

Philp, Alex

From: Philp, Alex
Sent: Friday, 26 February 2021 2:36 PM
To: 'Tarnawsky, Jo'
Cc: s47F; s47F; Rush, Peter; s47F
Subject: RE: s47F - My application of 18/1/21 seeking ombudsman's suspension [SEC=OFFICIAL]

OFFICIAL

Hi Jo

Thanks for your email and yes it was very nice to be at Govt House last week for that meeting.

I will consult my colleagues about the issues raised in your email and will respond to you more fully next week.

Warm regards
 Alex Philp

Alex Philp | Senior Adviser

Government Division | Department of the Prime Minister and Cabinet

e. alex.philp@pmc.gov.au | w. www.pmc.gov.au | p s22 m s22

s22

PO Box 6500 CANBERRA ACT 2600



The Department acknowledges the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters and community. We pay our respect to their Cultures, Country and Elders both past and present.

From: Tarnawsky, Jo <Jo.Tarnawsky@gg.gov.au>

Sent: Friday, 26 February 2021 10:22 AM

To: Philp, Alex <Alex.Philp@pmc.gov.au>

Cc: s47F; s47F

Subject: FW: s47F - RE: My application of 18/1/21 seeking ombudsman's suspension [SEC=OFFICIAL]

Dear Alex,

I hope you are well – it was great to see you at Government House the other day.

I am hoping you can provide our Office with some assistance to help inform a response to some correspondence we have received with regard to the Commonwealth Ombudsman.

In January, s47F wrote a letter to the Governor-General (attached) to make a complaint about the Commonwealth Ombudsman. He asked the Governor-General to exercise his power under s28(2) of the Commonwealth Ombudsman Act 1976 to suspend Michael Manthorpe from office on the grounds of Manthorpe's alleged misbehaviour. He later followed up with an email.

We originally responded to **s47F** letter and email to advise that the Governor-General cannot become involved in matters that are the responsibility of governments. We suggested that he bring his concerns to the attention of the Attorney-General's Department or the Department of the Prime Minister and Cabinet. We also provided a link to details on the Commonwealth Ombudsman's website about how to make a complaint about its decisions or service. With regard to the points of his letter which concerned potential privacy breaches, we suggested the Office of the Australian Information Commissioner may be of assistance.

s47F has written again to the Governor-General (see below) to dispute the response provided by the Office, claiming that we are legally obliged to act on his 'application' to have the Commonwealth Ombudsman removed and that he will seek a judicial review to enforce action if necessary.

It is our understanding that the appointment of the Commonwealth Ombudsman is made by the Governor-General in Council, on the advice of the Government (in the last case, by the Assistant Minister to the Prime Minister). The Governor-General cannot, by convention, unilaterally suspend the Ombudsman. Section 21 of the Act specifies that the Governor-General 'appoints' the Ombudsman and Section 28 says that the Governor-General can remove or suspend the Ombudsman. Again, these actions are undertaken by the Governor-General in Council, on the advice of the government.

For these reasons, we think our original advice to **s47F** that this matter would fall within the responsibility of the government, and the Governor-General cannot become involved, is correct.

But we would be very grateful for your confirmation of this?

And if so, could you please provide us with the details of a relevant contact at PM&C that we could convey to **s47F** **s47F** when we respond to his latest email?

Happy to discuss further if needed! My contact details are below. **s47F** – copied in, is also working on this matter and is also happy to talk to you about it).

Thanks and kind regards,
Jo



Ms Jo Tarnawsky | Deputy Official Secretary
Office of the Official Secretary to the Governor-General
Government House, Canberra ACT 2600
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From: gg-noreply@govcms.gov.au [<mailto:gg-noreply@govcms.gov.au>]
Sent: Thursday, 25 February 2021 4:08 PM
To: Office of the Official Secretary to the Governor-General <gg.donotreply@gg.gov.au>
Subject: **s47F** RE: My application of 18/1/21 seeking ombudsman's suspension

Your Full Name
s47F

Your E-mail
s47F

Correspondence for
The Governor-General

Subject

My application of 18/1/21 seeking ombudsman's suspension

Message

I refer to my letter of 18/1/21 to the GG which the secretariat neither had the courtesy nor decency to formally acknowledge. When I followed up the matter on 9/2/21 I received a computer generated letter saying that the GG does not get "involved in matters that are responsibility of the governments". The email also referred me to take my concerns to the attorney general or the DPMC. I was also referred to the ombudsman, the very person who I had asked the GG to exercise his power to suspend the ombudsman. This is utterly ludicrous, demonstrating the staff don't have the intellect to properly read and comprehend what the correspondence is about.

The overall response is utter humbug. My application to suspend the ombudsman is nothing to do with matters that are the responsibility of the governments. Parliament, by enacting section 28(2) of the Ombudsman Act 1976 clearly directed the GG to act on my application on the ombudsman's suspension. By refusing to act on my application and asserting its a matter for the "governments" the GG is acting unlawfully. Neither the GG nor his staff (who all are paid from the public purse) are above the law. The GG and this staff are subject to the law and the rule of law. The GG must make a formal decision on my application, whether to suspend the ombudsman or not and giving his reasons.

I am under no obligation to take my concerns to those mentioned in the GG's secretarial email. That is the GG's job - to seek advice from the Executive before he acts.

In my letter of 18/1/21 I clearly mentioned that the GG's conduct/ inaction is subject to judicial review by the Federal Court of Australia or the High Court. This email puts the GG on notice that if he fails to make a formal determination on my application of 18/1/21 seeking suspension of Michael Manthorpe as commonwealth ombudsman, then I will seek a judicial review forcing the GG's hand. I reiterate - the GG is not above the law, but subject to it.

I therefore give the GG until 10 March 2021 close of business to make his decision about my application of 18/1/21, failing which I shall proceed without any further notice.

s47F

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Philp, Alex

From: Philp, Alex
Sent: Monday, 15 March 2021 9:25 AM
To: 'Tarnawski, Jo' s47F; s47F; Rush, Peter; s47F
Cc:
Subject: RE: s47F My application of 18/1/21 seeking ombudsman's suspension [SEC=OFFICIAL]

OFFICIAL

Hi Jo

Apologies for the delay, we have given this one some thought and can offer the following.

We suggest referring to the Federal Executive Council Handbook as it goes some way to describe the role of the Governor-General, and may be a useful public document and context to provide to s47F to reinforce your original advice.

For your consideration, I have prepared some standard words (based on the ExCo Handbook) below which are proposed to be included in a response to s47F

The Governor-General exercises the executive power of the Commonwealth under section 61 of the Constitution of the Commonwealth of Australia. Since Federation it has been an established principle that the Governor-General, in exercising the powers and functions of the office, should only do so with the advice of their Ministers of State. This principle is reinforced under section 62 of the Constitution, which establishes the Federal Executive Council to 'advise the Governor-General in the government of the Commonwealth'. In this regard, the powers exercised by the Governor-General on the advice of the Executive Council are referred to as those of the 'Governor General in Council'. This arrangement is reinforced by the *Acts Interpretation Act 1901*, s16A which states that "Where, in an Act, the Governor-General is referred to, the reference...shall be read as referring to the Governor-General...acting with the advice of the Executive Council."

Powers exercisable by the Governor-General in Council under the Constitution or, more commonly under Acts of Parliament, include the making and terminating of appointments to statutory offices, boards, commissions, courts and tribunals and diplomatic posts. Consistent with our previous advice, these powers are always exercised by the Governor-General in Council, in practice meaning on the advice of the Government via the Executive Council. While the Governor-General presides over meetings of the Executive Council they are not a member of the Council, noting that it would not be consistent with section 62 of the Constitution for them to exercise their powers without the advice of, the Government, meaning the Executive Council.

It is for these reasons that a decision to suspend the Ombudsmen cannot be taken unilaterally by the Governor-General but rather, must be done "in Council", meaning that this must be a decision taken by the Federal Executive Council.

Further information on the role and operations of the Federal Executive Council is available via the Handbook, available from the Department of the Prime Minister and Cabinet website: [Federal Executive Council Handbook 2019 | Department of the Prime Minister and Cabinet \(pmc.gov.au\)](https://www.pmc.gov.au/federal-executive-council-handbook-2019)

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In terms of a PM&C contact, you can refer s47F to myself, A/g Assistant Secretary, Parliamentary and Government Branch.

Very happy to discuss further should you have any questions.

Thanks,
Alex Philp

Alex Philp | A/g Assistant Secretary

Parliamentary and Government Branch | Department of the Prime Minister and Cabinet

e. alex.philp@pmc.gov.au | w. www.pmc.gov.au | p. s 22 m. s 22

s 22 | PO Box 6500 CANBERRA ACT 2600



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From: Tarnawsky, Jo <Jo.Tarnawsky@gg.gov.au>

Sent: Sunday, 14 March 2021 5:21 PM

To: Philp, Alex <Alex.Philp@pmc.gov.au>

Cc: s47F; s47F; Rush, Peter <Peter.Rush@pmc.gov.au>; s47F

Subject: RE: s47F My application of 18/1/21 seeking ombudsman's suspension [SEC=OFFICIAL]

Hi Alex,

I hope you are well. I'm just following up on this one. I realise it's been a busy couple of weeks.

To the best of my knowledge, we haven't heard again from s47F (although I will double-check this with s47F and s47F who manage the correspondence inboxes). However, I'm conscious that 10 March (the date he set out in his letter) has now passed.

Happy to discuss this week if needed. Let me know if PM&C have formed any views on how best to respond in the interim.

Thanks,
Jo



Ms Jo Tarnawsky | Deputy Official Secretary
Office of the Official Secretary to the Governor-General
Government House, Canberra ACT 2600

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Your E-mail
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Correspondence for
The Governor-General

Subject

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