

Parliamentary Complaint Handling Procedures

4. Jurisdiction

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Overview

The Commonwealth Ombudsman's authority to investigate certain actions is provided in the *Ombudsman Act 1976* (Cth). Our Parliamentary complaints jurisdiction covers administrative actions of Australian Government departments and agencies, and the actions of non-government bodies that provide Australian Government services to the public ('Commonwealth service providers').

Likewise, the *Ombudsman Act 1989* (ACT) provides the ACT Ombudsman authority to investigate certain actions. The ACT Ombudsman's jurisdiction covers the administrative actions of ACT Government Directorates or agencies.

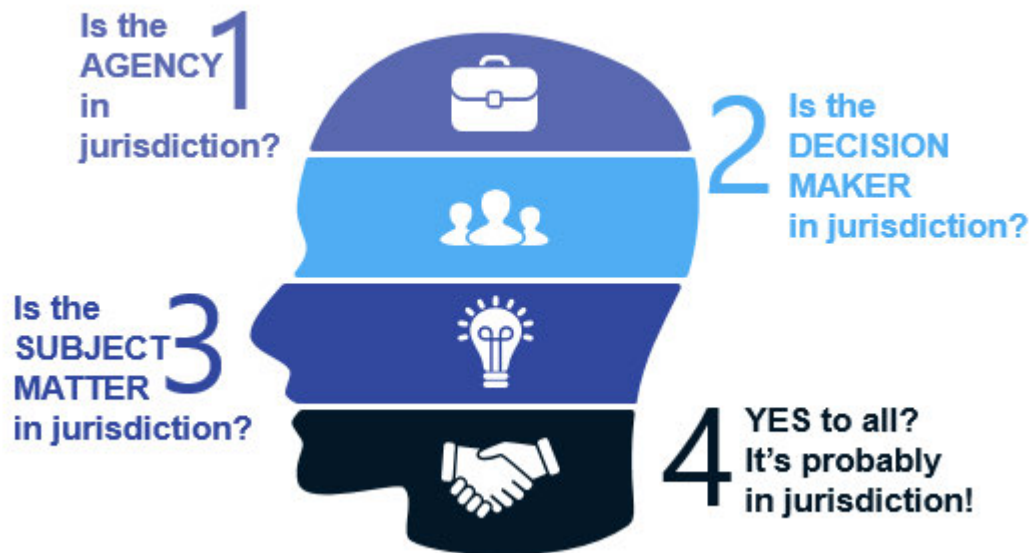
The Ombudsman's jurisdiction is established by examining three issues:

- which agency took the action/made the decision? (See section 4.2)
- who took the action/made the decision? (See section 4.3)
- what type of action/decision is the complaint about? (See section 4.4).

The Ombudsman also has functions under the *Public Interest Disclosure Act 2013* (Cth) and *Public Interest Disclosure Act 2012* (ACT). Refer to the Public Interest Disclosure (PID) team for more information on public interest disclosures.

Purpose	To explain the Office's parliamentary complaint handling jurisdiction and outline jurisdiction and legal team related processes and business rules
Workflow	Applicable at all complaint handling stages
Scope	All general rules set out in this Procedure are subject to more specific directions set out in our Office's approved policies

4.1 Key principles of the Ombudsman's parliamentary complaint jurisdiction



Is the AGENCY in jurisdiction?

To identify whether the agency complained about is within our jurisdiction, you should first refer to the Legal team's [Commonwealth](#) and [ACT jurisdiction](#) tables. Those documents are a comprehensive and up to date list of Commonwealth and ACT government departments and agencies. You can rely on whether it states the agency is or is not within jurisdiction. If it states N/A or the agency is not on the list, you should consult with your Supervisor and Director. If it remains unclear, you can seek your Director's approval to contact the Legal team.

More information about agency jurisdiction, including ACT jurisdiction, is provided at 4.2 of this Procedure.

Is the DECISION MAKER in jurisdiction?

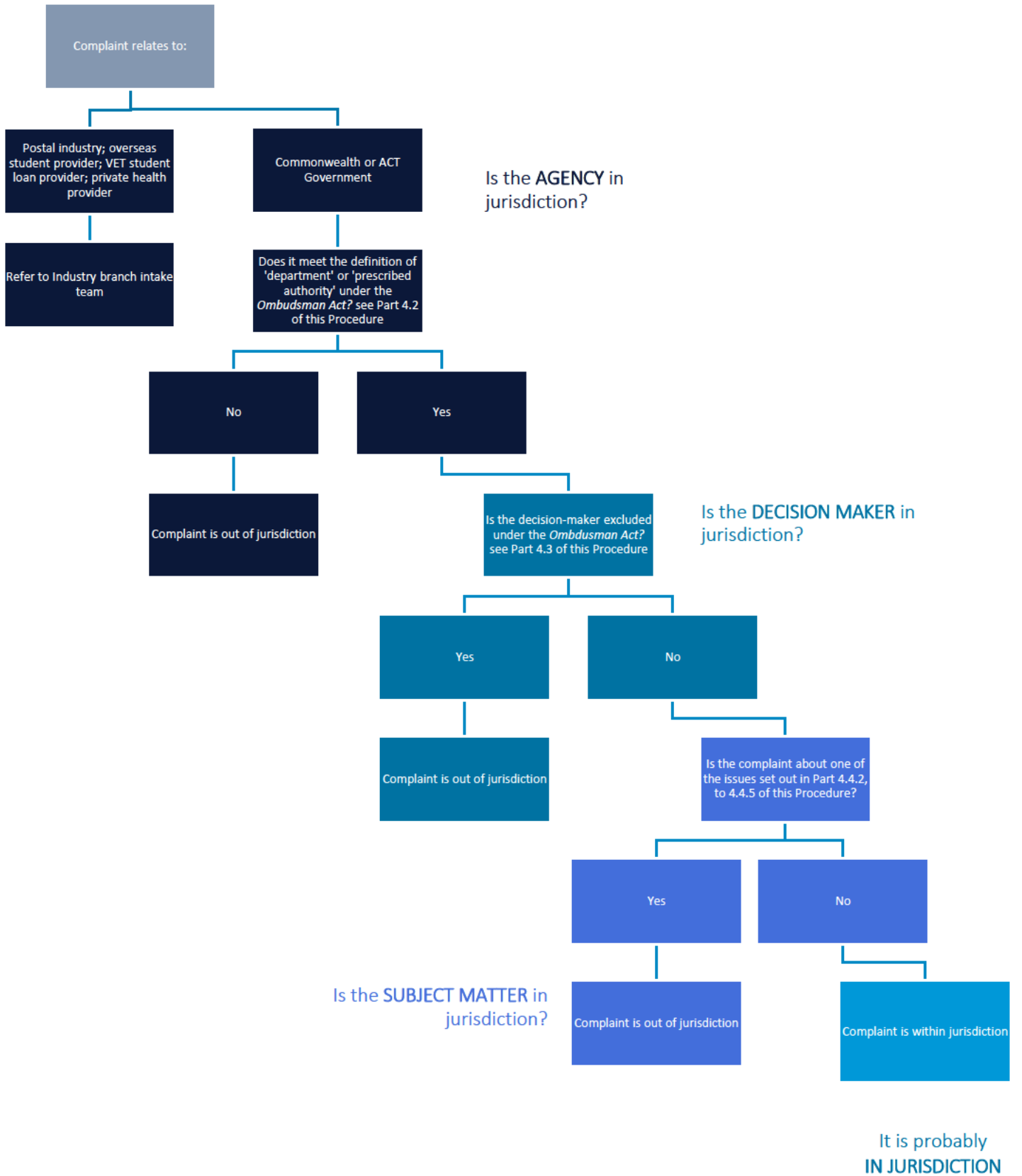
The Commonwealth and ACT Ombudsman Acts, along with the *Ombudsman Regulations 2017* (Cth), specify classes of people or decision makers that the Office cannot consider or investigate. Tables outlining these decision makers are provided at 4.3 of this Procedure.

Is the SUBJECT MATTER of the complaint in jurisdiction?

The Office can only consider complaints about certain subject matter. This goes to the fundamental issues of the complaint that the person has complained about. Primarily, as an organisation that oversees administrative action and decision making, complaints must be about a *matter of administration*. However, the applicable legislation also exempts certain types of issues (such as APS employment matters) from our jurisdiction.

It is important to understand and be alert to the nuances of the Office's subject matter jurisdiction. It is covered in depth in 4.4 of this Procedure.

Flowchart – Identifying Commonwealth and ACT jurisdiction



4.2 Which agency took the action or made the decision?

Which sections of the Act?	<p>Commonwealth: Sections 5, 3, 3A, 3B, 3BA of the Ombudsman Act Ombudsman Regulations 2017</p> <p>ACT: Sections 5, 3, 3A, 3B and the Dictionary of the Ombudsman Act</p>
Who to consult?	<ol style="list-style-type: none"> 1. Read this Procedure and the relevant legislative provision(s). 2. If unsure, ask your Supervisor and/or Director. 3. If still unsure and you have your Director’s approval, seek advice from the Legal team.

4.2.1 Commonwealth Jurisdiction

Section 5 of the Ombudsman Act (Cth) authorises us to investigate administrative actions taken by departments and prescribed authorities.

Section 3 of the Ombudsman Act defines ‘Department’. Sections 3 and 3A define ‘prescribed authority’. The Ombudsman Regulations (Cth) should also be considered when determining whether a body is a prescribed authority – these regulations exclude and include specific bodies and persons from the Ombudsman’s jurisdiction.

In summary, we are authorised to investigate actions taken by:

- Australian Government departments and their service providers (see s 3BA of the Ombudsman Act (Cth))
- Australian Defence Force
- Australian Federal Police
- Commonwealth court registries/registrar’s (but judicial actions and delegated judicial actions are excluded, e.g. a Family Court registrar’s delegated judicial actions)¹
- Commonwealth-controlled companies which came into existence on or after 15 March 1994
- parliamentary departments
- most prescribed statutory authorities.

In identifying government bodies, it is useful to refer to the Department of Finance’s flipchart.² Some agencies are explicitly out of jurisdiction as per Regulation 6 of the Ombudsman Regulations 2017.³

¹ Please note: administrative matters are within our jurisdiction where they are not a directive of the Federal Magistrate or Judge. (See 4.3.1 of this Procedure for more detail)

² Can be found on the www.finance.gov.au website by typing into the Search field ‘flipchart’.

³ Australian Security Intelligence Organisation; Commonwealth Grants Commission; Defence Force Remuneration Tribunal; Pharmaceutical Benefits Remuneration Tribunal; Remuneration Tribunal; Shire of the Cocos (Keeling) Islands.

4.2.2 ACT jurisdiction

Section 5 of the *Ombudsman Act 1989* (ACT) authorises us to investigate actions taken by agencies. In the Dictionary to the *Ombudsman Act 1989* (ACT), an agency means an administrative unit or a prescribed authority. ‘Prescribed authority’ is also defined in the Dictionary.

Section 3 should also be considered when determining if a body is within our jurisdiction.

4.2.3 Industry jurisdiction

The Ombudsman has jurisdiction to receive and consider complaints about certain industries – postal industry, overseas student providers, VET student loan providers and private health insurance providers. These matters are dealt with by the Industry Branch in the Office. If you receive a complaint about one of these industries or providers, you should refer it to Industry Branch’s Intake to assess.

4.3 Who took the action or made the decision?

Which sections of the Act?	<p>Commonwealth:</p> <p>Sections 5 of the Ombudsman Act</p> <p>ACT:</p> <p>Sections 5, 3A, 3B of the Ombudsman Act</p>
Who to consult?	<ol style="list-style-type: none"> 1. Read this SOP and the relevant legislative provision(s). 2. If unsure, ask your supervisor and/or Director. 3. If still unsure, seek advice from the Legal team.

4.3.1 Commonwealth jurisdiction

The individuals or institutions that are outside our jurisdiction are outlined below.

Person/institution	Excluded by	Scope	Any exceptions
Parliament	S 5(2)(aa)	All actions that form part of the proceedings of Parliament, including Committee matters.	-
Ministers	S 5(2)(a)	We are not authorised to investigate actions and decisions taken by Ministers.	<p>We can investigate decisions made by public servants under Ministerial delegations. We can also investigate actions taken by departments in relation to Ministerial decisions and advice to Ministers.</p> <p>Note: bring these matters to the attention of the relevant Director before deciding whether or not to investigate the complaint.</p>
Judges and Justices	S 5(2)(b)	We cannot investigate actions taken by a Justice or Judge of a court created by Parliament.	-

Person/institution	Excluded by	Scope	Any exceptions
Action by Officers exercising a judicial power	S 5(2)(ba)	We cannot investigate actions by officials exercising a power of the court e.g. Registrar of the Federal Court when exercising a power of the Court.	Important note: this depends on the type of action/decision rather than the person exercising it. For example, not all actions of the Registrar of the Federal Court are out of jurisdiction – the Registrar’s administrative actions are in jurisdiction.
Court-like bodies	S 3	Any Commonwealth body that can take evidence on oath and is required or expressly permitted to include a Judge among its members, e.g. Fair Work Commission.	There may be very limited jurisdiction about actions of certain people in the agency e.g. the General Manager or Registry staff.
Magistrate or Coroner	S 5(2)(c)	The Ombudsman is not authorised to investigate action taken by a magistrate or coroner for the ACT, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands, or a person who holds office as a magistrate in a state or the Northern Territory.	-
Bodies specified in the <i>Ombudsman Regulations 2017</i> ⁴		Even when a body is otherwise within jurisdiction, the Regulations provide that it may be specifically excluded from jurisdiction (e.g. ASIO).	-

4.3.2 ACT jurisdiction

In the ACT, the Ombudsman is excluded from investigating actions taken by certain persons under s 5 of the Ombudsman Act (ACT). The more common ones are listed in the following table. Please read the section carefully and consult with the Legal team if you are unsure.

Person/institution	Excluded by	Scope	Any exceptions
Ministers	S 5(2)(a)	We are not authorised to investigate actions and decisions taken by Ministers.	We can investigate decisions made by public servants using Ministerial delegations. We can also investigate actions taken by directorates in relation to Ministerial decisions and advice to Ministers.
Judges and Registrars	S 5(2)(b)	We cannot investigate actions taken by a judge or the associate judge of the ACT Supreme Court. We also cannot investigate actions taken by the registrar or a deputy registrar of the Supreme Court of the Magistrates Court when	This does not exclude the actions of the registrar or a deputy registrar when they are performing administrative functions.

⁴ Regulation 6 of the *Ombudsman Regulations 2017*: Auditor-General; Australian Government Solicitor; President of the Defence Force Remuneration Tribunal; President of the Remuneration Tribunal; Director-General of Security; Inspector-General of Intelligence and Security

Person/institution	Excluded by	Scope	Any exceptions
		performing a function of a judicial nature.	
Magistrate or coroner for the ACT	S 5(2)(c)		-
Tribunals	S 5(2)(d)	A member of a tribunal or a member of the staff of a tribunal when exercising the tribunal’s deliberative functions.	-
ACT Human Rights Commission	S 5(2)(i)	A member of the commission or a staff member of the commission, in the exercise of the commission’s deliberative functions.	-

4.4 What type of action or decision is the complaint about?

Which sections of the Act	<p>Commonwealth:</p> <p>Sections 5 of the Ombudsman Act</p> <p>ACT:</p> <p>Sections 5 of the Ombudsman Act</p>
Who to consult?	<ol style="list-style-type: none"> 1. Read this SOP and the relevant legislative provision(s). 2. If unsure, ask your supervisor and/or Director. 3. If still unsure, seek advice from the Legal team.

4.4.1 Overview

The Ombudsman’s jurisdiction is intentionally very broad. It should not be approached narrowly or pedantically.

Botany Bay Council v Ombudsman (NSW Court of Appeal):

“[The Ombudsman’s] powers are, as they ought to be, extremely wide. They are not powers which this Court should read down. They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability, including to ordinary citizens... [A] large power is intended. The words of the Ombudsman Act should be given ample meaning.”

‘A matter of administration’:

Generally, the Ombudsman investigates actions which relate to a matter of administration (s 5 of *Ombudsman Act 1976* (Cth) and *Ombudsman Act 1989* (ACT)). A ‘matter of administration’ is not defined in either Act. But:

- it is not legislative and judicial action (see below)
- the concept of ‘administration’ covers a broad range of activities—for example, the decisions or actions of staff, implementation of departmental policies, and agency policy-making.

When deciding if complaints about policy issues are within our jurisdiction, consider this distinction:

- Approaches about the content and direction of 'high level' Government policy are generally outside our jurisdiction.
- Approaches about any departmental policies developed to implement the Government's legislated and announced policies are within our jurisdiction. The exception is when departments are implementing a Ministerial decision or providing advice to Ministers about the content and operation of a policy.

4.4.2 Judicial action

The Ombudsman is expressly precluded from investigating actions of court/tribunal members and others (e.g. registrars) where they are exercising the powers of the court or powers of a judicial nature (s 5(2)(ba) of the *Ombudsman Act 1976* (Cth) and s 5(2)(b), (c) and (d) of the *Ombudsman Act 1989* (ACT)).

The types of approaches about courts and tribunals which normally fall within our jurisdiction are approaches about the administrative processes of their registries.

If you are unsure, check the jurisdiction of approaches about court or tribunal registries with the Legal team.

4.4.3 Legislative action

In general, we cannot commence an investigation of a complaint for the purpose of assessing or reviewing the correctness of a legislative provision. In very limited circumstances we may investigate issues related to reasonableness of the law and legislative matters where a rule or provision of an enactment may be unreasonable, unjust, oppressive or improperly discriminatory, however these are exceptional circumstances and should only be used following consultation with a Director, SAO and Legal team.

4.4.4 ACT jurisdiction

Disability, health and services for young and older people

Section 5(2)(o) of the *Ombudsman Act 1989* (ACT) prevents the Ombudsman from investigating action taken by an agency for the purposes of providing (or purporting or refusing to provide) a disability service, a health service, a service for children and young people, or a service for older people.⁵

This includes:

- providing, or failing to provide when requested, health advice or a health service
- a service for children or young people (e.g. education, accommodation or rehabilitation services) unless it relates to reportable conduct**
- a service for older people (e.g. respite care, personal care or home maintenance services)
- a health service or a health practitioner (e.g. a service provided by a hospital, medical practice, doctor, nurse, allied health professional or vet)
- a service for people with disabilities (e.g. home help provided to an individual with substantial reduce mobility).

These exclusions relate to general complaint handling under the *Ombudsman Act 1989* (ACT) only. Complaints about these issues should be referred to the ACT Human Rights Commission

⁵ This does not apply to action taken in relation to a reportable allegation or reportable conviction.

4.4.5 Employment related matters

The Ombudsman is not authorised to investigate employment-related matters regarding employees of the public service or a prescribed authority (s 5(2)(d) of the *Ombudsman Act 1976* (Cth) and s 5(2)(l) of the *Ombudsman Act 1989* (ACT)). Employment related matters are described as including (note this list is not exhaustive):

- an employee's duties, position or pay
- the way an employee is supervised
- a promotion or non-promotion of an employee
- the discipline of an employee
- a decision to dismiss, terminate, retrench or retire an employee.

Actions of an agency (including rehabilitation programs, medical appointments, return to work plans following a Comcare claim being accepted) in circumstances where the agency is acting in its capacity as a rehabilitative authority under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and not as the employer, are employment matters and therefore out of jurisdiction.

The exclusion does not apply to actions that:

- occurred before the person was employed
- occurred after the person ceased to be employed (although it may be impossible to investigate where an action relies on something that happened during employment)
- are no more than incidentally related to employment, such as the payment of compensation or superannuation (but not actions related to return to work programs, light duties etc.)
- action arising out of dealings between a Commonwealth agency and a labour hire company which has made an employee available to the agency, but not action relating to the employment of the contracted employee
- FOI complaints brought by agency employees who are seeking access to their personnel records (including amendment requests).

Another body such as the [Merit Protection Commissioner](#), the [Fair Work Commission](#) and/or the [Fair Work Ombudsman](#) may review some employment actions. The availability of other avenues for review is a factor in determining whether to investigate a matter. However the absence of other review avenues alone is not generally sufficient reason for investigating a matter.

Public Interest Disclosures regarding employment:

The Commonwealth and ACT Ombudsman may become involved in employment actions when dealing with a matter under the *Public Interest Disclosure Act 2013* (Cth) or the *Public Interest Disclosure Act 2012* (ACT).

Defence employment related matters:

The Ombudsman has a role as Defence Force Ombudsman to deal with employment actions taken in relation to members of the Australian Defence Force. However, the member will be asked to make a 'redress of grievance' with the Department of Defence about the employment related matter before our Office will consider their complaint.

The Defence Force Ombudsman does not have jurisdiction in relation to employment actions taken in relation to APS employees of the Department of Defence, or Cadets, because they are not members of the Australian Defence Force.

Australian Federal Police (AFP) employment related matters:

The Ombudsman may have jurisdiction in relation to AFP employment matters (including ACT policing) where the complaint relates to action taken by an AFP appointee in relation to information given to another AFP appointee that raises an AFP conduct or practice issue.

In practice, if the person made a complaint to the AFP's Professional Standards, it is likely that the complaint will be within our jurisdiction as the actions and decisions of AFP Professional Standards are within our jurisdiction. All complaints that have gone through PRS are employment matters as they relate to a possible breach of the professional standards and open appointees to employment related sanctions.

Complaints about the AFP regarding employment matters which do not go through the Professional Standards area may not be within jurisdiction. You should consult with your supervisor about these cases and carefully consider whether the exception at s 5(4) of the *Ombudsman Act 1976* (Cth) applies.

4.4.5 Taxation matters

The Ombudsman is not authorised to investigate matters of tax administration, as they are matters that can be investigated by the [Inspector-General of Taxation](#) (s 6D of the *Ombudsman Act 1976* (Cth); s 7(1)(a) or (b) of the [Inspector-General of Taxation Act 2003](#) (Cth)).

There are some matters relating to the Australian Taxation Office (ATO), which do not relate to the administration of taxation, which our Office is authorised to investigate (s 6D(2) of the *Ombudsman Act 1976* (Cth)).

However, we may investigate tax administration matters where the matter is transferred to our Office from the Inspector-General of Taxation (IGT), or the complaint is also a PID or a complaint about the handling of a PID under the *Public Interest Disclosure Act 2013*, or the complaint is a matter of administration under the *Freedom of information Act 1982* (s 6D(2) of the *Ombudsman Act 1976* (Cth) (for example, the application of an FOI policy or the handling of an FOI application).

If a tax administration complaint is made to our Office we are required to consult with the IGT on which agency is best suited to investigate. Generally, where the complaint relates to conduct under legislation that the ATO has the power to administer, the IGT will prefer to consider it.

If you are unclear whether the matter is something our office can investigate, please contact the Legal team.

4.5 Other oversight (complaint and review) bodies

There are a number of in jurisdiction Commonwealth bodies whose functions include dealing with complaints, reviewing agency decisions or regulating an industry or some form of conduct. These agencies are independent of the agencies or businesses whose actions they oversee and they have specific statutory powers that enable them to carry out their functions.

4.5.1 Policy for complaints about oversight bodies

Where the Ombudsman has jurisdiction to investigate the actions of such a body, the Ombudsman has a policy where it would generally decide not to investigate certain actions, for example:

- decisions by a body about whether a matter falls within its complaint priorities
- decisions of an expert body on a matter within its area of responsibility and expertise (e.g. the Office of the Australian Information Commissioner; the Australian Securities and Investments Commission)
- the way a tribunal member conducted a hearing or the decision made following a consideration of available material

- determinations which affect the way in which an industry or an individual business does something.

This policy recognises Parliament has given a particular responsibility to these bodies, and provided them with appropriate powers and mechanisms for judicial or merits review. It recognises that investigation by this Office would not be warranted where a matter has been properly reviewed by a body entitled to do so. **This policy is not to be applied inflexibly.** It is appropriate and legally necessary for Ombudsman delegates to consider on a case-by-case basis whether to investigate, but the policy should be given considerable weight. There will be instances where investigation may be appropriate, for example:

- an incurable failure to deal with the issue before the body
- a process that is markedly and unreasonably unfair or oppressive
- an administrative systemic issue which is impacting the work of the body
- a decision that is on its face outside the realm of what might be considered to have any reasonable basis.

Our Office may, unless there are other reasons not to do so, investigate routine administrative actions (such as replying to complaints, issuing tenders) taken by one of these bodies. Staff need to be aware that decisions of courts and the AAT are not within the Ombudsman's jurisdiction.

Note that this policy has been [formalised and published](#) online in relation to ASIC complaints.

4.5.2 Commonwealth oversight and regulatory agencies

Oversight agencies:

- Auditor-General
- Australian Commission for Law Enforcement Integrity
- Australian Public Service and Merit Protection Commissioners
- Inspector-General of Intelligence and Security
- Inspector-General of the ADF
- Inspector-General of Taxation
- Office of the Australian Information Commissioner

Regulatory agencies:

- Australian Communications and Media Authority
- Australian Competition and Consumer Commission
- Australian Maritime Safety Authority
- Australian Prudential Regulation Authority
- Australian Pesticides and Veterinary Medicines Authority
- Australian Radiation Protection and Nuclear Safety Agency
- Australian Securities and Investments Commission
- Australian Transaction Reports and Analysis Centre
- Civil Aviation Safety Authority
- Food Standards Australia New Zealand

This list is not exhaustive but includes those agencies we most often receive complaints about. Regulatory functions may also be within a department (e.g. the Therapeutic Goods Administration is part of the Department of Health).

4.5.3 ACT government oversight and regulatory agencies

- ACT Human Rights Commission (including the Children and Young People Commissioner, the Health Services Commissioner and the Public Advocate)
- ACT Integrity Commissioner
- ACT Judicial Council
- Commissioner for Sustainability and the Environment

4.6 Procedures for handling out of jurisdiction matters

S 47G

S 47G

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4.6.3 Subject matter out of jurisdiction complaints

Subject matter out of jurisdiction complaints are handled in the same way as a decision not to investigate a complaint. That is, they are processed as if the decision were a 's 6 Discretion not to investigate'. Refer to Procedure 8.2 for how to complete this process.

When finalising the complaint, select an Issue String to reflect that the issues were out of jurisdiction.

4.7 Procedures for requesting advice from the Legal team

1	Discuss the need for legal assistance with your Director	You should do this by email. Do not attach it to your Resolve complaint record.
2	Consider how soon you need the legal advice	If the matter is urgent, it may be appropriate to contact the Legal team by phone. See the Legal services policy
3	Draft your request for legal advice	Requests for legal advice should be made in writing to legal@ombudsman.gov.au Requests should include the following information: <ul style="list-style-type: none"> • sufficient background and context to the request for advice • all relevant documentation • a timeline of events, and • a copy of any legal advice that the business area has previously received on the same or similar matters.
4	Once you receive the advice	You should link the objective file that contains the legal advice to the complaint record in Resolve You must not store the legal advice in Resolve or tell the complainant or agency that you have sought or obtained legal advice without express permission from the Legal Team

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