



Submission by the  
Commonwealth Ombudsman

**REVIEW OF THE *FREEDOM OF  
INFORMATION ACT 1982* AND THE  
*AUSTRALIAN INFORMATION  
COMMISSIONER ACT 2010***

Submission by the Commonwealth Ombudsman, Mr Colin Neave AM

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## INTRODUCTION AND SUMMARY

The Ombudsman's office is an agency subject to the *Freedom of Information Act 1982* (the FOI Act). It receives a number of requests for access to documents each year, and makes various decisions under the FOI Act that may be subject to both internal and external review.

Historically, the Commonwealth Ombudsman has also investigated the actions that other Commonwealth agencies have taken under the FOI Act. However, since 1 November 2010—with the commencement of the *Australian Information Commissioner Act 2010*—the Ombudsman's complaint-handling function in relation to FOI has largely given way to that of the Information Commissioner. While the Ombudsman may still investigate FOI complaints, the Ombudsman and Information Commissioner have acknowledged, through a memorandum of understanding, that the investigation of such complaints is now primarily the responsibility of the Office of the Australian Information Commissioner.

Both the Ombudsman's current and historical roles in relation to FOI have informed this submission. The Ombudsman supports the review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*, and outlines in this submission two ways in which the effectiveness of the current FOI framework can be enhanced.

## BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action;
- fostering good public administration that is accountable, lawful, fair, transparent and responsive;
- assisting people to resolve complaints about government administrative action;
- developing policies and principles for accountability; and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

In the past, the Ombudsman has published two general reports arising from own motion investigations into FOI administration.<sup>1</sup> Reports have also been published following complaint investigations relating to specific agencies.<sup>2</sup> The Ombudsman made a submission on FOI law reform to the Senate Finance and Public

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<sup>1</sup> Commonwealth Ombudsman *Needs to Know: Own motion investigation into the administration of the Freedom of Information Act 1982 in Commonwealth agencies*, Report No 3/1999; *Scrutinising Government: Administration of the Freedom of Information Act in Australian Government Agencies*, Report No 2/2006.

<sup>2</sup> Commonwealth Ombudsman *Department of Immigration and Citizenship: Timeliness of Decision-Making under the Freedom of Information Act 1982*, Report No 6/2008, and *Department of Finance and Deregulation: Processing of an FOI Application*, Report No 20/2009.

Administration Legislation Committee in January 2010, on the *Freedom of Information Amendment (Reform) Bill 2009* and the *Information Commissioner Bill 2009*.

While the number of complaints received and handled by the Ombudsman in relation to FOI has steadily decreased since the Information Commissioner's role began in 2010, the number of requests for access to Ombudsman documents under the FOI Act has risen.

Prior to the 1 November 2010 amendments to the FOI Act, the Ombudsman's office dealt only with a small number of FOI requests (20 in 2009–10). However, from 1 November 2010 there has been a substantial increase in the number of FOI requests received by this office: in the 2010–11 reporting period the office received 92 FOI requests—a 360% increase on the number received in 2009–10—while in the 2011–12 reporting period the number of requests increased to 182.

In many cases documents have been sought by complainants to the Ombudsman in relation to whose matters a discretion was exercised not to investigate their complaint, or, where investigation has taken place, whose matters have not been finalised to their satisfaction. Very few requests are lodged for what may be described as 'general' or 'non-personal' information, and many FOI applicants who approach the office have lodged more than one FOI request with the office in the past.

## RESPONSE TO TERMS OF REFERENCE

***'The impact of reforms to freedom of information laws in 2009 and 2010, including the new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system.'* (TOR (a))**

As anticipated in the Ombudsman's submission to the Senate inquiry into the *Freedom of Information Amendment (Reform) Bill 2009* and the *Information Commissioner Bill 2009*, the (then proposed) amendments to the FOI Act have facilitated more FOI access requests. This can be attributed to the removal of former barriers, such as application fees and the requirement for an Australian address, as well as the increasing public awareness of the pro-disclosure objects of the FOI Act.

The objects of the FOI Act<sup>3</sup> compliment the functions and purpose of this office. The Ombudsman supports laws that enhance the right of access to government information, and views them as an important aspect of open, transparent and accountable decision making in public administration. However, the Ombudsman considers that appropriate checks on the right of access should exist where access to information is sought for purposes which have no apparent connection with the principles that underpin the objects of the FOI Act. These checks should include permitting agencies to refuse requests or parts of requests, on the basis that they are frivolous, vexatious or an abuse of process.

### Dealing with 'vexatious' FOI applications

This office has both as an agency subject to FOI, and from its role in FOI oversight, observed the disproportionate diversion of agency resources to the processing of

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<sup>3</sup> Section 3.

requests from a small group of applicants whose conduct may be characterised as querulous or vexatious.

In his submission to the Senate inquiry, the then Ombudsman noted that the practical effect of the introduction of the 'vexatious applicant' provisions into the FOI Act was not wholly predictable. However, it was thought that they might at least enable agencies to provide a better access service to more applicants, rather than having to respond repeatedly to a small group of applicants.

The submission also noted a tendency in some agencies, including this office, for disproportionate resources to be required to deal with FOI requests with no apparent value to the applicant or the community.<sup>4</sup> This trend has continued and remains a concern for the Ombudsman, in relation to his obligations under the FOI Act.

Whilst the re-introduction of an application fee, or the re-instatement of the requirement for the provision of an Australian address, may in some part reduce the number of such requests, the Ombudsman submits that an amendment to the vexatious applicant provisions in the FOI Act, to enable agencies to apply them in appropriate circumstances, would have a more balanced effect. Addressing the efficacy of these provisions would target the relatively small group of applicants whose conduct may be characterised as querulous or vexatious, rather than having the indiscriminate disincentive effect that an application fee, or more stringent address requirements, might have.

#### The current statutory position

Currently, a vexatious applicant declaration can only be made by the Information Commissioner. Although the FOI Act permits the Information Commissioner to make a vexatious applicant declaration that is universal in effect<sup>5</sup>, the FOI Act anticipates the declaration being directed to a particular access request, amendment request or application for internal review.

The FOI Act sets out the grounds that must be considered by the Information Commissioner when considering making a vexatious applicant declaration.<sup>6</sup> The Information Commissioner has also issued Guidelines. A decision by the Information Commissioner to declare an applicant vexatious is reviewable by the AAT.

The FOI Act also contains provisions that go some way in assisting agencies in managing difficult applicants, without necessarily invoking the vexatious applicant provisions. In particular, it provides for a request consultation process<sup>7</sup> where a 'practical refusal reason' exists<sup>8</sup>.

However, the experience of this office is that there are certain kinds of requests that do not sit comfortably within the parameters of the definition of a 'practical refusal reason', and are better described as vexatious, frivolous or an abuse of process.

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<sup>4</sup> Commonwealth Ombudsman, *Submission to the Senate Finance and Public Administration Legislation Committee on the Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009*, January 2010.

<sup>5</sup> Section 89M.

<sup>6</sup> Section 89L.

<sup>7</sup> Under s 24AB this involves providing the applicant with written notice of the intention to refuse the request and inviting the applicant to revise it.

<sup>8</sup> Under s 24AA where, for instance, the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations, or where documents are not sufficiently identified.

Particular examples are

- where an applicant makes repeat requests for what are essentially the same documents,
- where personal information about decision makers is pursued obsessively,
- where requests contain abusive or offensive language,
- where requests are buried in lengthy emails addressed to a broad range of agencies re-agitating a wide range of complaints or other issues, and
- where requests seek to circumvent court processes.

The overall effect of the vexatious applicant provisions is that when faced with a potentially vexatious request an agency must draft a detailed submission in support of an application to the Information Commissioner, and then await the outcome of this application. In the meantime, however, it is still obliged to process the request. Unlike the request consultation process<sup>9</sup>, time does not stop running unless a request for an extension of time has been made to, and accepted by, the Information Commissioner, under another provision of the FOI Act.<sup>10</sup>

In many cases, an agency may consider that the investment of time and resources in pursuing an uncertain outcome on a vexatious applicant declaration far exceeds that which would be devoted to simply processing the request. The uncertainty is increased because, as far as the Ombudsman is aware, the Information Commissioner's powers are yet to be tested before the Administrative Appeals Tribunal, and no guidance has been made available through publication of decisions by the Information Commissioner.

#### An alternative approach

The Ombudsman considers that it would be reasonable to enable *agencies* to refuse a request, or part of a request, on the same grounds that the Information Commissioner must currently consider in deciding whether to make a 'vexatious applicant' declaration. While earlier material has suggested that devolving this type of decision to agencies could lead to the powers being invoked in circumstances where an applicant is merely perceived as a 'nuisance'<sup>11</sup>, two points need to be made about such a perspective.

Firstly, it ignores the fact that there are many instances in public administration where an agency is permitted to draw a conclusion regarding the querulous or vexatious nature of an application or complaint, and consequently refuse to take further action on it.<sup>12</sup> Although rarely invoked, the *Ombudsman Act 1976* (Ombudsman Act) permits the Ombudsman to decline to investigate, or continue to investigate, a complaint if he forms the view that the complaint is frivolous, vexatious or not made in good faith.<sup>13</sup> The delegation of this power is appropriately limited.

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<sup>9</sup> See notes 7 and 8 above.

<sup>10</sup> See, for example, s 15AB (noting, however, that this section requires a request to be voluminous or complex, which may not be the case with many potentially vexatious applicants).

<sup>11</sup> Explanatory memorandum to the *Freedom of Information Amendment (Reform) Bill 2009* and Australian Law Reform Commission and Administrative Review Council, Report No 40, *Open Government: A Review of the Federal Freedom of Information Act 1982*, December 1995, at para 7.18.

<sup>12</sup> For example, *Freedom of Information Act 1982* (Cth) ss 54W(a)(i) and 73(e); *Privacy Act 1988* (Cth) s 41(1)(d); *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 22(3)(b); *Human Rights and Anti-Discrimination Bill 2012* (Cth)(exposure draft) cl 117(2)(c) (which retains the discretion to close complaints on this basis contained in existing human rights legislation).

<sup>13</sup> *Ombudsman Act 1976* s 6(1)(b)(i).

Secondly, it implies a distinction between the kinds of matters that a decision maker needs to take into account in the application of exemptions under the FOI Act, and the considerations that would apply to a vexatious applicant decision. Arguably, the former are no less complex or nuanced than the latter, yet the current legislation allows decisions on the former to be made by authorised decision makers in agencies, but reserves decisions on the latter to the Information Commissioner.

While there may be an argument that the consequences of declaring a particular application to be vexatious are more serious than applying a particular exemption to a document (because it curtails the right of a person to access to information under the FOI Act and is inconsistent with the objects of the FOI Act), this concern could be addressed by empowering decision makers to refuse requests (or parts of them) on the basis that the *request*—not the applicant—is vexatious. This would reflect the Ombudsman’s approach to managing unreasonable complainant conduct, the focus of which is the conduct rather than the complainant<sup>14</sup>, and would be a different process to that which may be applied by courts in relation to vexatious litigants.

Naturally, any concerns around oversight of decisions and procedural fairness could be addressed through the provision for an internal and/or external review process, and the implementation of a mandatory process, similar to the request consultation process, once a preliminary view is formed that a request is querulous or vexatious.<sup>15</sup>

Should it be found that agencies were applying the provisions too liberally this would become evident through the review process, in a similar fashion to that which guides other decisions under the FOI Act. The Information Commissioner would also be able to issue guidelines to which agencies would be required to have regard in exercising their powers.

In conclusion, the Ombudsman considers that subject to a right of review, agencies should be able to refuse an FOI request, or part of a request, on the same grounds that the Information Commissioner must currently consider in deciding whether to make a ‘vexatious applicant’ declaration.

### ***‘The effectiveness of the Office of the Australian Information Commissioner’ (TOR (b))***

The Ombudsman considers that the establishment of the Office of the Australian Information Commissioner has made a positive contribution to transparency and accountability in government decision making. There is no doubt that in providing oversight of FOI decisions, and advocacy for laws that support access to government information, the Australian Information Commissioner has increased accessibility of government information, and raised the profile of government information as a national resource.

Apart from noting the need for adequate resourcing, the Ombudsman considers that the Office of the Australian Information Commissioner has operated effectively as an oversight agency. The Ombudsman notes the useful and clear guidelines issued to assist decision makers under the FOI Act.

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<sup>14</sup> Commonwealth Ombudsman, *Better practice guide: Managing Unreasonable Complainant Conduct*, 1<sup>st</sup> edition, June 2009.

<sup>15</sup> See note 7 above.

***‘The appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act’ (TOR (e))***

In contrast to most State and Territory Ombudsmen, who are partially excluded or exempt from freedom of information laws that apply in their respective jurisdictions, the Commonwealth Ombudsman is subject to the FOI Act.

In South Australia and Western Australia the ombudsmen are wholly excluded from FOI.<sup>16</sup> In New South Wales, Victoria, Tasmania and the Northern Territory, the exclusion or exemption is partial, applying only to specific documents or information.<sup>17</sup>

Under the Ombudsman Act, and a number of other pieces of legislation, the Ombudsman performs functions that can broadly be described as falling within two categories. The first can be described as an investigative function, instigated by complaints or upon the Ombudsman’s own motion (investigation function), and the second as an oversight, inspection or reporting function (oversight function).<sup>18</sup> It is in respect of these statutory functions that the Ombudsman considers that an FOI exemption should apply.

The effect of the Ombudsman Act

The Ombudsman Act expressly provides that Ombudsman investigations are to be conducted in private.<sup>19</sup> There is no requirement for public hearings, information provided to the Ombudsman is protected<sup>20</sup>, the Ombudsman and his officers are subject to secrecy provisions<sup>21</sup>, and the Ombudsman is not compellable in legal proceedings<sup>22</sup>. Further, the Ombudsman’s power to disclose information is exercisable only when the Ombudsman considers it is in the interests of an agency, a person, or if it is in the public interest.<sup>23</sup>

The Ombudsman submits that there is a tension between these provisions and his obligations under the FOI Act, particularly in relation to his investigation work. The Ombudsman’s FOI obligations have the potential to frustrate ongoing investigations, particularly where there is a risk of disclosing speculative or tentative opinion that has

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<sup>16</sup> In South Australia, the combined effect of s 4 (definitions of ‘agency’ and ‘exempt agency’), s 12 and sch 2 of the *Freedom of Information Act 1991* means that documents cannot be requested from the Ombudsman under FOI. In Western Australia, the Ombudsman (or Parliamentary Commissioner) is exempted by virtue of s 10 and sch 2 of the *Freedom of Information Act 1992*.

<sup>17</sup> Schedule 2 of the *Government Information (Public Access) Act 2009* (NSW) describes what information of particular agencies is ‘excluded information’ for the purposes of that act. In the case of the NSW Ombudsman, this is described as information relating to complaint handling, investigative and reporting functions. In Victoria, s 29A of the *Ombudsman Act 1973* provides that the *Freedom of Information Act 1982* (Vic) does not apply to complaint/investigation documentation in the Ombudsman’s possession, while in Tasmania s 33A of the *Ombudsman Act 1978* makes for similar provision. In the Northern Territory the *Information Act* provides that particular Ombudsman complaint/investigation information contained in documentation is exempt from FOI, on the basis that it would not be in the public interest to disclose such information.

<sup>18</sup> For a more detailed discussion of the role and functions of the Commonwealth Ombudsman see pages 2-3 of the Ombudsman’s Annual Report 2011-2012.

<sup>19</sup> *Ombudsman Act 1976* s 8(2).

<sup>20</sup> *Ombudsman Act 1976* ss 8(2B)(2C)(2D) and (2E).

<sup>21</sup> *Ombudsman Act 1976* ss 35(2) and (5).

<sup>22</sup> *Ombudsman Act 1976* s 35(8).

<sup>23</sup> *Ombudsman Act 1976* s 35A. (Note that the legislation governing other Australian ombudsmen contain similar provisions regarding information disclosure.)

yet to be formally adopted by the Ombudsman<sup>24</sup>, and it also creates the risk of inappropriately disclosing documents considered by an agency to be sufficiently sensitive that they not be disclosed<sup>25</sup>.

Such considerations also have resonance in connection with other statutory functions performed by the Ombudsman, including his oversight work<sup>26</sup>. In relation to these functions the Ombudsman may possess particularly sensitive information (beyond that which he may otherwise make public) that is not, in the circumstances, in the public interest to disclose.

It is also important to consider the specialised role of the Ombudsman reflected in the legislation relating to reports prepared by this office, including reports following an investigation and the annual report of the Ombudsman<sup>27</sup>, as well as any statements made under s 35A of the Ombudsman Act. These reports/statements are not the Ombudsman's view until finalised. The Ombudsman is unable to delegate his reporting functions<sup>28</sup>, and, as indicated above, in respect of any statements made under s 35A, he or his delegate is required to identify a particular interest either in relation to an agency, person or the public, before a statement can be made. It is important to note in this context that whilst any exemption of investigation and oversight work would cover most material prepared for the purposes of these reports or statements, it is possible that circumstances could arise where material prepared for the purposes of an annual report or public statement under s 35A could relate to the Ombudsman's more general functions. It would be inconsistent if any exemption did not capture this material as well<sup>29</sup>.

It is axiomatic that should the Ombudsman have greater control over the outflow of information from this office it would maximise the frankness of interactions or information exchanges between the Ombudsman and agencies, as well as the Ombudsman and members of the public. At present, notwithstanding the confidentiality provisions of the Ombudsman Act<sup>30</sup> the Ombudsman is unable to offer complainants or agencies a guarantee that sensitive information that is disclosed in the course of an investigation or oversight process, can be protected from disclosure under FOI. In our view this situation does not enhance the Ombudsman's effectiveness as an independent oversight body for Australian Government agencies, and public administration more broadly.

### Administrative burden

In considering the effect that an exclusion of the Ombudsman's investigation work may have on a person's right to access to information, it is worth noting that the overwhelming majority of FOI requests received by this office are made by

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<sup>24</sup> This is notwithstanding that a deliberative process conditional exemption under the FOI Act might, on a case-by-case basis, be available to the Ombudsman in relation to specific documents.

<sup>25</sup> Note here that the Ombudsman's ability to transfer such documents (where appropriate) to another agency is currently by *agreement only*.

<sup>26</sup> For example, the Ombudsman's long-term immigration detention reporting under Part 8C of the *Migration Act 1958*, and his inspections of enforcement agency records under the *Telecommunications (Interception and Access) Act 1979*.

<sup>27</sup> Reports following an investigation see ss 15, 16, 17, 19V, 19W, 19ZQ, 19ZR, annual report see ss 19, 19X, 19ZS, and see also s 19F.

<sup>28</sup> Section 34 of the *Ombudsman Act 1976* provides that the reporting functions cannot be delegated.

<sup>29</sup> See note 24 above.

<sup>30</sup> *Ombudsman Act 1976* s 35 describes the confidentiality that officers, including the Ombudsman, are to observe and ss 35AA, 35A, 35B, and 35C set out the circumstances in which a disclosure can be made.

complainants in relation to their own complaint files. On this basis, when considering the administrative burden on this office in processing these requests, and the little apparent benefit to the applicant and the community, the following points are worth noting:

- These files consist largely of material provided by the complainant and often, although to a lesser extent, provided by the agency that is the subject of the complaint. In those circumstances, complainants that lodge FOI requests are likely to have seen, or been made aware of, relevant agency material before approaching the Ombudsman (and may have provided a substantial part of the Ombudsman's file).
- An individual's rights under the *Privacy Act 1988* regarding access to their 'personal information' would not be affected.
- The Ombudsman is under a statutory obligation to provide a complainant with the findings of an investigation, and in most cases the complainant will be advised of relevant information provided to our office by the subject agency during the course of an investigation.<sup>31</sup>
- At present the Ombudsman almost invariably attempts to transfer to other agencies FOI requests (or parts of FOI requests) that relate to documents for which that agency is responsible, to ensure that consistent decisions are made by those with knowledge of the documents' content, context and significance.
- The Ombudsman is likely to apply exemptions to more 'substantive' material in his possession, as it may contain or reflect agency-sourced sensitive information, untested criticism of an agency or person, or information relating to persons other than the applicant.

#### Other considerations

In suggesting that a form of exemption is appropriate, we have also noted recommendations made by the NSW Ombudsman in his February 2009 report, *Review of the Freedom of Information Act 1989*.

In this review the NSW Ombudsman suggested a number of criteria for agencies to address that might help inform the argument either for, or against, exemption. Those that are relevant are discussed below:

1. *'The relevant statutes comprehensively set out the circumstances in which the agencies are able or required to report on the outcome of their performance of the function'*

When the Ombudsman decides not to investigate a complaint, or decides to stop investigating a complaint, the Ombudsman Act requires him to inform the relevant complainant.<sup>32</sup> Once an investigation is completed, the Ombudsman is required to provide the relevant complainant with particulars of the investigation.<sup>33</sup>

Further, where an investigation reveals a particular issue(s) in relation to an agency's action then the Ombudsman is required to report on the matter to that agency<sup>34</sup>. Any such report is also provided to the minister responsible for the agency, and where appropriate action is not taken by the agency on any matters or recommendations

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<sup>31</sup> Such information also typically forms a large part of a complaint investigation file.

<sup>32</sup> *Ombudsman Act 1976* s 12(1).

<sup>33</sup> *Ombudsman Act 1976* s 12(3).

<sup>34</sup> *Ombudsman Act 1976* s 15(1)&(2) and similar requirements in relation to the Overseas Student Ombudsman and Postal Industry Ombudsman.

raised in the report, the Ombudsman may inform the Prime Minister accordingly in writing.

The production of reports (whether to agencies, ministers or to Parliament) are also features of other functions performed by the Ombudsman, including his immigration detention reporting under the *Migration Act 1958*, and his inspection of agency records under the *Telecommunications (Interception and Access) Act 1979*, *Surveillance Devices Act 2004* and *Crimes Act 1914*.

2. *'The rights of affected individuals are usually protected by statutory procedural fairness provisions'*

The Ombudsman Act contains an express provision requiring that a procedural fairness process be followed before the Ombudsman makes an express or implied criticism about an agency or person in an investigation report.<sup>35</sup> Sections 19(1) and 35A of the Ombudsman Act apply the same requirements to the annual report and to public disclosures of information, respectively.

Apart from that process, the Ombudsman is obliged to provide common law procedural fairness when making any adverse decisions, for example, a decision to cease an investigation which a person may reasonably have believed would continue.

3. *'The function can lead to decisions that affect the legal rights of individuals, for example in employment, arrest/bail/prosecution, insurance coverage'*

In his investigation work the Ombudsman does not possess any broad determinative powers—he has no power to quash or nullify an agency decision, or to force an agency to take corrective action. As such, he does not represent an avenue of appeal in the way that a specialist merit review tribunal or court does and, consequently, cannot affect the substantive rights of complainants.

4. *'The function can result in findings adverse to an individual in circumstances where the agency performing the function is not required to provide procedural fairness'*

As we have noted above, both the Ombudsman Act and common law impose procedural fairness requirements on the Ombudsman. Any adverse findings made by the Ombudsman during the course of an investigation are made in this context.

In conclusion the Ombudsman considers that he should be exempt from the FOI Act in respect of documents relating to his investigative, reporting and oversight functions.

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<sup>35</sup> *Ombudsman Act 1976* s 8(5). This section provides that the Ombudsman 'shall not make a report in respect of an investigation under this Act in which he or she sets out opinions that are, either expressly or impliedly, critical of a Department, prescribed authority or person unless, before completing the investigation, he or she has: (a) if the opinions relate to a Department or prescribed authority—afforded the principal officer of the Department or authority and the officer principally concerned in the action to which the investigation relates opportunities to appear before him or her, or before an authorized person, and to make such submissions, either orally or in writing, in relation to that action as they think fit; and (b) if the opinions relate to a person—afforded that person an opportunity to appear before him or her, or before an authorized person, and to make such submissions, either orally or in writing, in relation to the action to which the investigation relates as he or she thinks fit.'