation under this Act must be conducted in private.

(3) The Ombudsman—

- (a) is not required to hold a hearing for the purposes of an investigation;
- (b) may obtain information from such persons and in such manner as the Ombudsman thinks fit;
- (c) may determine whether any person to whom an investigation relates may have legal or other representation.

(4) Before making a report affecting an agency to which this Act applies the Ombudsman must allow the principal officer of the agency a reasonable opportunity to comment on the subject matter of the report.

(5) The Ombudsman must report any evidence of breach of duty or misconduct on the part of a member, officer or employee of an agency to which this Act applies to the principal officer of the agency.

(6) Subject to this Act, the procedure to be adopted in relation to an investigation will be as determined by the Ombudsman.

Ombudsman to have powers of a Royal Commission.

19. For the purposes of an investigation the Ombudsman has the powers of a commission as defined in the Royal Commissions Act, 1917, and that Act applies as if—

- (a) the Ombudsman were a commission as so defined;
- and
- (b) the subject matter of the investigation were set out in a commission of inquiry issued by the Governor under that Act.

No obligation on persons to maintain secrecy.

20. No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to persons in the service of the Crown or an agency to which this Act applies, whether imposed by any enactment or by a rule of law applies to the disclosure of information for the purposes of an investigation by the Ombudsman and, except as is provided in this Act, the Crown is not entitled, in relation to any such investigation, to privilege in respect of the production of documents or the giving of evidence.

Protection for proceedings in Cabinet.

21. (1) No person shall be required or authorized by virtue of this Act—

- (a) to furnish any information or answer any questions relating to the proceedings of the Cabinet or of any committee of the Cabinet;

or

- (b) to produce or inspect so much of any document as relates to any such proceedings.

(2) For the purposes of this section a certificate issued under the hand of the Minister certifying that any information or question or any document or part of a document relates to the proceedings referred to in subsection (1) is conclusive evidence of the fact so certified.

Secrecy.

22. (1) Information obtained by or on behalf of the Ombudsman in the course of or for the purpose of an investigation under this Act must not be disclosed except—

- (a) for the purposes of the investigation and of any report or recommendation to be made under this Act;

or

(b) for the purposes of any proceedings under the Royal Commissions Act, 1917, or under this Act.

(2) A person shall not disclose any information referred to in subsection (1) contrary to the provisions of that subsection.

Penalty: \$500.

23. For the purposes of an investigation, the Ombudsman or a person authorized by the Ombudsman may enter and inspect any premises or place occupied by an agency to which this Act applies and anything in or on those premises or that place. Entry and inspection.

24. A person shall not— Obstruction.

(a) without lawful excuse obstruct, hinder or resist the Ombudsman or other person in the exercise or performance of powers or functions conferred by or under this Act;

(b) without lawful excuse fail or refuse to comply with any lawful requirement of the Ombudsman or any other person under this Act;

or

(c) wilfully make any statement that is false or untrue in a material particular to the Ombudsman or any other person acting in the exercise of powers under this Act.

Penalty: \$500.

25. (1) This section applies to any investigation conducted by the Ombudsman as a result of which the Ombudsman is of the opinion that the administrative act to which the investigation relates— Proceedings on the completion of an investigation.

(a) appears to have been made contrary to law;

(b) was unreasonable, unjust, oppressive or improperly discriminatory;

(c) was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory;

(d) was done in the exercise of a power or discretion and was so done for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations;

(e) was done in the exercise of a power or discretion and the reasons for the act were not but should have been given;

(f) was based wholly or in part on a mistake of law or fact;

or

(g) was wrong.

(2) In the case of an investigation to which this section applies in which the Ombudsman is of the opinion—

(a) that the subject matter of the investigation should be referred back to the appropriate agency for further consideration;

- (b) that action can be, and should be, taken to rectify, or mitigate or alter the effects of, the administrative act to which the investigation related;
 - (c) that the practice in accordance with which the administrative act was done should be varied;
 - (d) that any law in accordance with which or on the basis of which the action was taken should be amended or repealed;
 - (e) that the reason for any administrative act should be given;
- or
- (f) that any other steps should be taken,

the Ombudsman must report that opinion and the reasons for it to the principal officer of the relevant agency and may make such recommendations as the Ombudsman thinks fit.

(3) The Ombudsman must send a copy of any report or recommendation made under subsection (2) to the responsible Minister.

(4) The principal officer of an agency in relation to which a recommendation is made under subsection (2) must, at the request of the Ombudsman, report to the Ombudsman within a time allowed in the request on what steps have been taken to give effect to the recommendation and, if no such steps have been taken, the reason for the inaction.

(5) If it appears to the Ombudsman that appropriate steps have not been taken to give effect to a recommendation made under this section, the Ombudsman may make a report on the matter (containing a copy of the earlier report and the recommendation) to the Premier.

(6) Where the Ombudsman reports to the Premier under subsection (5), the Ombudsman may forward copies of the report to the Speaker of the House of Assembly and the President of the Legislative Council with a request that they be laid before their respective Houses.

Publication of
report of
investigation.

26. If the Ombudsman considers it to be in the public interest or the interests of an agency to which this Act applies to do so, the Ombudsman may have a report on an investigation published in such manner as the Ombudsman thinks fit.

Report to
complainant.

27. (1) The Ombudsman must inform a complainant of the result of an investigation made on the complaint.

(2) If—

- (a) a complaint is investigated;
- (b) the Ombudsman makes a recommendation under this Act in relation to the subject matter of the complaint;

and

- (c) the Ombudsman is of the opinion that reasonable steps have not been taken to implement the recommendation within a reasonable time,

the Ombudsman must inform the complainant of that opinion and may make any further comments on the matter that appear appropriate in the circumstances.

28. Where—

(a) an investigation has been commenced or is proposed under this Act;

and

(b) a question arises as to whether the Ombudsman has jurisdiction to conduct the investigation,

the Supreme Court may, on the application of the Ombudsman, an agency to which this Act applies or the principal officer of such an agency, determine the question and make any orders necessary to give effect to the determination.

Determination of the Ombudsman's jurisdiction.

PART IV
MISCELLANEOUS

29. (1) The Ombudsman must in each year prepare a report on the work of the Ombudsman's office during the preceding year and send copies of the report to the President of the Legislative Council and the Speaker of the House of Assembly to be laid before their respective Houses at the earliest opportunity.

Annual report.

(2) The Ombudsman must send a copy of each annual report to the Minister.

30. (1) No liability attaches to the Ombudsman or any member of the Ombudsman's staff for any act or omission in good faith in the exercise or purported exercise of powers or functions under this Act.

Protection of Ombudsman and officers.

(2) Except for the purposes of an application under section 28, neither the Ombudsman nor any member of the Ombudsman's staff can be called to give evidence before any court in any judicial proceedings, on a matter coming to his or her notice in the course of exercising powers or functions under this Act.

31. The offences constituted by this Act are summary offences.

Summary procedure.

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APPENDIX

Legislative History

Legislative history prior to 3 February 1976 appears in marginal notes and footnotes included in the consolidation of this Act contained in Volume 7 of The Public General Acts of South Australia 1837-1975 at page 710.

Section 2:	deleted in pursuance of the Acts Republication Act, 1967, as its function is now exhausted
Section 3(1):	definition of "administrative act" substituted by 103, 1986, s. 4 (Sched.) definition of "act" inserted by 103, 1986, s. 4 (Sched.) definition of "agency to which this Act applies" inserted by 103, 1986, s. 4 (Sched.) definition of "authority" substituted by 103, 1986, s. 3 definition of "department" substituted by 103, 1986, s. 4 (Sched.) definition of "investigation" amended by 103, 1986, s. 4 (Sched.) definition of "officer of the Ombudsman" substituted by 103, 1986, s. 4 (Sched.) definition of "principal officer" substituted by 103, 1986, s. 4 (Sched.) definition of "responsible Minister" substituted by 103, 1986, s. 4 (Sched.) definition of "Ombudsman" substituted by 103, 1986, s. 4 (Sched.)
Section 3(2) and (3):	substituted by 103, 1986, s. 4 (Sched.)
Sections 4 and 4a:	repealed by 103, 1986, s. 4 (Sched.)
Section 5(2):	substituted by 24, 1985, s. 3
Section 6(1):	substituted by 103, 1986, s. 4 (Sched.)
Section 6(2):	substituted by 59, 1985, s. 13
Section 6(2a):	inserted by 59, 1985, s. 13
Section 6(3):	amended by 103, 1986, s. 4 (Sched.)
Section 7:	amended by 103, 1986, s. 4 (Sched.)
Section 8(1):	amended by 103, 1986, s. 4 (Sched.)
Section 8(3):	substituted by 103, 1986, s. 4 (Sched.)
Section 9(1):	substituted by 103, 1986, s. 4 (Sched.)
Section 10(3) and (4):	substituted by 103, 1986, s. 4 (Sched.)
Sections 11 and 12:	substituted by 103, 1986, s. 4 (Sched.)
Section 13(2) - (4):	amended by 103, 1986, s. 4 (Sched.)
Section 14:	repealed by 103, 1986, s. 4 (Sched.)
Section 15(1):	amended by 103, 1986, s. 4 (Sched.)
Section 15(2):	substituted by 103, 1986, s. 4 (Sched.)
Section 15(3a):	inserted by 103, 1986, s. 4 (Sched.)
Section 15(4):	amended by 103, 1986, s. 4 (Sched.)
Section 17(1) and (3):	substituted by 103, 1986, s. 4 (Sched.)
Section 18(1):	substituted by 5, 1984, s. 2; amended by 103, 1986, s. 4 (Sched.)
Section 18(1a):	inserted by 5, 1984, s. 2; substituted by 103, 1986, s. 4 (Sched.)
Section 18(3) - (6):	substituted by 103, 1986, s. 4 (Sched.)
Section 19:	amended by 103, 1986, s. 4 (Sched.)
Section 20:	amended by 103, 1986, s. 4 (Sched.)
Section 23:	substituted by 103, 1986, s. 4 (Sched.)
Section 24:	amended by 103, 1986, s. 4 (Sched.)
Section 25(2):	amended by 103, 1986, s. 4 (Sched.)
Sections 25(4) - (6):	substituted by 103, 1986, s. 4 (Sched.)
Sections 26 - 30:	substituted by 103, 1986, s. 4 (Sched.)