



## Complaints to the Ombudsman

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## Introduction

The ombudsman's function is to receive and investigate complaints about the administrative actions of agencies. An administrative action is any action about a matter of administration and includes a decision, an act and an omission or failure to act. The ombudsman has the power to investigate complaints for which no other remedy is available.

Any type of complaint can be made to the ombudsman, whether it concerns the legality of an administrative action, a decision or its merits. The ombudsman cannot investigate certain administrative actions and has the discretion to refuse to investigate in other circumstances.

The Commonwealth Ombudsman is created by the *Ombudsman Act 1976* (Cth) (Cth Ombudsman Act) and the Queensland Ombudsman is created by the *Ombudsman Act 2001* (Qld) (Qld Ombudsman Act).

## Complaints to the Commonwealth Ombudsman

The Commonwealth Ombudsman can receive a complaint orally, in writing or by use of the ombudsman's online complaint form. Where a complaint is made orally, the ombudsman may require that it be put in writing and may decline to investigate a complaint where such a request has been made, but the written complaint has not been received (s 7 Cth Ombudsman Act).

A complaint can be informal; there is no set structure. However, a complaint should be clear enough to indicate exactly what the complainant's concerns are, and what they would like done to remedy the situation. There is no need for a complainant to give reasons why they think an administrative action was wrong. The ombudsman's job is to consider why the action might have been wrong and whether it was wrong in the circumstances.

The ombudsman may also investigate an action of its own accord (s 5 Cth Ombudsman Act). This means that the ombudsman is not confined to investigating the particular matter that a person has complained about, but may also look at related actions affecting that person.

The ombudsman is not restricted in its investigations by needing to know who is making the complaint, it can also investigate matters raised by anonymous complainants. However, choosing to make an anonymous complaint may reduce the opportunities for the investigation to proceed or for the complainant to be informed of any actions taken as a result of their complaint (the remedy). In all cases where a person elects to make an anonymous complaint, they should attempt to provide as much detail as possible.

## What can be investigated?

Under the Cth Ombudsman Act, the Commonwealth Ombudsman also undertakes the roles of the Defence Force Ombudsman, the Postal Industry Ombudsman and the Law Enforcement Ombudsman and can investigate actions taken by members of the Australian Federal Police. The Commonwealth Ombudsman also operates as the Australian Capital Territory Ombudsman under the *Ombudsman Act 1989* (ACT). Examples of the type of complaints investigated by the ombudsman include:

- the failure to obtain compensation from Australia Post for damage to an insured parcel

- the manner in which the Department of Social Security has recovered overpayments from a beneficiary
- the delay by the Australian Taxation Office in making the appropriate refund in respect of an allowable deduction
- the alleged misleading statements by an officer of the Department of Immigration and Multicultural and Indigenous Affairs on a person's eligibility for permanent resident status.

## What cannot be investigated?

The ombudsman cannot investigate any matter that is not a matter of administration or any action taken by a body that is not a department or prescribed authority. 'Department' is defined in the Cth Ombudsman Act to mean a department of the Australian Public Service other than the parliamentary departments such as the Department of the Senate and the Department of the House of Representatives. A prescribed authority includes bodies established for a public purpose by an enactment, bodies established by the Governor-General or a minister, incorporated companies over which the Commonwealth exercises control and persons holding an office established by an enactment.

In addition, s 5 of the Cth Ombudsman Act excludes from the ombudsman's jurisdiction any action taken:

- by ministers, judges, magistrates and coroners
- with respect to the employment and remuneration of public servants.

## Discretion to investigate

In some circumstances the Commonwealth Ombudsman may decide not to investigate a complaint even though it falls within the scope of the ombudsman's authority. The circumstances in which the ombudsman may decide not to investigate a complaint include (s 6 Cth Ombudsman Act):

- if the ombudsman is satisfied that the complainant became aware of the action more than 12 months before the complaint was made to the ombudsman
- if, in the opinion of the ombudsman:
  - the complaint is frivolous, vexatious or was not made in good faith
  - the complainant does not have a sufficient interest in the subject matter of the complaint
  - an investigation or further investigation of the action is not warranted having regard to all the circumstances.

Section 6(2) of the Cth Ombudsman Act also provides that the ombudsman shall not investigate complaints where the complainant has exercised or exercises a right to have the action reviewed by a court or tribunal, unless there are special reasons justifying an investigation. There are other scenarios set out in s 6 that provide the ombudsman may decide not to investigate, or the complainant has a right to have the action reviewed by a court or tribunal but has not exercised that right, unless their failure to do so is not unreasonable in all the circumstances.

## Powers of investigation

Under s 8 of the Cth Ombudsman Act, the ombudsman is required to inform the minister or principal officer of the body concerned that it is to be investigated before commencing an investigation. The ombudsman may either before or after the completion of the investigation discuss any matter relevant to the investigation with the responsible minister or any other minister concerned with the matter (s 8(8) Cth Ombudsman Act).

The investigation is conducted in private, and the ombudsman may obtain information and make such inquiries as they think fit. Most investigations are carried out quite informally.

The ombudsman has power to order persons to appear to answer questions on oath, to answer written questions or to produce documents (s 13 Cth Ombudsman Act). The ombudsman may enter any place occupied by a department or prescribed authority at any reasonable time of the day and inspect any documents kept there (s 14 Cth Ombudsman Act).

## Results of investigation

After an investigation is completed, the ombudsman is required to inform the complainant and the government body concerned of the results of the investigation (s 12 Cth Ombudsman Act).

If the investigation reveals that the action taken was contrary to law or was unreasonable, unjust, oppressive or improperly discriminatory (whether in accordance with a rule of law or otherwise), or was based either wholly or partly on a mistake of law or of fact, or otherwise in all the circumstances wrong (s 15 Cth Ombudsman Act), the ombudsman is required to report that finding and the reasons for it to the government body concerned and, if necessary, supply a recommendation as to what should be done to remedy the situation. The ombudsman may request the government body to advise as to the action it proposes to take with respect to the recommendation.

If no action is taken within a reasonable time, the ombudsman may inform the Prime Minister accordingly and give the complainant a copy of the recommendations and any comments thought appropriate. Sections 15-17 of the Cth Ombudsman Act also provide for a copy of the report to be forwarded to the President of the Senate and the Speaker of the House of Representatives for presentation to parliament.

The ombudsman affords all agencies the right of natural justice to respond to an adverse report, notwithstanding the non-disclosure provisions of s 8 of the Cth Ombudsman Act. When a report contains opinions that are critical of a department, prescribed authority or person, the body or person criticised (regardless of whether the criticism is direct or implied) must be given an opportunity to appear before the ombudsman to make submissions relating to the matter being investigated before the report can be made.

## Complaints to the Queensland Ombudsman

Section 12 of the Qld Ombudsman Act provides that the principal functions of the Queensland Ombudsman are to investigate the administrative actions of agencies, to consider the administrative practices and procedures of agencies whose actions are being investigated and to make recommendations or provide information or other help to agencies about ways to improve the quality of decision-making and administrative practices.

A complaint may be made by any person apparently directly affected by the action and must usually be made within one year after the day the complainant first had notice of the action. An investigation can be commenced if a complaint is made either in writing or orally about a particular administrative action or if the ombudsman considers an administrative action should be investigated (s 20 Qld Ombudsman Act). The ombudsman must investigate any administrative action of an agency referred by parliament or a statutory committee of the parliament (s 18 Qld Ombudsman Act). An administrative action of an agency includes an administrative action taken by, in or for the agency by an entity that is not an agency (s 10 Qld Ombudsman Act).

### What can be investigated?

The ombudsman investigates the administrative actions of agencies. Agencies within the ombudsman's jurisdiction are Queensland government departments, local governments and public authorities (s 8 Qld Ombudsman Act). An administrative action is defined (s 7 Qld Ombudsman Act) as any action about a matter of administration and includes:

- a decision or an act
- a failure to make a decision or do an act
- the formulation of a proposal or intention
- the making of a recommendation, including one made to a minister
- an action taken because of a recommendation made to a minister.

The ombudsman can investigate administrative actions even if an Act says the action is final or cannot be appealed against, challenged, reviewed, quashed or called into question (ss 7, 14 Qld Ombudsman Act).

### What cannot be investigated?

The ombudsman cannot question the merits of a decision made by a minister or by cabinet, or a decision that the ombudsman is satisfied implements a decision made by cabinet (s 16 Qld Ombudsman Act).

In addition, the ombudsman must not investigate an administrative action taken by:

- a tribunal or member in the performance of the tribunal's deliberative functions
- a person acting as legal adviser to the state or as counsel for the state in legal proceedings

- a member of the police service, if the action can be investigated by the Crime and Corruption Commission or if the officer may be liable for disciplinary action or has been disciplined under the *Police Service Administration Act 1990* (Qld)
- the auditor-general
- a mediator at a mediation session under the *Dispute Resolution Centres Act 1990* (Qld)
- a person in a capacity as a conciliator under the *Health Ombudsman Act 2013* (Qld)
- the Information Commissioner in the performance of the commissioner's functions under the *Right to Information Act 2009* (Qld) (s 12 Qld Ombudsman Act).

If a question arises during an investigation about whether the ombudsman has jurisdiction to conduct the investigation, the ombudsman may apply to the Supreme Court to decide this question. The application must be heard in closed court (s 17 Qld Ombudsman Act).

## Discretion to investigate

Under ss 20 and 23 of the Qld Ombudsman Act, the ombudsman has the discretion whether or not to investigate a complaint.

If a complaint is made orally, the ombudsman may decline to investigate until the complaint is put in writing. The ombudsman may give a person necessary assistance to put the complaint in writing. If a complaint is made after one year from the day the complainant first had notice of the action, the ombudsman may accept it under special circumstances.

In addition, the ombudsman may refuse to investigate a complaint or refuse to continue to investigate a complaint if the ombudsman considers that the:

- complaint is trivial, frivolous, vexatious or not made in good faith
- complainant does not have a sufficient direct interest in the action complained of
- complainant has a right of appeal, reference or review that has not been exhausted where it would be reasonable to do so before investigation
- complainant has a right of appeal, reference or review that has been exhausted and makes the investigation unnecessary or unjustifiable.

All agencies are required to have a complaint management system in place to handle complaints. Accordingly, the ombudsman will not usually investigate a complaint unless the agency responsible for the administrative action has first been given an opportunity to address the issue under its own complaint management system.

Finally, a complaint need not be investigated if the ombudsman is satisfied that a complaints entity (as defined) has investigated or will investigate the action complained of at a level at least substantially equivalent to the level at which the ombudsman would otherwise investigate the complaint.

## Powers of investigation

The ombudsman may undertake a preliminary inquiry to decide whether a complaint should be investigated (s 22 Qld Ombudsman Act). If a decision is made to investigate a complaint, it may be conducted either informally or by exercising powers under pt 4 of the Qld Ombudsman Act. If any of these powers are to be exercised, a formal notice to the agency is required (s 27 Qld Ombudsman Act). The powers include to:

- require a person to give a document or information
- require a person to create and give a document
- require a person to attend before the ombudsman and give information, answer questions or give a stated document or all documents of a stated type
- enter and inspect a place occupied by the agency on giving reasonable notice and take extracts from or copy documents located at that place.

Unless the Qld Ombudsman Act provides otherwise, the ombudsman may regulate the procedure of an investigation in the way the ombudsman considers appropriate (s 24 Qld Ombudsman Act).

## Consultation

The ombudsman has the discretion to consult with the minister concerned in the action complained of (s 26 Qld Ombudsman Act). However, consultation must occur if the minister asks to consult or if the investigation relates to a recommendation the agency has made to the minister, and the ombudsman is considering making a formal report.

If the ombudsman considers there may be grounds for making a report that may affect or concern an agency, the principal officer of that agency must be given the opportunity to comment on the matter under investigation before that report is made.

The ombudsman must not make an adverse comment about a person in a report unless, before the report is prepared, the ombudsman gives the person an opportunity to make submissions about the proposed adverse comment. If the person makes submissions and the ombudsman still proposes to make the adverse comment, the ombudsman must ensure the person's defence is fairly stated in the report (s 55 Qld Ombudsman Act).

## Results of investigation

If the ombudsman cannot investigate a complaint, refuses to investigate a complaint or refuses to continue an investigation of a complaint, the ombudsman must inform the complainant in a way the ombudsman considers appropriate of the decision and the reasons for the decision as soon as reasonably practicable (s 23(4) Qld Ombudsman Act).

Where an investigation is undertaken, the ombudsman is able to form opinions and make recommendations.

If the ombudsman considers that:

- the action investigated should be considered further by the agency

- action should be taken to rectify, mitigate or alter the effects of the action in some way
- any practice or law under which the action was taken should be varied or reconsidered
- further reasons should be given for the administrative action
- other steps should be taken

the ombudsman may give to the principal officer a report stating the action the ombudsman considers should be taken and the reasons, and may make such recommendations as the ombudsman considers appropriate (s 50 Qld Ombudsman Act).

Under s 49 of the Qld Ombudsman Act, the ombudsman may make a report if it is considered the administrative action was:

- taken contrary to law
- unreasonable, unjust, oppressive or improperly discriminatory
- in accordance with a rule of law, a provision of an Act or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory in particular circumstances
- taken for an improper purpose, on irrelevant grounds or on irrelevant considerations
- taken without giving reasons, and reasons should have been given
- based wholly or partly on a mistake of law or fact.

If the ombudsman considers there is evidence of a breach of duty or misconduct on the part of an officer of the agency, a report must be given to the principal officer and a copy may be given to the minister or, if the agency is a local government, to the mayor (s 50(2) Qld Ombudsman Act). If the agency is a local government, the principal officer must give a copy of the report and any recommendations to all members of the local government (s 50 Qld Ombudsman Act).

The ombudsman may ask the principal officer of the agency to advise within a stated time of the steps taken or proposed to be taken to give effect to the recommendations made in the report. If any steps that the ombudsman considers appropriate have not been taken within a reasonable time after giving the report, and within that time the ombudsman has considered any comments made and the ombudsman considers it appropriate, the ombudsman may give the premier a copy of the report and a copy of any comments made by the principal officer. In such a case, the ombudsman may give to the speaker another report that deals with the original report and the comments for tabling in the assembly (s 51 Qld Ombudsman Act).

If an investigation is undertaken, the ombudsman must inform the complainant of the result of the investigation in a way the ombudsman considers appropriate (s 57 Qld Ombudsman Act).

## Legal Notices

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