

freedom of information statement

Statement in accordance with section 8 of the *Freedom of Information Act 1982*.

This statement is correct to 30 June 2004.

ESTABLISHMENT

The Commonwealth Ombudsman was established by the *Ombudsman Act 1976*. The Act came into effect on 1 July 1977 and is administered by the Prime Minister. The Ombudsman is also the Defence Force Ombudsman (DFO).

ORGANISATION

The National Office of the Commonwealth Ombudsman and the office of the Australian Capital Territory Ombudsman are co-located in Canberra. Other offices are located in Adelaide, Brisbane, Darwin, Hobart, Melbourne, Perth and Sydney.

The Ombudsman and Deputy Ombudsman are statutory officers appointed under the Ombudsman Act. Staff are employed under the *Public Service Act 1999*.

FUNCTIONS

Investigation of administrative actions

Following a complaint from a member of the public, or using 'own motion' powers under the Ombudsman Act, the Ombudsman may investigate the administrative actions of most Australian Government departments and agencies and some private contractors delivering government services.

The Ombudsman cannot investigate:

- the action of government Ministers or judges
- employment-related matters (although the Defence Force Ombudsman can investigate employment-related complaints from current or former members of the Defence Force)
- the actions of some government business enterprises.

The Ombudsman can decide not to investigate complaints that are 'stale', or frivolous, where the complainant has not first sought redress from the agency, or where some other form of review or appeal is more appropriate in all the circumstances.

The Ombudsman may conduct a complaint investigation as he or she thinks fit. The powers of the Ombudsman are similar to those of a Royal Commission, and include compelling an agency to produce documents and to examine witnesses under oath.

Ombudsman investigations are private and details are generally not revealed to people who are not legitimately concerned with the investigation. The Ombudsman's office is subject to the *Freedom of Information Act 1982* and the *Privacy Act 1988*.

Following an investigation, the Ombudsman is required to consider whether the actions of the department or authority were unreasonable, unlawful, improperly discriminatory or otherwise wrong.

When the Ombudsman concludes that an agency has erred, he or she may report that view to the agency and may recommend whatever remedial action the Ombudsman thinks is appropriate. If the agency does not implement that action, the Ombudsman can report such to the Prime Minister and the Parliament. The Ombudsman must inform complainants of the action taken by the office in response to their complaints.

Defence Force complaints

The DFO can investigate complaints about administrative actions and Defence Force employment matters. The DFO cannot investigate actions connected with disciplinary proceedings or the grant or refusal of an honour or award to an individual. The DFO investigates complaints from serving members only after they have exhausted internal grievance mechanisms, unless there are exceptional circumstances. The DFO also investigates complaints from ex-service personnel or their families.

Taxation complaints

The Ombudsman has a specialist group to investigate complaints about the Australian Taxation Office (ATO), headed by the Special Tax Adviser. Under s 4(3) of the Ombudsman Act, the Commonwealth Ombudsman is also the Taxation Ombudsman when dealing with complaints about the ATO.

Complaints about Freedom of Information (FOI)

The *Freedom of Information Act 1982* (the FOI Act) enables the Ombudsman to investigate complaints about actions and decisions by departments and agencies relating to requests for access to documents under FOI. Details of these complaints are included in the Ombudsman's annual reports and in any additional reports made to Parliament under s 19 of the Ombudsman Act. These reports may include observations about the operation of the FOI Act and recommendations on ways to improve public access to documents.

Complaints about the Australian Federal Police

The Ombudsman has specific functions in relation to complaints about the Australian Federal Police (AFP) under the *Complaints (Australian Federal Police) Act 1981*. Complaints about the AFP usually focus on its practices and procedures or the conduct of individual AFP appointees. Complaints about its practices and procedures are dealt with in a similar way to complaints made under the Ombudsman Act.

Where the conduct of an AFP appointee is in question, the AFP Professional Standards and Internal Investigation division normally undertakes the initial investigation. There are occasions where Internal Investigation is not involved; for example, when the complaint is about actions of a member of Internal Investigation. The Ombudsman examines reports of all AFP investigations, whether the originating complaint was made to the Ombudsman or to the AFP, and decides whether further action is necessary. If action is required, the case may be referred back to the AFP for further investigation. Alternatively, the Ombudsman can decide to investigate the matter independently.

Following an investigation by either the Ombudsman or the AFP, the Ombudsman

can recommend remedial action to the AFP Commissioner. Recommendations may include that an appointee be charged with a criminal offence or a breach of discipline, or some other course of action.

The Ombudsman's intercept audit

Under the *Telecommunications (Interception) Amendment Act 1987*, the Ombudsman can inspect certain records of the AFP and the Australian Crime Commission (ACC) to ascertain whether the agencies have complied with specified record-keeping requirements of the Act.

Audit of controlled operations

In accordance with the *Crimes Act 1914*, the Ombudsman is required to inspect and report on records of controlled operations conducted by the AFP and the ACC.

Australian Capital Territory (ACT) Ombudsman

By arrangement between the Australian and ACT Governments, the Commonwealth Ombudsman is also the Ombudsman for the ACT. A more detailed explanation of the role of the ACT Ombudsman appears in a separate annual report made to the ACT Government.

Under the *Public Interest Disclosure Act 1994* (ACT), the Ombudsman is a proper authority to receive and investigate disclosures by whistleblowers in relation to the actions of ACT agencies.

CATEGORIES OF DOCUMENTS HELD BY THE OMBUDSMAN

Broadly speaking, the Ombudsman holds information related to:

- investigations, including complaints, correspondence and consultations with complainants, agencies and other information sources, background material, records of conversation, analysis and advice, and reports
- the Ombudsman's role as the chief executive of an Australian Government agency with a particular set of responsibilities, in terms of the development or implementation of administrative process, policy or legislation

- the Ombudsman's management of the office, including personnel, contracting and financial records and information about asset management.

FOI ACCESS AND INITIAL CONTACT POINTS

General inquiries and requests for access to documents or other matters relating to Freedom of Information may be made in person, by telephone or in writing at any Commonwealth Ombudsman office. Each office is open between 9 am and 5 pm on weekdays. For the cost of a local call, people can contact their nearest Commonwealth Ombudsman's office by calling the National Complaints Line on 1300 362 072.

Pursuant to s 23 of the FOI Act, the Ombudsman has authorised the Deputy Ombudsman, all Senior Assistant Ombudsmen, and some executive-level officers to grant or refuse requests for access. Under an arrangement made outside the Act, the Ombudsman has agreed to officers at and above Executive Level 1 providing limited complaint information if requested by, or on behalf of, a complainant.

FOI REQUESTS TO THE OMBUDSMAN'S OFFICE

The Ombudsman's office deals with a moderate number of requests every year (23 in 2003–04 compared to 37 in 2002–03), mostly for documents related to investigations. Following are some observations about how these requests are handled.

- The office tries to set a good standard of compliance. We do not require a complainant to submit an FOI request prior to Ombudsman staff providing certain kinds of documents:
 - documents previously and lawfully provided by or to the complainant by the Ombudsman's office or someone else
 - records of telephone conversations involving the complainant
 - most database entries relating to the complainant.

In the course of investigation, we may provide an agency response to a complainant

so that he or she can better understand the agency's position.

- It is likely that an investigation file could contain information and documents provided by other agencies—typically, the agency about which a complaint was made. Wherever possible, the Ombudsman will seek the other agency's agreement to transfer to it those parts of the request that relate to its functions. This is done because the other agency is usually much better placed to make an informed decision about a document's context, in light of their experience in dealing with requests for similar documents.

A further consideration is that if the request is not transferred, the other agency would have a legitimate interest in making suggestions about the decisions the Ombudsman should make. The Ombudsman would not be bound to accept those suggestions, but they would have to be given considerable weight. From the point of view of the complainant, if there is a complaint about an FOI process, it is probably better that the Ombudsman's office is involved as little as possible.

- It is possible to detect that some FOI requests to the Ombudsman are made with a view to causing extra work for an investigator who made, in the view of a complainant, the 'wrong' decision. As a matter of practice, staff who have had little or no involvement with the investigation often perform the tasks of processing and decision making on FOI requests. The question of motive is, of course, irrelevant to rights under the FOI Act.

The Ombudsman is currently considering whether much would be lost if the office, like some of its State counterparts, were excluded from the FOI Act for documents relating to its investigative functions. Discussions related to the review of the Ombudsman legislation (dealt with in the 'Year in review' chapter of this report) and a review conducted at the Ombudsman's request by Prof. Ian Freckelton (on policy and administrative issues dealing with unusually persistent complainants) raised questions about the value of FOI access to the Ombudsman's records. Of course, the final decision rests with the Australian Government and Parliament.