

FACT SHEET 1

Ombudsman investigations

July 2008

A fundamental feature of Australian democracy is that people have a right to complain about government agencies to an independent organisation without hindrance or reprisal, and to have their complaint resolved on its merits. This helps ensure that government agencies are accountable, and it assists agencies to improve their administration.

The office of Commonwealth Ombudsman was established by the *Ombudsman Act 1976*. Under this Act, the Ombudsman has statutory roles to investigate complaints from individuals, groups or organisations about the administrative actions of Australian Government officials and agencies, and to undertake investigations of administrative action on an 'own motion' basis. The Ombudsman's office receives over 30,000 complaints and other approaches each year.

The Ombudsman also has statutory roles under other legislation—for example, inspecting the records of agencies such as the Australian Federal Police to ensure compliance with legislative requirements applying to telephone interception and electronic surveillance.

In undertaking these roles, the Ombudsman is impartial and independent. The Ombudsman is not an advocate for complainants or for agencies.

Powers and protections

An investigation under the Ombudsman Act must be conducted in private, and as the Ombudsman sees fit. It is up to Ombudsman office staff, under delegation and with guidance from the Ombudsman, to decide which issues in a complaint to investigate and how to conduct the investigation.

The Ombudsman Act also gives the Ombudsman and delegated staff wide powers to obtain information for the investigation of

complaints. Examples are the power to:

- require a person or agency to provide documents or other written records relevant to an investigation (s 9 of the Ombudsman Act)
- require a person to attend a specified place and answer questions (s 9)
- examine witnesses on oath or affirmation (s 13).

The large majority of complaints are resolved without using these formal powers. They are especially useful where agencies or people may be reluctant to provide information, the information is particularly sensitive, or there is a statutory secrecy provision that inhibits voluntary disclosure.

The Ombudsman Act provides protection for an agency or person who gives the Ombudsman information when requested, or because it reasonably appears relevant to an investigation. Information given to the Ombudsman's office:

- cannot be used in evidence against the person (other than for giving false or misleading information)
- does not breach the *Privacy Act 1988*
- does not affect a claim that may be made for legal professional privilege.

The Ombudsman Act also provides that, where a person or agency may be implicitly or explicitly criticised, the person or agency must first be given an opportunity to make submissions about the matter (s 8(5)).

Agency contact arrangements

Under the Ombudsman Act, the Ombudsman may make arrangements with the principal officer of an agency about the way in which the Ombudsman will inform them that he proposes to undertake an investigation in relation to the agency. Having appropriate agency contact arrangements in place is important in helping

ensure complaints can be dealt with as efficiently as possible, both for the Ombudsman's office and for the agency concerned.

Investigation processes

Under the Ombudsman Act, the Ombudsman has a broad discretion not to investigate a complaint. On average, 65–75% of complaints that are in jurisdiction are not investigated upon initial receipt. The most common reason is that the complainant is advised to raise their complaint with the agency concerned in the first instance.

If an investigation is undertaken, the Ombudsman Act provides a high degree of flexibility in deciding how the investigation will be conducted. This enables the most relevant, practicable and efficient approach to be selected. Most investigations are conducted informally, and may entail telephone and/or email contact between the Ombudsman investigation officer and the agency contact officer. An investigation can be as simple as one or two telephone calls, or as complex as requiring review of many agency files and documents, formal interviews, and obtaining independent specialist advice.

There are several steps in the investigation process dictated by the Ombudsman Act.

Under s 8, the agency must be advised of the matter being investigated. In practice, in the interests of efficiency this usually occurs at the first contact with the agency, when the Ombudsman investigation officer also seeks comments and information about the matter being investigated.

The Act also enables a preliminary inquiry to be made, to ascertain whether a matter is in jurisdiction or should be investigated (s 7A). Given the lack of a clear distinction between a 'preliminary inquiry' and an 'investigation', and in the interests of efficiency, the Ombudsman's office treats all contact with an agency in relation to a complaint as an investigation.

Many investigations are concluded before all issues are fully examined. This can occur because an appropriate remedy has been provided or

offered, or further investigation is not warranted. When an investigation ceases, the Ombudsman officer will advise the complainant of their intention and their reasons.

Consistent with the principles of good administration, the complainant is usually given an opportunity to respond and to submit any further information or arguments. Following this process, and any further investigation that may result, the investigation officer will close the investigation and advise the agency (s 12).

Recommendations, remedies and remedial action

The emphasis of Ombudsman work is on achieving remedies for complainants and on improving public administration. The Ombudsman has no power to force an agency to change a decision or provide a service. The Ombudsman relies on agencies to cooperate in resolving problems.

When an investigation establishes that an error has occurred, the Ombudsman investigation officer will consider whether the agency should take action to remedy the problem. This could be a remedy for the complainant, and, if the problem appears to be broader, other remedial action—for example, a change to agency policy or procedures.

The large majority of complaints are resolved without deciding whether or not there has been any administrative deficiency. The term 'administrative deficiency' encompasses actions that are:

- unlawful, unreasonable, unjust, oppressive, improperly discriminatory or otherwise wrong
- not explained properly by an agency
- based on a law or policy that was unreasonable, unjust, oppressive or improperly discriminatory.

A recording of administrative deficiency is made to assist agencies identify problem areas in their administrative processes that may need attention. It is not made to admonish agencies. Recording administrative deficiency

also contributes to the systemic work of the Ombudsman's office by identifying issues that may need further attention.

Where the Ombudsman considers there has been a serious case of administrative deficiency, or there is some remedial action the agency should take but has not agreed to, the Ombudsman can make a formal report to the agency head under s 15 of the Act. [For more details see Commonwealth Ombudsman Fact Sheet 2—Administrative deficiency.]

Working cooperatively with the Ombudsman

Ombudsman officers recognise that it can be difficult and even confronting for agency staff to deal with complaints about their actions, whether or not allegations are well-founded. The focus of the Ombudsman's office is on identifying whether there has been a problem and how it might be resolved as quickly as possible, and not on apportioning 'blame' to individual officers.

The best results can be achieved from an investigation when the agency works cooperatively with the Ombudsman's office, is open and provides information in a timely manner. This helps ensure that complaints are resolved quickly and efficiently, and any required improvements in public administration are identified and implemented.

More information?

More detail is available in *Dealing with the Commonwealth Ombudsman's office—Information for agencies* on our website.

If you would like copies of other Commonwealth Ombudsman fact sheets, more information about the work of the Ombudsman's office, or a more detailed briefing for agency staff, please contact the Director Public Affairs.

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The Ombudsman has offices in:

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