

Submission by the
Commonwealth Ombudsman

**Inquiry into Australia's Human Rights
Framework**

Submission by the Commonwealth Ombudsman, Iain Anderson

3 July 2023

Introduction and summary

1. The Office of the Commonwealth Ombudsman (OCO) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights' inquiry into Australia's Human Rights Framework.
2. In 2004, then Commonwealth Ombudsman, Professor John McMillan AO¹ observed that the role played by Ombudsman and other elements of the administrative law system can frequently be overlooked in the debate about protection of human rights in Australia. The role that Ombudsmen have in safeguarding the rule of law and human rights in Australia was reinforced more recently in 2020, when Resolution 75/186 of the General Assembly of the United Nations specifically recognised that the promotion and protection of human rights, the promotion of good governance and respect for the rule of law, are all integral to the role of Ombudsmen.
3. The OCO draws the attention of the Committee to Professor McMillan's remarks, notably how the functions of Ombudsman across Australia contribute to safeguarding human rights in Australia.

Our role

4. The purpose of the OCO is to:
 - provide assurance that the agencies and entities we oversee act with integrity and treat people fairly, and
 - influence systemic improvement in government administration.
5. We aim to achieve our purpose by:
 - independently and impartially handling complaints and disclosures about government administrative action
 - influencing government agencies to be accountable, lawful, fair, transparent, and responsive, and
 - providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

How the OCO promotes and protects human rights in Australia

Complaint handling and administrative investigation

6. The OCO's primary function is to be an independent and impartial body that handles complaints from people about Australian Government administrative actions and decisions.

¹ 'The Ombudsman and the Rule of Law' (2004), also in 'The Role of the Ombudsman in Protecting Human Rights' (2006) and 'The Ombudsman's Role in Human Rights Protection—An Australian Perspective' (2009).

7. Complaint handling is an accessible and relatively informal part of Australia's administrative law system, compared to formal merits review by a federal tribunal or judicial review by a federal court. Making complaints enables individuals to have their concerns heard. It can also provide assurance to the broader community and Parliament that government agencies are acting fairly and reasonably, including when responding to problems with their services.
8. Many government agencies have now set up internal mechanisms to facilitate the making of complaints to them by their customers. Nonetheless, members of the community frequently look to the OCO for assistance to exercise their right to complain. For example, in 2021-22 the OCO received 25,135 complaints, 13,646 of which were about Australian Government agencies. In terms of what matters most to the public, the largest number of complaints in 2021-22 were about social security and family assistance, passport services and visa services.
9. The OCO does not have the power to direct an action or outcome, nor compel an agency to act on a recommendation. However, our administrative investigations and subsequent recommendations can stimulate the sensitivity of an agency's organisational culture to the human rights impacts of its decisions and influence systemic change. We follow-up with agencies to confirm whether they have implemented the recommendations they accepted. Our reporting on this follow-up process demonstrates that agencies generally do implement the recommendations they accepted.²
10. The ability to complain about and challenge the actions of government agencies is a fundamental right. After around 50 years of Ombudsman in Australia, it is widely accepted that people have and should have this right and that government agencies should be accountable for their actions. Over this period, public administration in Australia has become significantly more attuned to the rights of members of the community.

Treatment of human rights complaints in Australia

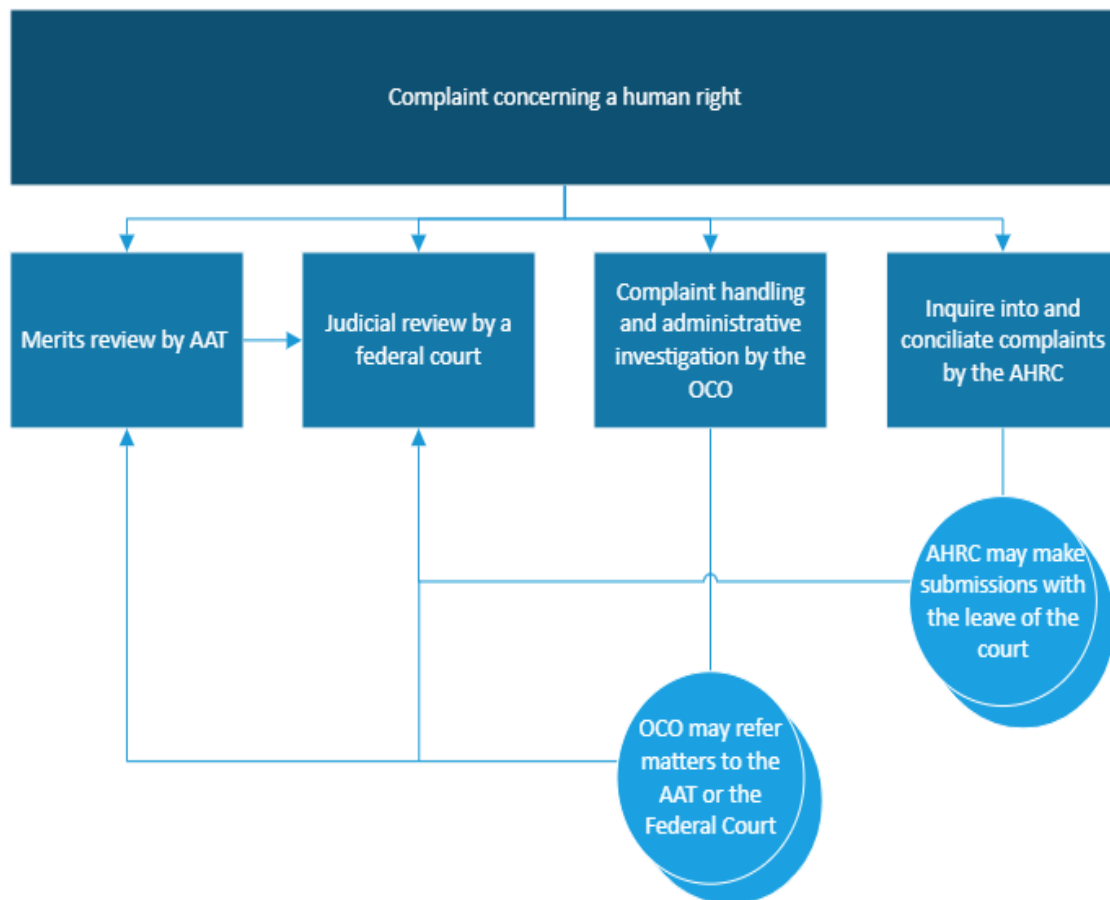
11. The OCO provides one of several pathways (summarised in **Figure 1**) through which a complaint concerning a human right can be considered in Australia:
 - **complaint handling** and **administrative investigation** by the OCO
 - **merits review** by a federal tribunal
 - **judicial review** by a federal court and
 - **inquiry** and **conciliation** by the Australian Human Rights Commission (AHRC).
12. The agency which made the decision subject to complaint can also provide internal merits review.
13. Both the OCO and the AHRC may receive and investigate complaints concerning a human right:

² 'Did They Do What They Said They Would? Volume 2, Commonwealth Ombudsman Report No. 04/2022. This report found that, across the OCO's investigation reports between 1 July 2019 and 30 June 2021, 77 recommendations were made. Of those, 73 were accepted, 67 were fully or partially implemented, and 6 were not implemented.

- The AHRC can inquire into and attempt to conciliate individual complaints of unlawful discrimination, equal opportunity in employment and other breaches of human rights pursuant to the *Australian Human Rights Commission Act 1986*.³
- The OCO can consider complaints concerning matters of administration by a department or a prescribed authority pursuant to the *Ombudsman Act 1976*.⁴ These complaints may concern human rights, such as social security benefits.

14. These roles are intended to be complementary, rather than overlapping, and are both integral parts of the human rights framework.

Figure 1: Pathways through which a human rights complaint can be considered in Australia



Oversight of detention facilities

15. The OCO has been regularly inspecting immigration detention facilities since 2010. Under s 486O of the *Migration Act 1958*, the Ombudsman must also assess the appropriateness of the immigration detention arrangements for people who have been in immigration detention for 2 years, and then continue making regular assessments (receiving a report on an

³ Section 11 of the *Australian Human Rights Commission Act 1986*

⁴ Section 5 of the *Ombudsman Act 1976*

individual from the Department of Home Affairs for this purpose every 6 months) for as long as they remain in detention.

16. Since being appointed as the Commonwealth National Preventive Mechanism under the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in 2019, the OCO has focussed its monitoring and visits on human rights standards. The OCO also expanded its visits to other places of detention including those controlled by the Australian Federal Police and the Australian Defence Force. These visits are designed to ensure that persons who are detained are treated with respect and dignity and are safe from ill-treatment and/or torture, that they have access to appropriate services including medical and well-being services, and have access to purposeful activities. The OCO publishes reports on these activities every year.

Oversight of the use of covert and intrusive powers

17. The OCO provides assurance that Commonwealth, state and territory law enforcement, integrity and regulatory agencies comply with statutory requirements when using Commonwealth covert, intrusive and coercive powers.
18. The use of covert, intrusive and coercive powers often impact human rights. Due to their covert nature, a person is typically unaware they are the subject of these powers and as a result cannot make a complaint about or question an agency's actions. The OCO's oversight role offers a level of assurance by assessing and reporting on an agency's legislative compliance—that is, whether they are using these powers as Parliament intended.