

## 11.7 Less commonly used powers

The following are less commonly used powers under the Ombudsman Act. A summary of the powers are provided below. You should read the actual text of the provisions before considering using the power.

If you consider exercising any of the powers may be appropriate discuss the matter first with your Director. If your Director supports it they will discuss the proposal with the SAO and legal team. Check the [current delegation](#) to determine how to exercise the relevant power.

### ***Section 10 (Cth) and s 12 (ACT) – unreasonable delay in exercising power***

Section 10 (Cth) and 12 (ACT) cover a situation where the Ombudsman receives a complaint about an unreasonable delay in exercising a legislative power. Several things need to be satisfied for 10 or 12 to be invoked.

First the law must give a power on the power to do something but without specifying a time period for taking action. Second there must be a law which provides that an application may be made to a tribunal for the review of decisions made in the exercise of that power. Third the Ombudsman must have investigated the complaint and formed an opinion that there has been unreasonable delay.

If the conditions are met the Ombudsman can give the complainant a certificate which in effect allows the complainant to make an application for review to the tribunal.

### ***Section 10A and 11 (Cth) and s 13 (ACT) – referring questions to the AAT (Cth) or ACAT (ACT)***

Where the Ombudsman is conducting an investigation 10A 11 (Cth) and 13 (ACT) allow the Ombudsman to refer questions or recommend that the principal officer refer questions to the Administrative Appeal Tribunal (in the case of Cth) or the ACT Civil and Administrative Tribunal (in the case of ACT) for an advisory opinion.

### ***Section 11A (Cth) and s 14 (ACT) – powers of the Federal Court of Australia and the ACT Supreme Court***

The Ombudsman or the principal officer of an agency may apply to the Federal Court of Australia or the ACT Supreme Court, as the case may be, to determine a question about the exercise of the Ombudsman's functions or powers.

Contains deletions under FOI

**Gregory Parkhurst**

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**From:** Caitlin § 47F  
**Sent:** Tuesday, 13 April 2021 9:23 AM  
**To:** Carmen § 47F; Leisa § 47F Gregory Parkhurst  
**Subject:** FW: Request for information: Section 10 Ombudsman Act [SEC=OFFICIAL:Sensitive]

**OFFICIAL: Sensitive**

FYI – regarding s 10 for FOI-2021-30006

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**From:** Carmen § 47F § 47E  
**Sent:** Wednesday, 11 September 2019 9:00 AM  
**To:** § 47E  
**Subject:** FW: Request for information: Section 10 Ombudsman Act [DLM=For-Official-Use-Only]

Caitlin – for file when you return please

Kind regards  
Carmen  
X930

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**From:** Jaala Hinchcliffe § 47E  
**Sent:** Wednesday, 11 September 2019 8:51 AM  
**To:** Inverarity, Tara § 47E  
**Cc:** § 47F § 47E; Harmer, Anna § 47E; Rodney Walsh § 47E; Carmen § 47F § 47E; Paul Pfitzner § 47E  
**Subject:** FW: Request for information: Section 10 Ombudsman Act [DLM=For-Official-Use-Only]

Hi Tara,

It just so happens that we were asked a question about section 10 of the Ombudsman Act from another agency in the last week (I suspect completely unrelated to the submission raised with you).

We cannot find that section 10 has been used before, noting that our current case management system does not go back our full 40 year history. My sense is that section 10 may be a useful reserve power to have, the reference to which can help to get matters resolved without necessarily needing to invoke it.

I can also see the potential that when we see delay, we often see it across a program (for example, review delays in the NDIA plan process which we highlighted in our investigation on the Administration of reviews under the NDIS Act), so dealing with each individual matter under section 10 would merely shift the problem to the tribunal rather than deal with the systemic issue in the agency, which is the approach we have taken instead.

We also have a deeming decision provision in our ACT FOI role, as a result of which we can receive matters for review when a decision is deemed to be “no” because of delay. As raised in your questions below, the review decision in these circumstances is more in the nature of a decision in the first instance because the material needs to be collected and assessed in order to be able to make the decision, rather than to review what was assessed to make the original decision.

Sorry that’s not particularly helpful. I’m happy to discuss further if you would like.

Jaala

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*Influencing systemic improvement in public administration*

*The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.*

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**From:** Inverarity, Tara s 47E  
**Sent:** Tuesday, 10 September 2019 8:59 AM  
**To:** Jaala Hinchcliffe s 47E  
**Cc:** s 47F s 47E Harmer, Anna s 47E  
**Subject:** Request for information: Section 10 Ombudsman Act [DLM=For-Official-Use-Only]

### **For Official Use Only**

Hi Jaala

I'm hoping that you might be able to help us with some information about the operation of section 10 of the Ombudsman Act. We have received a submission suggesting that section 10 be replicated in another Act, in another context and would benefit from further details about how the provision is currently operating in practice for the Ombudsman.

As you know, section 10 empowers the Ombudsman to issue a certificate in circumstances of unreasonable delay in respect of certain administrative decisions. The certificate deems the decision to have been made not to exercise a power or do an act or thing. The Explanatory Memorandum to the Ombudsman Bill 1976 provides, 'The issue of that certificate will then enable an application to be made to the Administrative Appeals Tribunal as if the matter had been decided against the complainant and he had appealed to the Tribunal in the ordinary way'.

To assist us in considering the submission about replicating section 10 in another context, we would be grateful for some further information from the Ombudsman's office. Specifically:

1. Has section 10 been used? Are you able to provide examples of the types of matters in which it has been used?
2. If section 10 has been used, how does it work in practice? For example:
  - a. how does the AAT assess the merits of a decision which is deemed to have been made?
  - b. who is the government party in proceedings before the AAT (we presume the agency who has been deemed to have made a decision in the negative, rather than the Ombudsman)?

Very happy to discuss and provide more context if that would assist. If possible, we would be grateful to receive your response by COB Wednesday 18 September but happy to discuss if that isn't possible.

Kind regards  
Tara

**Tara Inverarity**

Assistant Secretary  
Secretariat

Comprehensive Review of Legal Frameworks governing the National Intelligence Community  
Attorney-General's Department

T: s 47E [REDACTED] | M: s 47E [REDACTED]  
E: s 47E [REDACTED]

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