

Parliamentary Complaint Handling Procedures

7. Assessing complaints and deciding a course of action

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Overview

The first step you need to complete after receiving or being allocated a complaint is to assess it and decide the most appropriate action to take. All parliamentary complaints must be assessed, although the process will differ depending on what stage the complaint is at. For example, an intake officer is only expected to assess for jurisdiction or referral back to an agency, in which case a complaint can be finalised, otherwise it should be referred to another officer for further assessment.

The [Ombudsman Act 1976 \(Cth\)](#) and [Ombudsman Act 1989 \(ACT\)](#) (the ACT Act) provide that we must investigate all complaints unless one of the statutory grounds not to investigate is met. One of these grounds is that investigation is not warranted having regard to all the circumstances. In practice, this gives us broad discretion to determine the most appropriate way to handle the complaint, including to formally investigate or to utilise the other tools at our disposal.

Conducting a thorough assessment ensures the issues raised by the complainant are fully considered and results in better quality and more transparent decision-making. This Procedure explains how to undertake your assessment and decision-making process.

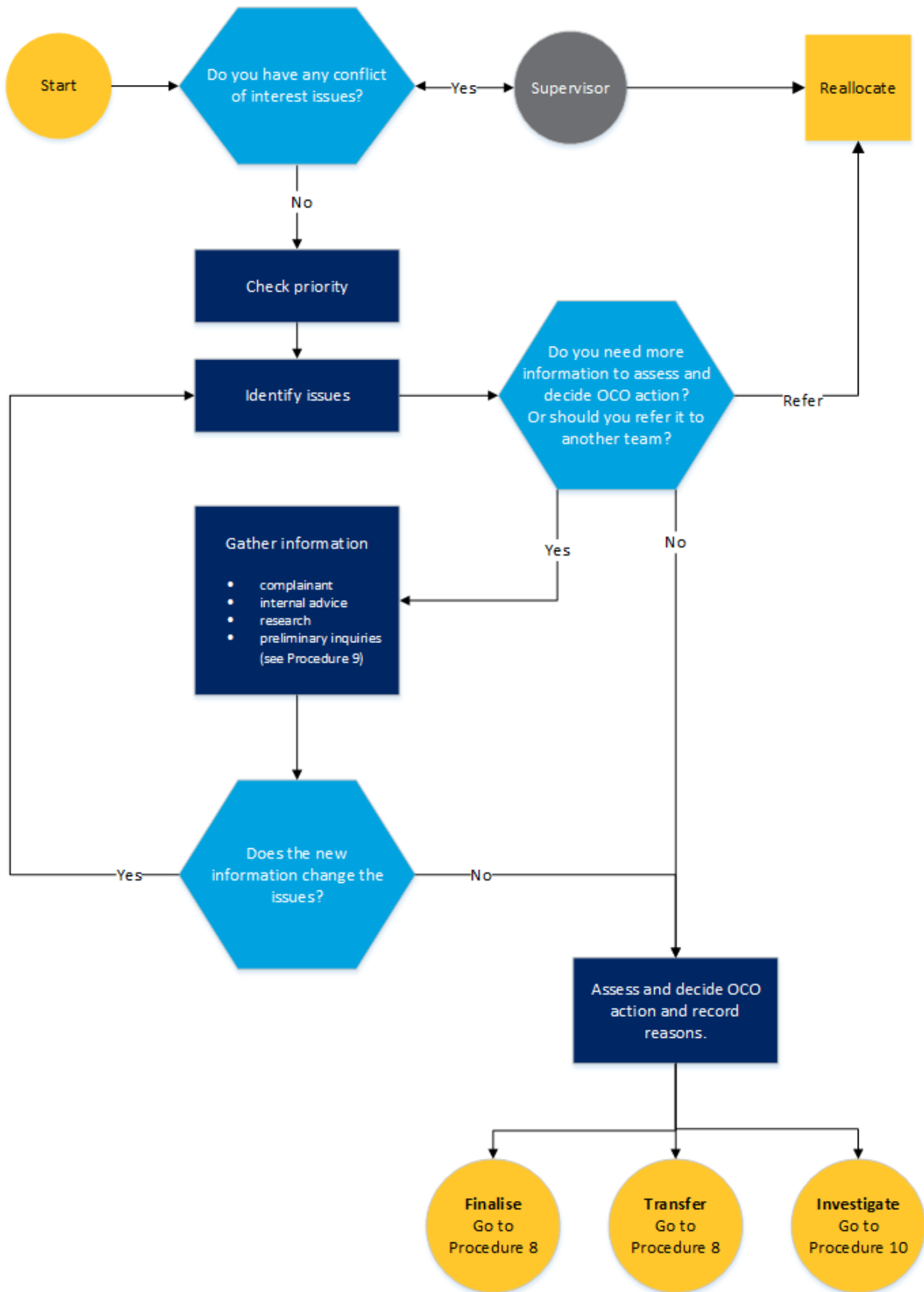
Resolving complaints early

The process of resolving complaints early, while adhering to the Ombudsman Act, is a guiding principle of how our Office handles complaints. A key step in our assessment process is identifying where the issues raised in a complaint are suitable for early resolution. Early resolution mean identifying and implementing a proportionate and fit for purpose response to a complaint at the earliest point possible. It recognises that in many complaints there are avenues other than formal investigation or other dispute resolution techniques that allow for a prompt outcome to be reached. Early resolution allows for efficient and effective complaint resolution and promotes expedient and effective use of public resources.

Our complaints management system is structured so that the option to resolve a complaint early is considered in most complaints. Consideration is given at all stages to the most appropriate complaint-handling option and the complaint allocated accordingly.

Purpose	To explain how to assess complaints, identify issues and how and when to obtain additional information. To explain what decisions you can make and how to determine what decision you should make.
Workflow	<i>Previous Steps:</i> Procedure 5 - Receiving and registering complaints. <i>Next Steps:</i> Procedures 8, 9 and 10 – Actioning your decision.
Scope	It does not explain how to implement your decision. This is covered in Procedures 8, 9 and 10.

Flowchart - assessing and deciding complaints



7.1 Conflicts and Priority

Prior to commencing a substantive assessment of your complaint, you need to conduct two pre-assessment steps, to determine if a conflict arises or whether the complaint should be prioritised over others.

7.1.1 Conflict of interest

While conflicts of interest are rare, it is important that they are identified and mitigation steps implemented so that your decisions can be seen by both complainants and agencies to be impartial and independent.

All staff are bound by s 13(7) of the [Public Service Act 1999](#), which requires us to 'disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent)' in connection with our duties. The Australian Public Service Commission provides more information about the [obligations on staff regarding conflicts of interest](#).

Our [Conflict of Interest Guidelines](#) outlines how to identify and respond to conflicts of interests. You are expected to have read and understood that document prior to handling complaints.

The first step after receiving a new complaint is to identify if you personally have a conflict of interest in relation to the complainant, agency or subject matter. In most cases, you will know upon reading the complaint if you have a conflict on reading the complaint particulars. However you may identify further into your complaint that you have a conflict. Regardless of when you identify the conflict, you are expected to immediately take steps to mitigate the conflict.

If you believe there could be a conflict of interest—for you or one of your colleagues—speak to your supervisor.

7.1.2 Priority

We aim to respond to all complaints within our service standards (see Procedure 2.1). Usually, this would mean dealing with complaints in the order we receive them, although this is not necessarily always the case. There are a number of factors that may give a complaint a higher priority or require escalation, through urgency, sensitivity or vulnerability.

Identifying these issues allows us to assess and evaluate the risks attached to a complaint and implement steps to address those risks. There are many options to address such circumstances which largely depend on the facts of the case but may include:

- targeted case allocation
- internal escalation and/or consultation
- expedited complaint handling, and
- extra time to allow a complainant to engage with us.

When identified, you must consider the urgency, sensitivity, vulnerability or accessibility consideration and record how you considered it and what action – if any – you took.

You must notify your manager of any urgency, sensitivity or vulnerability in circumstances where:

- you have proposed action that is out of the ordinary or conflicts with our usual complaint handling procedures, or
- you are concerned about the impact that our involvement in the complaint may have on the complainant.

Urgency

While all complaints should be finalised as quickly as possible, a small number of complaints that we receive are particularly urgent and should be given priority. You should record this clearly in Resolve including why. Factors that may mean a complaint is urgent include:

- the immediate wellbeing of the complainant, e.g. economic hardship, health and wellbeing or homelessness
- decisions that would be difficult to reverse, e.g. deportation, termination of a job in Defence¹
- the likelihood that evidence will be lost if action is not taken immediately
- the likelihood that delays will make it more difficult to achieve a resolution
- issues determined internally as a high priority
- an agency's willingness to stay (or delay) implementing a decision while we further consider or investigate a complaint.

Sensitivity

There are a number of factors that can result in a complaint being more sensitive than others, including:

- from a member of Parliament
- about which there has been Ministerial involvement
- about a high public or political profile of a person or issues, or in relation to which there is or may be media interest
- from a potential whistle-blower
- from someone making a potential public interest disclosure (PID) or PID handling complaint
- from someone in a correction or detention facility.

Vulnerability

The categories for what constitutes a vulnerability are intentionally broad. This does not mean that every complainant who fits a vulnerability indicator warrants different or urgent treatment – in many cases this will not be necessary. However the following indicators mean that it is best practice to give active consideration to how we service that complainant and if adjustments are warranted. A vulnerability may include, but is not limited to:

- disability or illness (physical, intellectual or psychiatric disability, mental health issues, acquired brain injury, addiction, severe illness)
- if the person is Aboriginal or Torres Strait Islander (especially if remote)
- age – under 18 or elderly
- language and/or literacy
- personal crisis e.g. bereavement, other recent trauma (such as traumatic diagnosis, relationship breakdown or physical injury, or other issues causing emotional distress)

¹ Note: we don't generally have jurisdiction over employment matters, but the Defence Force Ombudsman jurisdiction is one area in which we do, and we do get urgent complaints relating to imminent termination action.

- homelessness or risk of homelessness
- family or other violence
- geographically or socially isolated, or
- any other factors that may impact the ability of the complainant to engage with the agency complained of, or understand the actions required of them.

7.1.3 Accessibility and alternative servicing

In some cases, the above factors may not require prioritisation of a complaint, but may lead us to provide alternative servicing arrangements to meet the complainant’s identified needs or preferences.

For more information, refer to Procedure 2.3 on Accessibility.

7.2 Process table – Conducting a pre-assessment

The below table sets out the process you should follow prior to conducting your assessment of a complaint.

1	Review the information on the complaint file	This should include: <ul style="list-style-type: none"> • the information recorded in the <i>Initial Approach Details</i> screen • any correspondence in the <i>Documents</i> tab • any cross-referenced complaints in the <i>Parties/XRefs</i> tab • any relevant previous complaints the person may have made.
2	Conflict of interest	Consider whether there is a conflict of interest. If you believe there could be a conflict of interest – for you or one of your colleagues – you should speak to your supervisor.
3	Prioritisation assessment	Consider whether the complaint should be prioritised due to urgency, sensitivities or vulnerability. Any decision to prioritise a complaint due to urgency, sensitivities or vulnerability should be clearly recorded on Resolve using a <i>Briefing</i> action, or within your assessment of the complaint. Ensure you include an explanation of any risks associated with the urgency, sensitivity or vulnerability and how you intend to address those risks.
4	Conduct your assessment	In accordance with Process table 7.6

7.3 Identify the issues in the complaint

A complaint issue can usually be phrased as a question. An example of some issues you might identify in a complaint are:

- **Decision-making** – Did the agency consider all relevant information?
- **Process** – Is there unreasonable delay by the agency in making the decision? Did the agency follow its own processes and procedures in this situation?
- **Complaint-handling** – Did the agency respond to the complaint?

7.3.1 Framework to identify the issues in a complaint

A good starting point is what the complainant has told you they are concerned about and what they want to achieve.

However, this alone should not define the issues. It is important you conduct an independent review and assess the issues independently of what the complainant told you.

This assessment is a comparison **between what has happened** and **what should have happened**. Identifying the legal requirements and agency discretion questions provides a framework for deciding what should have happened. This in turn defines the relevant factual questions.

Legal requirements:

- What does the law require? Did the agency act lawfully?
- What should have happened?
- Legal questions are answered by looking at **the law**.

Agency discretion:

- What options or choices did the agency have? Did it consider all the options? Did it make a good choice?
- Discretionary questions are answered by looking at any **relevant policies/procedures** and considering the **principles of good administration**.

Factual:

- What happened?
 - who, what, where, when, why?
- Did the complainant engage with options available to them to progress their issue?
- Was the complainant aware of the options? Do they still have options available to resolve the issue?
- Factual questions are answered by looking at **the evidence**.

Once you have identified the relevant questions, you should consider if you can already satisfactorily answer any or all questions. The questions that do not have satisfactory answers will form the core issues of the complaint.

In many cases, identifying the issues in a complaint may be straightforward – the complainant may make it explicit, there may be only one or two issues of concern and there is sufficient information in the complaint for you to fully understand the problem. However this is not always the case, for example where the complainant provided voluminous or unclear information containing many intermingled issues.

The issues identified at this stage can evolve over the course of the complaint.

7.3.2 Accurately record the issue string for every issue

In Resolve, *Issue Strings* record four categories of data about a complaint (issue, cause, action taken and outcomes). We use issue strings to understand our complaint work at the macro level, perform trend analysis, prioritise and allocate resources where they are most needed and report to Parliament and the public. For these reasons, issue strings must be recorded accurately. Accurate reporting is a core part of our reputation as an Office.

Once you have identified the issue/s in the complaint create an Issue String about each issue. You can change the issue in the Issue String later if you identify that it does not correctly reflect the issues in the complaint.

Refer to Section 12.1 in Procedure 12 for more information about recording issue strings.

7.3.3 Are any of the issues also a tip-off?

A 'tip-off' complaint is one in which a person raises an issue relevant to an agency, and while the agency and/or our Office may well take action to address it, neither we nor the agency would be able to tell a complainant what action it is taking or has taken. Generally, this is due to privacy considerations, but may also be due to public interest, sensitivity or policy reasons.

Tip-off complaints can arise in the following situations:

- A person has made a tip-off to an agency providing information about another person's alleged wrongdoing and want to know if it has been actioned (i.e. a tip off that a person is unlawfully collecting welfare benefits).
- A person is in a multiparty arrangement and wants to know what action the agency has taken against the other party (i.e. Child Support collection action).
- A person was involved in a tender or funding arrangement and want to obtain assurance the process has been appropriately conducted (i.e. an unsuccessful grant or tender applicant seeking information about the process).
- A workplace relations allegation that is within the Ombudsman's jurisdiction (i.e. pre-employment allegations of wrongdoing during a recruitment process).

A complainant may want us to find out whether the agency's action or inaction involves poor public administration.

For privacy reasons, we cannot inform the complainant of the detailed outcome of our inquiries, but we can tell the complainant that we are satisfied that the agency's actions are reasonable and in accordance with their processes, or that we have concerns and have expressed them to the agency.

Tip-off complaints often warrant us taking some action to verify what the agency has done, such as a preliminary inquiry (Procedure 9) or an investigation (Procedure 10).

7.3.4 Identify systemic issues

What is a systemic issue?

As stated in Procedure 1, a *systemic issue* is:

likely to affect a class of persons beyond any person who lodged a complaint or raised a concern. Several complaints of the same type or a single complaint may raise a systemic issue, provided that the effect of the issue extends beyond a single complainant.

A systemic issue is by nature a significant issue. Examples of systemic issues include:

- a pattern of agency conduct, or recurring instances of agency conduct (for example, persistent delay in meeting a statutory timeframe, poor complaint handling or defective notification letters)
- a deficiency in an individual case that is likely to be repeated in other cases (for example, an erroneous interpretation of legislation, wrong advice in an agency manual, or an error by an individual officer that reflects poor training), and
- an issue that has been discussed in our public reports, whether or not we have made a recommendation.

Identify, then communicate and record

Regardless of the action taken on a complaint, it is important that you identify systemic issues in the complaints you receive. This includes new or emerging and known systemic issues.

The 'issues of interest' (IOI) functionality on Resolve records systemic issues, including emerging systemic issues. An IOI records how the issue will be dealt with and who has responsibility for taking action. A list of current IOIs can also be found on the office's [intranet](#).

An IOI can be created at any stage of complaint assessment or investigation. For more information, see the [Issues of Interest Framework](#) and the [IOI Guide](#).

Communication and recording are essential for effective management of systemic issues. Good communication about systemic issues allows:

- you to more effectively manage your caseload
- the Office to create agreed responses, so our response to the same systemic issue is consistent across complainants
- the Office to identify trends and strategically prioritise and allocate resources so we can achieve systemic improvements in public administration.

Recording accurate data about systemic issues:

- gives us an accurate overall 'snapshot' of maladministration and allows trend analysis
- allows us to allocate our resources appropriately to improve public administration.

For these reasons, you should:

- **Keep abreast of known systemic issues** relating to the agencies you regularly handle complaints about.
- **Identify known systemic issues**, and record them in Resolve.
- **Use existing Issue Strings and (IOIs)** and engage with the relevant SMS and strategic representatives.
- **Identify possible new and emerging systemic issues** and discuss with relevant SMS.
- If you are not already aware of the new systemic issue and there is a subject matter specialist (SMS) for the agency concerned, in the first instance consult with the SMS within your branch then, where appropriate, consult staff in the relevant strategy team. The SMS (or strategic representative) should be able to advise you if there is an agreed Office strategy in place to address the issue or else take the issue to the relevant strategy team at SMS meetings (see also Appendix B – How the OCO responds to systemic issues).
- If there is not an SMS network or the agency concerned does not have a specialist strategy team, you can search the IOIs on Resolve for the agency concerned (see below) to see if there is an IOI on the issue. If unsure, consult with your supervisor regarding whether the issue is significant enough to warrant monitoring it through an IOI and / or taking action on the individual complaint.

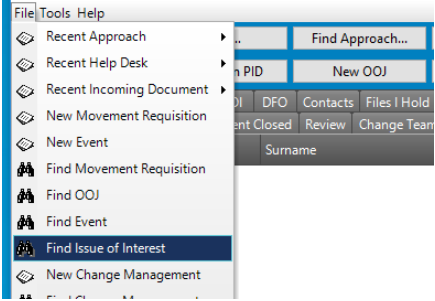
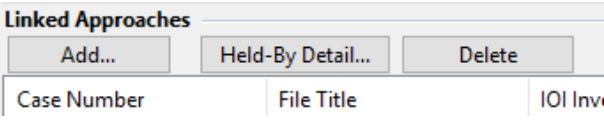
Refer to 7.5.3 for the factors you should consider when deciding whether to investigate a systemic issue.

Collaboration between CME and Strategy Branch

When a systemic issue is identified as warranting action, the relevant strategy team (if there is one) should be informed and their input considered as part of the investigation of the complaint (generally managed by the

investigating officer). Decisions about the sharing of investigations or systemic issue work should always involve engagement between the Directors of the teams involved.

7.3.5 Process table: Searching IOIs

1	Search IOI	<p>Select <i>Find Issue of Interest</i>. This is accessed through the File menu at the top left of the Resolve screen.</p> 
2	Enter parameters for the IOI search	<p>Enter the applicable search parameters regarding the agency and issue of your interest. Review the results to see if any match the issue of your complaint.</p> <p>If you know the IOI number for a specific IOI, you can search by that number.</p>
3	Link complaint to IOI	<p>To link to the case, open the relevant IOI. At the bottom of the IOI there will be the list of linked complaints. Select <i>Add</i> and add the Resolve number for your relevant complaint.</p> 
4	Notify IOI assigned officer	<p>In the IOI Action tab, add a <i>Briefing</i> action and ensure it is assigned to the IOI owner.</p> <p>In the <i>Briefing</i>, advise that you have added the case and the case number and briefly outline why you linked it to the IOI.</p>

7.4 Gather enough information to decide the next step

Having reviewed and considered the information on the complaint record, you should turn your mind to whether you require further information to finalise your assessment. If you already have enough information, you can skip this step and go to 7.5. The process of identifying issues may lead you to conclude that you need further information.

Further information, when required, can be obtained from any one or a combination of the following sources:

- the complainant
- internal information, including operational guidance in place for common or emerging issues
- research, including information agencies publicise on their websites
- a third party, or
- the agency (through a preliminary inquiry).

7.4.1 The complainant

If you require further information from a complainant, you should contact the complainant according to the relevant process set out in Sections 2.4 - 2.6 of Procedure 2.

7.4.2 Internal information – SMS and specialist teams

Operational approaches

From time to time, the office will develop an ‘operational approach’ to provide guidance about how to action common or emerging issues. Operational approaches may be team or branch specific. Any current operational approaches will be circulated within teams or may be on the intranet.

Subject Matter Specialists (SMS)

Subject matter specialists (SMS) are officers who have particular knowledge, skills or expertise. This may be one or two aspects of a single portfolio or it may be across several portfolios. Often there will be several SMS for an agency. This SMS network will attend meetings with representatives from the strategy team and will share that information, as required, to their teams.

SMS can provide practical and timely ad hoc advice in relation to complaints about their area of expertise. They can also provide assistance in relation to drafting correspondence to agencies (such as preliminary views, questions under s 8, or s 12(4) comments) or brainstorming (e.g., providing a further perspective to help you to decide how to action the complaint).

The advice of a SMS should assist your understanding of issues and suggested responses, but does not supplant the advice of your supervisor.

You should contact an SMS within your Branch before requesting advice from a strategy team. You can find a [list of SMS](#) in Objective. Before approaching an SMS, it is helpful to consider:

- what type of assistance you require
- what information the SMS is likely to request or need, and
- whether the matter is urgent.

Other specialist teams

Before asking another team for advice you should consider whether the information can be obtained from an SMS) or IOI, and seek approval from your supervisor (or your Director when you are seeking advice from the Legal team).

Table 7.1: Internal specialist teams

Team	Information
Legal team	The Legal Services Policy sets out the circumstances where you can (or must) seek legal advice. This includes advice in relation to: <ul style="list-style-type: none"> • interpretation of an agency’s policies or legislation, and • whether your complaint is in jurisdiction.
Strategy teams	Information specific to particular agencies including: <ul style="list-style-type: none"> • programs and schemes administered by the agency • work the agency is doing to address systemic issues, and • work Strategy is doing to address systemic issues.

ACT teams	Information about the ACT jurisdiction and priorities of the Office in that sector
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7.4.3 Research

There are multiple places where information can be obtained to assist your assessment of your complaint. This list is not exhaustive, but regularly used research avenues includes:

- previous complaints in Resolve (e.g. consider searching closed cases from that agency or cases on a relevant IOI)
- agency websites and published documents or reports
- legislation ([ComLaw](#) and [AustLii](#))
- the intranet (particularly resources published by the Strategy branch)
- agency procedural guidance provided to our Office and circulated through SMS networks or in your team
- internet searches, including media reports (the Strategy branch conducts media monitoring of systemic issues and may be able to assist)
- case law such as tribunal reasons or court judgements (generally available on [Austlii](#))
- in limited circumstances, textbooks or other published materials.

7.4.4 Seeking information from a third party

Seeking information from a third party is covered in more detail in Procedure 3.5.4.

You may wish to seek information from a third party in circumstances such as:

- seeking general information from an organisation, i.e., contacting a different organisation for information about its review process, or
- contacting an organisation or person with the complainant's consent to obtain relevant information.

In circumstances where you need to disclose information about the complainant to the third party, you may require the complainant's consent to do so. Refer to 3.5.4 for more information about when consent is required.

7.4.5 Preliminary inquiry

If you need information from an agency and cannot obtain it from operational documents available to us, the agency's website or other publicly available means, you may need to conduct a preliminary inquiry.

What is a preliminary inquiry?

A preliminary inquiry is a one-off inquiry made of an agency during the assessment of a complaint to determine whether or not to investigate the complaint. Preliminary inquiries are authorised by s 7A of the *Ombudsman Act 1976* (Cth) and s 8 of the *Ombudsman Act 1989* (ACT). Before conducting preliminary inquiries, you **must** familiarise yourself with the [Preliminary Inquiries Policy](#). Unlike other aspects of the Office's complaint handling, the use of preliminary inquiries is governed by an Office wide policy. To conduct a preliminary inquiry, follow Procedure 9.

Purpose of a preliminary inquiry

Preliminary inquiries are a useful tool to obtain information to allow for better decision making. Preliminary inquiries could be used to:

- obtain documents or correspondence
- identify if a complaint or issue is within jurisdiction
- seek confirmation that a complaint has been lodged with an agency and whether it has been finalised
- obtain policy or procedure that is not available to the public
- ask whether a decision has been made or when it will be finalised
- follow-up agency action after a complaint transfer.

Inappropriate use of preliminary inquiries

You should not use a preliminary inquiry when it was clear that investigation is warranted, or where it is clear that investigation is not warranted. A preliminary inquiry should not be used to 'fish' for information that is not otherwise needed in order to make a decision.

7.5 Decide what action we will take

Once you have fully assessed your complaint, including obtaining any further information, there are three decisions available to you:

- decide **not to investigate** the complaint because no further action is warranted
- **transfer** the matter to the agency or another organisation (and therefore finalising without investigation), or
- decide to **investigate**.

Regardless of what decision you make, you **must** assess and record your decision in accordance with [7.6](#).

Multiple issues in one complaint

If you have identified several different issues in your complaint, you can take different actions on those issues. For example, of three issues, you may decide not to investigate two issues, but one issue may warrant investigation.

In some cases, a decision to investigate one or more issues may result in you deciding to also investigate an issue which would not warrant investigation by itself. For example, if two issues in a complaint warrant investigation and a third issue may be resolved through a transfer, it may be appropriate to include the third issue as part of the investigation.

However, this should not extend to investigating issues where it is not warranted or inappropriate. For example, if an issue could be reviewed by a court or tribunal it should not be investigated purely because another issue in the same complaint is being investigated.

7.5.1 Decision not to investigate

Section 6 (other than s 6(2)) of the [Ombudsman Act 1976](#) provides that the Ombudsman has a broad discretion not to investigate complaints. The same authority is provided in s 6 of the [Ombudsman Act 1989 \(ACT\)](#).

The decision not to investigate can be reached at any time, including after a preliminary inquiry has been conducted. Further, the same provisions apply to decide not to investigate issues further – that is, they can be used to finalise investigation.

It is important to note that the Ombudsman has delegated some decisions only to Executive Level staff. The [delegation instrument](#) sets out all current delegations.

Which discretion will apply to each issue?

The legislation provides many discretions not to investigate. Some discretions are used regularly and others only in exceptional circumstances.

There are two principles to apply when deciding what discretion to apply to each issue:

1. Each issue requires a decision, and therefore if you are not investigating, **each issue requires a valid discretion not to investigate** (although the same discretion may apply to multiple issues).
2. The **most relevant discretion** should be used, even if another discretion may also apply.

Table 7.2: Discretions not to investigate

Reason	Provision (Cth)	Provision (ACT)	Procedure reference
Complaint not previously raised with agency	6(1A)	6(2)	7.5.1.1
Agency hasn't resolved / is still considering the complaint	6(1B)	6(3)	7.5.1.2
Other review available	6(4)	6(7)	7.5.1.3
Courts and tribunals	6(2), 6(3)	6(6)	7.5.1.4, 7.5.1.5
Complainant refuses to clarify in writing	7(2)	7(2)	7.5.1.6
Older than 12 months	6(1)(a)	6(1)(a)	7.5.1.7
Frivolous, vexatious, not in good faith	6(1)(b)(i)	6(1)(b)(i)	7.5.1.8
Not warranted in all the circumstances	6(1)(b)(iii)	6(1)(b)(iii)	7.5.1.9
Insufficient interest	6(1)(b)(ii)	6(1)(b)(ii)	7.5.1.10
Commercial activity	6(12)	N/A	7.5.1.11

7.5.1.1 Complaint not previously raised with agency

S 6(1A) - Where a person has not complained to the department or authority concerned, the Ombudsman may, in his or her discretion, decide not to investigate the action until the complainant so complains to the Department or authority

We would normally use this discretion and require the complainant to complain to the agency first where:

- a person has not yet complained to the department or authority concerned
- we believe they have the capacity and ability to do so
- we believe it is reasonable to ask them to do so, and
- we consider that the agency will properly consider the complaint

It is reasonable for us to expect an agency to try to resolve a problem with the complainant before we become involved.

In certain circumstances, we may have concerns about using this discretion due to:

- barriers to the complainant effectively taking up their complaint with the agency (e.g. ability to articulate the problem or to put it in writing for the agency; cultural or language difficulties; etc.)
- the nature of the complaint (e.g. is the matter urgent or likely to impact the complainant negatively in the short term; is it something the agency is unlikely to be able to resolve; is the matter so urgent, complex or sensitive that the Ombudsman should be involved?), or
- the complaint-handling record of the agency (e.g. where our experience shows the agency has a poor history of dealing with complaints, the particular complainant or the particular issue).

In these circumstances, a complaint transfer or an investigation may be warranted (refer to [7.5.2](#) and [7.5.3](#) of this Procedure).

7.5.1.2 Agency is still considering the complaint

s 6(1B) - Where a person ...has complained to the Department or authority ... the Ombudsman may, in his or her discretion, decide not to investigate the action unless and until the complainant informs the Ombudsman that no redress has been granted or that redress has been granted but the redress is not, in the opinion of the complainant, adequate

Use of this discretion can prevent premature investigation when the agency is already considering the complaint.

We do not usually investigate where a complaint about the matter has already been made to the agency concerned but that agency has not yet responded. We generally wait until the agency has finalised the matter. An exception would be where we believe there has been an unreasonable delay – a transfer or investigation may be appropriate.

Before deciding not to investigate, you **should**:

- satisfy yourself that the agency is addressing the complaint (e.g. has the complainant received any acknowledgement or timeframe for response?). If you are unsure, you may want to make a preliminary inquiry of the agency.
- invite the complainant to contact us again if they are dissatisfied with the response or do not receive one within a reasonable timeframe.

Note: s 6(1C) provides that the Ombudsman shall investigate if, in the opinion of the Ombudsman there is no remedy provided by the agency to such a complaint within a reasonable time or the remedy is inadequate. If you consider this provision applies you should consult with your supervisor.

7.5.1.3 Internal review available

s 6(4) - Where the Ombudsman is of the opinion that adequate provision is made under an administrative practice for the review of action of the kind complained of

If the agency has an effective internal review mechanism that the complainant has not yet accessed to address the issue complained about, we do not usually investigate. The internal review mechanism might be established under legislation or by the agency itself.

There are very few circumstances in which we would investigate a complaint about an issue where there is an agency review method available.

However, if there are accessibility, sensitivity or vulnerability issues we may transfer the complaint or conduct a preliminary inquiry to help facilitate the internal review, or ensure it has commenced. Complainants should be aware that they can complain to us again after the internal review has been finalised (unless there is an external review mechanism – see below).

You can only use this discretion where the internal review process can consider and address the issue complained about. For example, if a person's complaint is about an agency's process rather than the decision itself, the process issue is unlikely to be part of an internal review process and may be appropriate for us to investigate.

This provision would also cover external review (other than by a court or tribunal).

7.5.1.4 Could be, or could have been, considered by a Court or Tribunal

s 6(3) - Where the Ombudsman is of the opinion that a complainant has or had a right to cause the action complained of to be reviewed by a court or tribunal but has not exercised that right, the Ombudsman may decide not to investigate the action or investigate it further if the Ombudsman is of the opinion that, in all the circumstances, it would have been reasonable for the complainant to have exercised that right

If a complainant has not pursued their right to review of an action or decision by a court or tribunal, we can decide not to investigate if we consider that it would have been or would be reasonable for them to exercise that right. 'Tribunal' means a tribunal set up under an Act.

With all discretions not to investigate, using this authority on one issue does not prevent us investigating related actions of the agency that could or would not be considered by the court or tribunal. If you do investigate another issue, it is very important to clearly explain to the complainant in writing what you are and are not investigating. You should also consider whether it is more appropriate to wait until the court or tribunal review is finalised before investigating, although this is not a requirement for us to do so.

This discretion **cannot** be exercised on the basis that a complainant has a right to seek judicial review of the administrative action under the [Administrative Decisions \(Judicial Review\) Act 1977](#). Paragraph 10(1)(b) of the ADJR Act provides that any right to seek judicial review of the administrative action under that Act must be disregarded when considering whether to not to investigate a complaint. In other words, we *cannot* decide not to investigate a complaint, on the basis that a person has the right to seek judicial review in a federal court.

We operate on a general presumption that the complainant should pursue a matter to a tribunal, if they have that right. The parliament has established those tribunals as specialist review bodies and, where the issue complained of sits within the purview of the court or tribunal, we should not seek to circumvent that intention.

However, s 6(3) requires us to make an assessment that 'it would have been reasonable for the complainant to have exercised that right'. For example, if a complainant was not informed by the agency that merits review at a tribunal was available and the tribunal refused an extension of time application, we may consider investigating.

We should generally not make an assessment of the likely outcome of a court or tribunal appeal and make our decision based on that pre-assessment. However, in limited cases, we may assess that a tribunal or court may uphold the agency's decision, but that it would lead to an unreasonable or unjust outcome. In these cases, we may consider investigating the complaint or addressing it as a systemic issue. These are exceptional cases and the relevant Director should be consulted before deciding to investigate such a complaint.

7.5.1.5 Has been, or is being, considered by a Court or Tribunal

s 6(2) - Where the complainant has exercised, or exercises, a right ...to be reviewed by a court or by a tribunal constituted by or under an enactment, the Ombudsman shall not investigate, or continue to investigate... the action unless the Ombudsman is of the opinion that there are special reasons justifying the investigation of the action or the investigation of the action further

Unlike the provisions discussed in this section so far, **this provision is not a discretion**. When a complainant has had an action or decision reviewed by a court or tribunal, or it is currently being reviewed, we **cannot** investigate or continue to investigate unless there are special reasons justifying the investigation of the action. Please note that for this provision to apply, the court or tribunal must be set up by or under legislation.

Our authority in this situation is only to assess and decide whether there are special reasons to investigate. We are not in a position to review the decision of the court or tribunal.

This provision can be confusing but is a key limitation on our work. It is important that staff understand the circumstances where we may be able to investigate a complaint.

Only staff at EL1 and above have the delegation to decide that special reasons exist which justify an investigation. If you are below EL1 level then you should refer the matter to an EL1 or Director in your Team.

A case that has been or is being reviewed by a court or tribunal includes:

- applications currently being considered by a court or tribunal
- finalised decisions, and
- applications that have been withdrawn or settled (however reasons for withdrawal may be relevant to assessing 'special reasons').

It does not cover situations where merely the option to go to a court or tribunal exists (this situation is covered by s 6(3), see 7.2.1.4) and does not apply to cases where someone other than the complainant brought the matter before the court or tribunal (for example, the Director of Public Prosecutions).

Special reasons are inherently difficult to define but **would not** include circumstances where the complainant disagrees with the decision under review; argues the agency misled the court/tribunal; or where the complainant alleges the court/tribunal was biased. In these instances it would be more appropriate for the complainant to appeal the court or tribunal's decision.

Special reasons may include situations where the court or tribunal cannot or did not address issues we could address. Take special care to ensure that our processes do not conflict with, or possibly amount to a contempt of, a court's process or prejudice the capacity of any party to manage its part of the litigation. An allegation of a breach by an agency of the Commonwealth's Model Litigant policy may constitute a special reason but discuss this situation with your Director and the Legal Team.

If a complainant fails to obtain compensation after taking civil action in the courts, and we believe there nevertheless has been an administrative shortcoming, we may decide there is a special reason to pursue it, even though a court has reviewed the same action. For example, this may arise where a discretionary payment through Act of Grace or CDDA may be available. We may also consider investigating in the case where a court or tribunal has dismissed an application but has suggested that some relevant matter (e.g. an anomalous effect of legislation adverse to the applicant) be raised with the Ombudsman.

7.5.1.6 Complainant refuses to clarify in writing

S 7(2) - Where a complaint is made orally, the Ombudsman may at any time require the complainant to reduce the complaint to writing and, where the Ombudsman makes such a requirement of a complainant, the Ombudsman may decline to investigate the complaint, or to investigate the complaint further, until the complainant reduces the complaint to writing

While we receive complaints orally and in writing, the Act permits us to require that a complainant put their complaint in writing and to decline to investigate until the complaint is provided in writing. This provision should only be used when we cannot understand the complaint effectively without receiving it in written form. It is primarily used at the registration stage where the oral information is voluminous, unclear or inconsistent.

The complainant should be advised of the requirement to provide the complaint in writing and what form and information is needed to allow us to assess it. They should also be advised that no further action will be taken unless and until a written complaint is received.

Accessibility consideration: If the client is unable to prepare a written complaint, it may be appropriate to suggest they seek assistance to do so. Refer to Section 2.3 in Procedure 2. Subject to their circumstances and the resources required, we may be able to assist with this if they make an appointment to attend our Office.

7.5.1.7 Older than 12 months

s 6(1)(a) - if the Ombudsman is satisfied that the complainant became aware of the action more than 12 months before the complaint was made to the Ombudsman

This discretion recognises that when significant time has elapsed since the complainant became aware of the administrative action, it becomes increasingly unlikely that a meaningful outcome can be achieved. This discretion applies to reflect the entrenched principle of 'finality' in the Australian legal system. Further, when an investigation would be dependent on the memory of participants, where relevant officers or records may no longer be available, or when an action has been irretrievably overtaken by later events, investigation may be futile.

While we may decline to investigate a decision or action on the basis of the passage of time since the complainant was aware of it, there will be many circumstances where it will not be appropriate to decline to investigate *solely* on the fact that that more than 12 months has elapsed.

For example, the 12 month rule should not be used where the complainant has made every reasonable effort to resolve the matter with the agency throughout the intervening period, and approached us when that avenue failed. Similarly, it should not be used where the age of the complaint has no bearing on our ability to meaningfully consider the complaint.

If you are unsure whether to use this discretion, you should speak with your supervisor.

7.5.1.8 Frivolous, vexatious, not in good faith

s 6(1)(b)(i) - if, in the opinion of the Ombudsman, the complaint is frivolous or vexatious or was not made in good faith

This provision is not used often, and should not be used lightly. This provision is delegated to EL2 staff or above, but as a matter of Office practice, the Ombudsman or Deputy Ombudsman generally makes this decision.

This discretion can be applied to complaints lacking substance, potentially motivated by desire to cause trouble for an individual or agency, or there is documented evidence to suggest the complainant is deliberately withholding evidence. This category generally includes complainants who have contacted our Office on many occasions about the same issue.

If you consider that the complaint may be frivolous or vexatious or not in good faith, you should consider the [Unreasonable Complainant Conduct policy](#) and consult with your supervisor and/or Director. Legal advice will be required prior to making a decision under this provision.

In less serious cases, determining that investigation is not warranted is a more appropriate course of action.

7.5.1.9 Not warranted in all the circumstances

s 6(1)(b)(iii) – ... the Ombudsman may, in his or her discretion, decide not to investigate the action [...] if, in the opinion of the Ombudsman: an investigation, or further investigation, of the action is not warranted having regard to all the circumstances

This discretion recognises that there will be a wide range of circumstances in which investigation is not warranted, which have not been explicitly included in s 6. Due to the broad nature of this discretion, it is used often.

When deciding whether investigation is warranted in all the circumstances, consider the following factors (which are not mutually exclusive).

Table 7.3: Circumstances where not warranted in all the circumstances may apply

Factor	Details
No indication of maladministration	The agency's action or decision was correct or there is nothing wrong with what the agency did (and this is apparent from the information already available without the need to formally investigate).
Lack of specific details	Where allegations of a general nature are made that do not outline an individual complaint and more specific details are not provided despite reasonable requests.
No substance	Where, from our knowledge and experience, a complaint does not appear to raise any real or meaningful issues for consideration.

Factor	Details
Lack of meaningful or viable outcome	<p>Where it is unlikely that a meaningful, beneficial or additional outcome will be achieved, including where the agency has already provided a reasonable outcome or the outcome that the complainant is seeking cannot be achieved.</p> <p>It may be that an outcome could be achieved but it is not sufficient to justify investigation.</p> <p>NOTE: this situation can be subjective to the complainant's view and circumstances, and staff should assess the possible outcome and the complainant's desired outcome in the context of their experiences and the detriment experienced.</p>
Investigation unlikely to be effective	Where an investigation is unlikely to assist in resolving the issue. Generally used where it is unlikely any beneficial evidence would/could be obtained or a complainant appears unlikely to accept evidence supporting an alternative view.
Systemic issues (see also 7.3.4)	<p>If the only issue is a known systemic issue and no meaningful outcome is available to the individual complainant, we would not normally investigate and would address through other action on a strategic/systemic basis instead (e.g. agency liaison).</p> <p>Exceptions: where the complaint is about a small agency and/or it is unlikely another complaint on the issues will be received, investigation may be warranted. However the complainant's expectations should be managed regarding the possibility of an outcome.</p>
Trivial matter	Where the complaint concerns a trivial issue, decision or action or the desired outcome is minimal or inconsequential. For example, a complaint about punctuation in government letters or financial losses of very small amounts (e.g. the cost of a postage stamp or cost of a single phone call).
Policy or internal priority considerations and resources constraints	<p>The Ombudsman's policies and priorities can be taken into account. Sometimes it is an Office position not to investigate the complaint issue, or we have a particular handling strategy for complaints of that type that has been communicated to staff. However, even if the policy suggests that the complaint should not be investigated, you should still consider whether it would be unjust or unfair to apply the policy in the circumstances of the complaint.</p> <p>Further, the resources of the Ombudsman are limited and do not extend to investigating every complaint issue received. Priority should be given to issues or complaints where an outcome may reasonably be achieved and/or improvements in public administration may be realised.</p>
Significance	The significance of the matter to the complainant and the public interest.

7.5.1.10 Insufficient interest

s 6(1)(b)(ii) - if, in the opinion of the Ombudsman, the complainant does not have a sufficient interest in the subject matter of the complaint

As a general principle, a complainant needs to be *directly affected* by the action or decision that they are complaining about. When they are not, and are not authorised to act on behalf of someone who is, this discretion may apply.

'Directly affected' could include, for example, possibly suffering some damage to property rights, having direct business or economic interests or, in some cases, having direct social or political interests (e.g. as the office bearer of a community body).

A person whose interest is based solely on being a citizen, resident, taxpayer or member of the public would not usually have a sufficient interest in an administrative action.

However, such a complaint may be considered to be a valid 'tip off' complaint. That is, it raises genuine concern about an agency's administrative actions or practice that we should consider investigating as part of our broader oversight and assurance role – even if it doesn't directly impact the complainant or we cannot or should not inform the complainant of the details of our action. In such situations, this discretion generally should not be applied.

Insufficient interest does not prevent us from investigating the matter using the Ombudsman's own motion power under s 5(1)(b). For more information, see Procedure 13 and refer to Appendix B.

7.5.1.11 Commercial activity

s 6(12) - If the Ombudsman forms the opinion that action in respect of which a complaint has been made relates to a commercial activity of a Department or prescribed authority, the Ombudsman may decide not to investigate the complaint, or to cease investigating the complaint

This provision may apply to actions or decisions that relate to the commercial activity of an agency. Accordingly, disputes or disagreements should be resolved through appropriate commercial means.

We only consider a limited range of circumstances as commercial activity, and therefore this discretion is not regularly used. If you consider it applies to your complaint, you should consult with your supervisor.

In general, commercial activity may cover complaints about business or commercial activities of agencies as relates to the delivery of the core service functions, such government agency engaging an IT contractor or a dispute about a lease of a government premises.

It does not normally cover tender or grant processes (that is, it is open to us to investigate complaints about these processes), and we would generally consider if the processes were administratively fair and reasonable to determine whether investigation is warranted in the circumstances.

The discretion should not be applied to commercial agreements entered as part of an agency's delivery of its policy programs (e.g. an employment provider complaining about government audit activity).

Please note: this provision cannot be used as a basis not to investigate the actions of contracted service providers. Under s 3(4B) and 3BA of the Commonwealth Act, the actions of a service provider contracted by a government agency is taken to be an action by the agency who contracted the provider, and thus within our jurisdiction. Please note the ACT Act does not have a similar provision.

7.5.2 Transfer the complaint

What is a transfer?

In a *complaint transfer*, our Office prepares documentation and sends a complaint to another agency to assess and action. A decision to transfer a complaint is a decision to finalise that complaint without investigation. We can only transfer when there is a statutory basis to do so or an agreement or protocol in place with the other agency.

A complaint transfer is different to a referral to another organisation. In a *referral*, we tell a complainant about another body that may better handle their complaint. The complainant then contacts that other body.

Basis for transfer

A complaint may be transferred under a statutory provision, or under a protocol or agreement. If the agency is not listed in the legislation and there is no protocol or agreement, but you think a transfer would be beneficial, speak to your supervisor.

Table 7.4: Transfer obligations, depending on basis for transfer

Basis for transfer	Officer responsibility
Statutory provision	Transfer according to the requirements of the provision. Refer to Appendix A .
Protocol or agreement	Transfer according to the protocol or agreement. Refer to the intranet for information on existing protocols.

Mandatory transfers – Tax and Corruption

In certain circumstances the Act prevents investigation and requires us to transfer the complaint to another agency. For example:

- Complaints that allege a ‘serious corruption issue’ that could have been raised with the Integrity Commissioner must not be investigated, or investigated further, and must be referred to the Integrity Commissioner: s 6(17).
- Complaints about tax administration that should be raised with the Inspector-General of Taxation and Taxation Ombudsman must not be investigated by our office (with some exceptions): s 6D(1). See also Appendix A.

Obtaining consent to transfer

If a transfer is statute-based, whether mandatory or discretionary, you do not need to seek consent from the complainant before transferring the complaint.

For all other transfers, even where there is a protocol or agreement, the complainant’s consent is **always** required on the basis that transfer requires release of their personal information. Some complainants may refuse consent due to reluctance to allow the agency complained of to handle their matter again.

In all cases, refer to Procedure 8.3.

Decision to transfer

For mandatory transfers, there is no further consideration required. For statutory-based discretionary transfers, you should apply the following test when deciding whether to transfer:

1. *Can this agency help?* - Is there another agency that has jurisdiction to consider the complaint? Before transferring a complaint, you will need to satisfy yourself that the agency receiving the complaint will have jurisdiction to consider it. This may include reviewing standard contact protocols in place between the agency and our officer or contacting the agency to confirm they can receive the complaint.
2. *Efficient and effective* - Is the receiving agency able to more efficiently or effectively deal with the complaint than we can?

In some cases, you will be required by the relevant statutory provision to consult with the agency to determine whether transfer is warranted. Refer to Appendix A.

For non-statutory transfers, you should apply the above test and in addition, consider the following factors when deciding whether to transfer:

3. *Vulnerabilities and barriers* - Complaint transfers may be appropriate when you assess a complainant is vulnerable or impacted by barriers that inhibit their ability to make the complaint on their own. Transfers make it more likely the agency will respond quickly, and reduce concerns presented by urgency, vulnerability and sensitivities.
4. *Agency delay* - Transfers may help when a person has made a complaint to the agency, but the complaint remains unresolved.
5. *Keeping our options open* - As transferring a complaint does not exhaust the matter with our Office, the complainant is still able to return to us if the transfer is unsuccessful, at which point it may be appropriate to conduct a preliminary inquiry or to investigate.
6. *Internal guidance* - Is there [internal guidance](#) (e.g. a transfer pyramid) on complaint transfers that applies to the complaint?
7. *Does this complaint require further investigation?* Where you have assessed that further investigation is required on the complaint, this is an indication that transfer is not the appropriate outcome.

If you have decided to transfer your complaint to another agency, you must document your decision and reasons in accordance with the process table at 7.6 and then following 8.3.

7.5.3 Investigate

In an investigation, we request information from an agency in response to the issues we have identified.

This section and Procedure 10 refer to investigations commenced under s 8 of the *Ombudsman Act 1976* (Cth) and s 9 of the *Ombudsman Act 1989* (ACT). This section does not deal with an own motion investigation commenced under s 5(1)(b) of the Ombudsman Act. For more information, see Procedure 13 Investigations and refer to Appendix B.

Whether investigation is warranted

An investigation is likely to be warranted if you determine that:

- a) the issues you have identified are within jurisdiction
- b) the complainant has already complained to the agency
- c) the agency provided no redress or the complainant considers the redress inadequate
- d) it is more appropriate for the Ombudsman to deal with the complaint than to transfer or refer it elsewhere
- e) there are no reasons why you should decide not to investigate
- f) you need to contact the agency to resolve the complaint and a preliminary inquiry is not appropriate
- g) there is an identifiable outcome which could reasonably be achieved through investigating, and
- h) the investigation is a reasonable use of our resources.

If your proposed investigation is entirely or partly related to a systemic issue, you need to assess whether an investigation is the most appropriate way to achieve an outcome. This is because there are more avenues to achieve outcomes for systemic issues than a complaint about a single issue. You should consider Appendix B while assessing your systemic issue.

If the only issue is a known systemic issue and no meaningful outcome is available to the individual complainant, we would not normally investigate and would address through agency liaison or other avenues instead.

If you have satisfied the criteria, it is likely that an investigation is warranted and reasonable. Once you have decided to investigate your complaint, refer to Procedure 10. If unsure, check with your supervisor.

7.6 Process table – Assessing and deciding complaints

The below table sets out the process you should follow when assessing and deciding a complaint that has been allocated to you. It should be completed on every complaint, regardless of what decision you have made.

Ensure you have followed the pre-assessment process set out at [7.2](#) before commencing your assessment.

1	Open an <i>Assessment</i> action on the approach file	TIP: A third party should be able to read your <i>Assessment</i> action and understand what the complaint is about without having to examine any other Resolve screens or documents
2	Identify the issues in the complaint	Record each issue in your <i>Assessment</i> action. The level of detail included will vary depending on the type and complexity of the issues in the complaint.
3	Record an issue string for every issue	Procedure 12 – Finalising complaints sets out the process for recording issue strings.
4	Consider whether any of the issues is also a tip-off complaint	In circumstances where an issue is also a tip-off complaint, you will generally require further information to verify what the agency has done. Consider whether this information should be obtained by: <ul style="list-style-type: none"> • A preliminary inquiry (Procedure 9) • An investigation (Procedure 10)
5	Consider whether any of the issues are systemic issues	You can search systemic issues on Resolve by following the steps set out in section 7.3.5 of this Procedure.
6	Further information: complainant	Consider whether you require further information from the complainant to complete your assessment. You should contact the complainant in accordance with the information set out in Section 2.4-2.6 of Procedure 2.
7	Further information: SMS	Consider whether you require advice from an SMS to complete your assessment You can contact an SMS by phone, email, informally or by requesting a meeting. Any advice from an SMS should be recorded on the complaint file in a <i>Request Internal Advice</i> action, or within your <i>Assessment</i> action.
8	Further information: research	Consider whether you need to conduct any research. You should record any research you have conducted in a <i>Research</i> action. Ensure you include: <ul style="list-style-type: none"> • A reference to the source of the information • Where relevant, a link to the source
9	Further information: third party inquiry	Consider whether you require further information from a third party. In any circumstances where external contact has been made to a party that is not the complainant or agency complained of, use the <i>Contact with Third Party</i>

10		action. Include complete details of who was contacted, when and the details of what was discussed.
	Further information: preliminary inquiry	Consider whether you require information from the agency that could be obtained through a preliminary inquiry. If so, you must follow the process set out in Procedure 9.
11	Decide what action to take in relation to each issue	<p>After assessing the information, decide on what action you will take in relation to <i>each</i> issue. That is, whether you will:</p> <ul style="list-style-type: none"> • Not investigate the issue • Transfer the issue • Investigate the issue <p>Your decision must be recorded in the <i>Assessment</i> action, or a <i>Decision</i> action. Ensure you explain the basis of your decision, including:</p> <ul style="list-style-type: none"> • Any consideration given to urgency, sensitivities, vulnerability, or accessibility issues • Any relevant law and/or policy • Where relevant, any discretion not to investigate that you applied • Whether any of the issues are tip-offs or systemic issues

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Approval Date					
Date of Review					
Contact Team					
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Version	Amended by	Review Date	Brief Description of Change	Approved by	Date

Appendix A – Basis for transfer – statutory transfers

There are provisions within the *Ombudsman Act 1976* (Cth) and *Ombudsman Act 1989* (ACT) that **empower or require us to transfer complaints to specific agencies**.

Table 1: Legislative provisions for transfer of complaints to specific agencies.

Agency	Provision (Cth)	Provision (ACT)	Consultation
Discretionary transfers			
Australian Communications and Media Authority	6(4D-4E) & 6(6-8)	N/A	
Australian Public Service Commissioner	6(9-11)	N/A	
Parliamentary Service Commissioner	6(11A-11C)	N/A	
Australian Federal Police Commissioner	6(20-21)	N/A	
ACC	6A	N/A	
Integrity Commissioner	6B	N/A	Note below under Mandatory Transfers
Information Commissioner	6C	N/A	We must consult the Information Commissioner about complaints that either: <ul style="list-style-type: none"> could have been made to the information Commissioner regarding privacy or freedom of information matters, or. have been subject to a completed investigation by the Information Commissioner: s 6C(2).
Australian Small Business and Family Enterprise Ombudsman	6E	N/A	
ACT Statutory office-holders	N/A	6A	
ACT Commissioner for Sustainability and the Environment	N/A	6B	
ACT Human Rights Commission	N/A	6B	
Mandatory transfers			
Inspector-General of Taxation	6D	N/A	We must consult the Inspector-General of Taxation about complaints that are partly about tax

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			administration to determine whether the whole complaint should be transferred: s 6D(4).
Integrity Commissioner	6(17)	N/A	Where the Ombudsman forms the opinion a complaint involves a <i>significant corruption issue</i> that could have been referred to the Integrity Commissioner or could be more conveniently or effectively dealt with by the Integrity Commissioner.

Appendix B – How the OCO responds to systemic issues.

Possible OCO responses to a systemic issue

The Office's possible responses to a known systemic issue include:

- undertaking further monitoring of the issue either through complaint investigations, other inspection work or in the course of other forums (such as meetings) with the agency concerned
- checking Resolve's issues of interest functionality to identify whether the issue has previously been identified, or whether there are similar issues in other agencies or jurisdictions
- drafting a s 12(4) comment or suggestion
- drafting a letter to the agency to raise the issue and seek further information, signed by a SAO, the Deputy Ombudsman or Ombudsman
- requesting a briefing from the agency on the specific issue (and consider at which level to approach will be most effective)
- drafting an issues paper which might include highlighting the issue, providing examples through case studies and making suggestions or recommendations for addressing the problem
- including the issue in a quarterly report from the Ombudsman to the head of the agency
- reporting on the issue in our annual report
- preparing a formal report under s 15
- conducting an own motion investigation (see Diagram B-1 below)
- issuing a press release
- reporting on the issue on our website.

Strategic Policy Board process

In addition to considering general strategic matters affecting the Office, the [Strategic Policy Board \(SPB\)](#) also assesses what action the Office will take on systemic issues. The SPB considers systemic issues against the Office's current strategic priorities and proposed projects, as well as available resources, to determine whether they should be pursued and in what time frame.

Criteria to apply when determining whether to do an own motion inquiry.

Systemic issues: assessment framework

What criteria should we apply to determining when to do an own motion inquiry?

Phase 1: Issues Monitoring

Sources of information

Internal information

- Complaints data
- Issues of interest records
- Findings from investigations &/or inspections
- Feedback from regular agency liaison meetings
- Stakeholder feedback – round tables, communities of practice, other engagement

External/public information

- Policy & administrative reforms
- Other inquiries – Parliamentary, Productivity Commission, ANAO
- Decisions of courts & tribunals
- Media coverage
- Academic papers/research
- Senate Estimates hearings, agency Annual Reports

Outputs

- Briefings on key agencies/roles to Strategic Policy Board:
- Every 6 – 12 months, with schedule determined 6 months in advance
 - 10 minute presentations, followed by 10-20 minute discussions
 - Written material, if needed, no more than 1-2 pages
 - Identify trends & systemic issues
 - Recommend issues for further investigation

Phase 2: Assessment Criteria

Potential own motion investigation issues to be assessed against the following criteria

Impact	What change will result from the investigation? Is it measurable?
Scope	Is the issue within our jurisdiction? Does it align with our strategic objectives? Are other agencies investigating this issue? If so, what value will we add?
Significance	Is it a systemic issue? How important is the issue to our stakeholders? How many people are likely to be affected? What is the impact on them?
Vulnerability	What is the impact on: <ul style="list-style-type: none"> • Aboriginal and Torres Strait Islander peoples? • People with disability? • People from CALD backgrounds? • Other vulnerable people?
Risk	• What are the risks of investigating or not investigating?
Resources	<ul style="list-style-type: none"> • What resources do we need? • What resources are available? • What other issues/work will be delayed or cease?

Phase 3: Options

Options for progressing an investigation following Strategic Policy Board decision

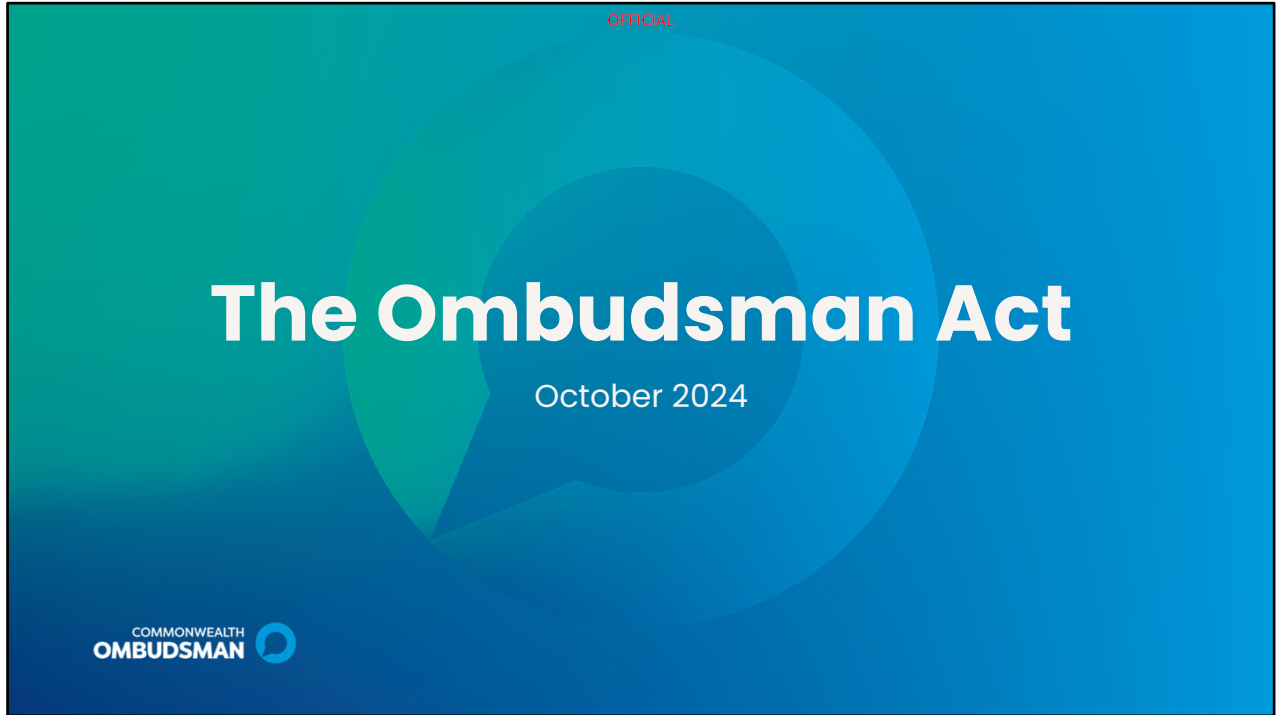
- Investigation options:**
- Own motion investigation (section 5 (b))
 - Section 15 report
 - Research paper or issues paper
 - Media release
- Alternative options:**
- Section 12 (4) comment or suggestion
 - Write to agency raising issue & asking how it intends to address issue
 - Organise forum with relevant agencies to raise issue & explore options for addressing it?

Outputs

- Strategic Policy Board record of decision, capturing:
- Whether to progress an investigation
 - Priority of issue/investigation
 - Agreed option (investigation or alternative) for progressing issue

Next steps

- Depending on the option chosen:
- Seek formal Ombudsman endorsement of s 5(b) or s 15 options
 - Agree establishment of project team
 - Seek Strategic Policy Board's agreement of project plan, with clearly defined objective, scope & timeframe
 - Provide monthly updates to Strategic Policy Board







Welcome to our session on the Ombudsman Act


Over the next two hours we'll be talking about the legislation that sets out how we perform our role.

It gives us powers to make lawful decisions and will become a constant reference point in your day to day work.

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Learning outcomes

-  Gain a basic understanding of the Act, including where to find it
-  Identify key sections and what they mean
-  Begin to understand how the Office performs its role
-  Become familiar with how to use the Act as a resource

 [This is the heading](#) 2

From this session, I hope that you will ...

We are not legal experts. I am not here as a lawyer.

We should have a basic understanding of what the law says so that we can do our job effectively.

- At any stage while you are undertaking your work, if you have a question about how a section should be applied, you should consult the written guidance and consider speaking to your colleagues/supervisor.

Guidance from a supervisor will generally satisfy most questions. In some circumstances, an EL 1 or EL 2 may request internal legal advice for the curly questions.

Relevant documents

- *Ombudsman Act 1976* (Commonwealth)
- *Ombudsman Act 1989* (ACT)
- Ombudsman Regulations 2017
- Parliamentary Complaint Handling Procedures (the **Procedures**)
- Legal Delegations



This is the heading

3

Book mark the following:

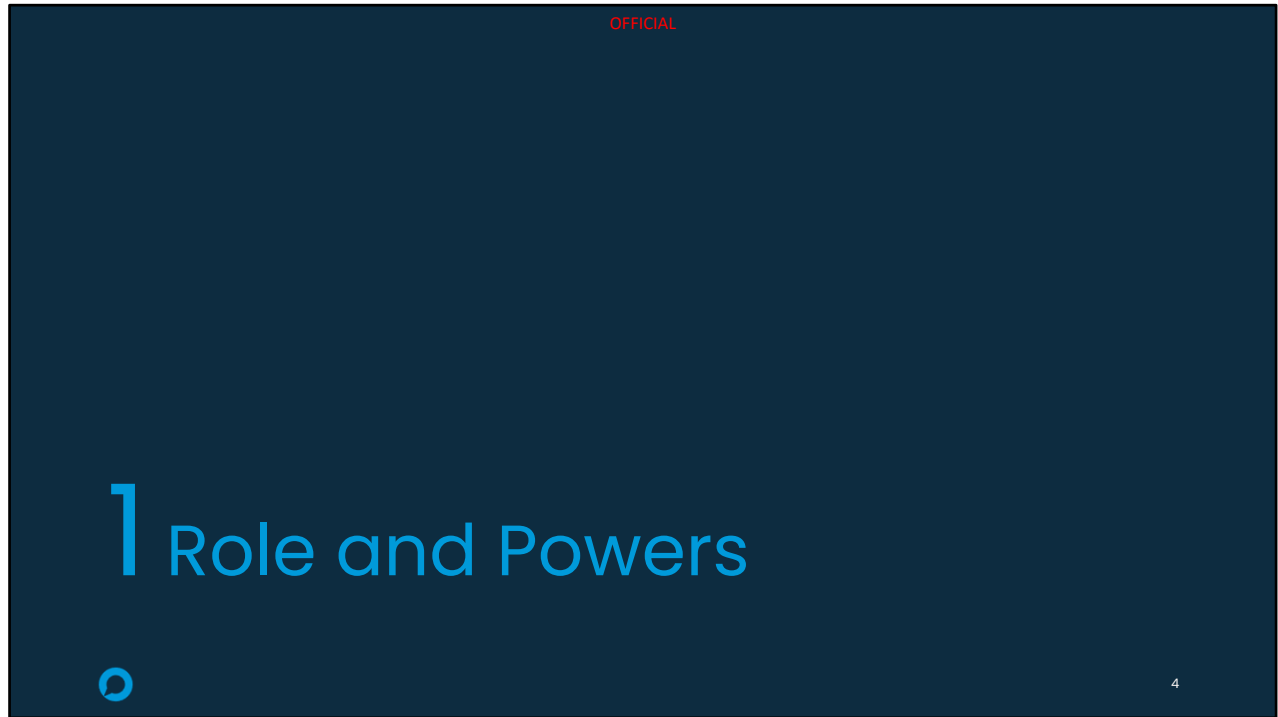
Ombudsman Act – Cth - https://austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/oa1976114/

Ombudsman Act – ACT – https://austlii.edu.au/cgi-bin/viewdb/au/legis/act/consol_act/oa1989114/

Ombudsman Regulations –
https://classic.austlii.edu.au/au/legis/cth/consol_reg/or2017223/

Parliamentary Complaint Handling Procedures - especially procedure 4 (jurisdiction) , procedure 7 (assessing complaints and determining course of action) and 8 (actioning your decision – not investigating and transferring complaints)
<https://workplace.ombudsman.gov.au/your-everyday-needs/policies/parliamentary-complaint-handling-procedures>

Legal Delegations – The Ombudsman has signed Delegated Instruments, under the Ombudsman Act, which allows for certain staff to take certain actions -
<https://workplace.ombudsman.gov.au/your-everyday-needs/legal/delegations>



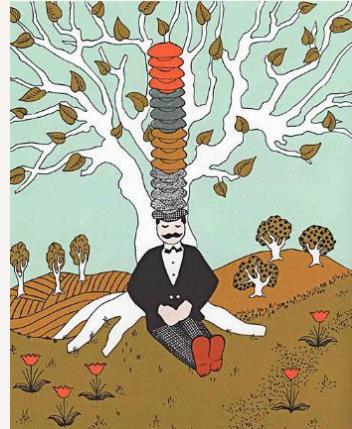
Let's start with the role of our office, and the powers we have

OFFICIAL

We wear many hats...

- Commonwealth Ombudsman (OCO)
- Defence Force Ombudsman (DFO)
- Private Health Insurance Ombudsman (PHIO)
- Postal Industry Ombudsman (PIO)
- Overseas Students Ombudsman (OSO)
- VET Student Loans Ombudsman (VSLO)
- ACT Ombudsman

- *Coming soon in 2025!* – National Student Ombudsman (NSO)



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The wide variety of work that we do here never ceases to amaze me.

As our name suggests, we have oversight over many APS entities as the Commonwealth Ombudsman.

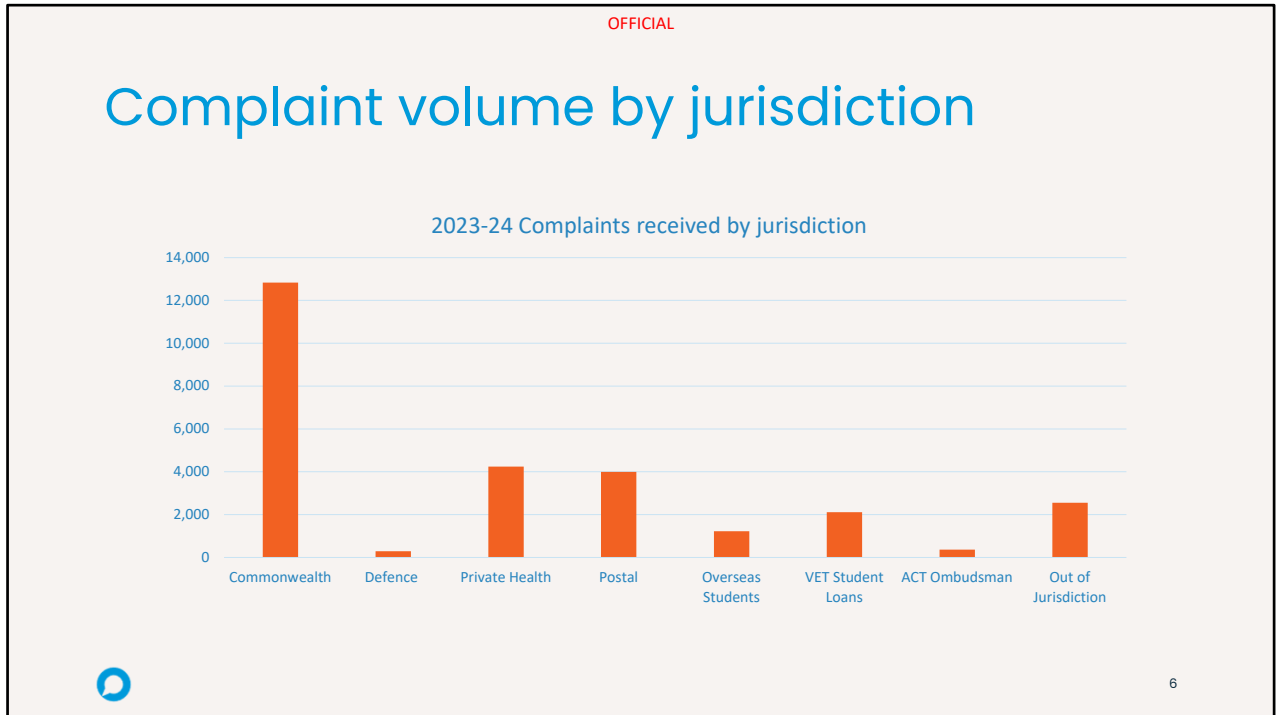
In addition to this, we are also the Ombudsman for various other industries including Private Health and the Postal Industry.

We are also the ACT Ombudsman, Defence Force Ombudsman and we play a role to protect the interests of students as the Overseas Students Ombudsman and the VET Student Loans Ombudsman.

You may have heard that we are also setting up a new function – from early next year our agency will also be the National Student Ombudsman.

The functions highlighted in pink are the jurisdictions that our new officers in CAT will be focussing on over the next 2 weeks.

The source of our powers for the first six functions listed on this slide is the *Commonwealth Ombudsman Act 1976* – which is of course the focus of this session.




OFFICIAL

Jurisdiction – Commonwealth Ombudsman

2 key components

Which agencies we
can investigate
(agency jurisdiction)

Which actions we
can investigate
(subject matter
jurisdiction)



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So onto the jurisdiction of the **Commonwealth Ombudsman ...**

One of the first things we do with a complaint is assess whether our office has the legal power to consider it (or jurisdiction, if you will)

There are two key parts to this assessment –
Firstly - **agency jurisdiction** (the entities we can investigate)

Secondly, **subject matter jurisdiction** (the types of actions that can we investigate).

OFFICIAL

Agency jurisdiction – Section 5

What's in?

(1) Subject to this Act, the Ombudsman:
(a) shall investigate action.....that relates to a matter of administration.....by a Department, or by a prescribed authority.....



This is the heading

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Section 5 is key to the question of jurisdiction. It says (paraphrase):

- Refer to slide.

Agency jurisdiction – What is a Prescribed Authority?

Section 3

- Statutory bodies (eg ASIC, ACCC)
- Commonwealth controlled companies (ie Australia Post)
- Chief Executive of a court or tribunal
 - Includes Registrar and Registry staff – s 3(14)
 - Excludes Judges and Members – s 3(15)
- Statutory Officers
 - a person who holds a position whose duties and functions are specifically assigned in legislation



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Government department is easy to understand. The main ones we hear about are Services Australia, Home Affairs, Department of Defence, NDIA (few examples)

- *Has anyone worked in another government agency or department?*

Refer to table of agencies in the Parliamentary Complaint Handling Procedures Procedure 4 – Page 4:

Table of Commonwealth agencies -

<https://objective.ombudsman.gov.au/id:A1824357/document/versions/published>

Table of ACT agencies -

<https://objective.ombudsman.gov.au/id:A1824355/document/versions/published>

“Prescribed authority” is not a Plain English term. However, s 3 of the Act provides a definition of Prescribed Authority (refer to slide)

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Agency - Section 5

What's out of jurisdiction (OOJ)

(2) The Ombudsman is not authorised to investigate:

- (a) Ministers (but delegates are in! – s 5(3))
- (aa) Parliament
- (b) Judges and Magistrates
- (c) Judicial powers / functions undertaken by Registrars and CEOs of Courts
- (d) APS employment matters for current employees, including promotion, termination, discipline, remuneration (recruitment from outside APS is in!)



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Section 5 of the Ombudsman Act includes groups of people we cannot investigate.

This includes Ministers, P'ment, People exercising judicial power such as judges.

We also can't touch APS employment matters for current staff, however actions under recruitment is in. (e.g. if you're not an existing APS employee and your complaint is about something that happened during the recruitment process)

Ombudsman Regulations 2017

Additional bodies and persons that are OOJ “Decision-maker jurisdiction”

- Regulations 6 and 7 – Some examples

Bodies	Persons
Australian Security Intelligence Agency (ASIO)	Auditor General
Remuneration Tribunal	Australian Government Solicitor
Shire of the Cocos (Keeling Islands)	Inspector-General of Intelligence and Security



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The Ombudsman Regulations states that some additional bodies and people are out of our jurisdiction. This is otherwise known as “decision maker jurisdiction”.

With respect to our ACT jurisdiction, similar bodies such as ministers, judges and tribunal members are also out of jurisdiction. The ACT Human Rights Commission is also specified as OOJ in the ACT legislation.

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Ombudsman Act

Other OOJ complaints

- Tax matters considered by the ATO – refer to Inspector General of Taxation

Office's policy on oversight bodies

- We generally don't investigate the decisions of other independent oversight bodies (don't apply inflexibly)
 - OAIC
 - ASIC
 - Australian Public Service Commission



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Back to the Ombudsman Act ...

We don't have jurisdiction over the ATO for complaints related to tax – they are referred to the Inspector General of Tax. We can however look at other matters of administration, re: ATO

We also generally don't investigate complaints about other specialist complaint oversight bodies (e.g. OAIC, ASIC, APSC). This is because we respect the authority of Parliament to set up these bodies to be the decision-makers of specific matters.

However, this is office policy and should not be applied inflexibly.

OFFICIAL

Subject Matter – What is ‘Action that Relates to a Matter of Administration’?

Intentionally VERY broad!



[The Ombudsman’s] powers are, as they ought to be, extremely wide....They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability...[a] large power is intended.

Botany Bay Council v NSW Ombudsman



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If we circle back to s 5 of the Cth Ombudsman Act, we know that the things the Ombudsman can investigate must relate to matters of “administration”.

What is administration? The Court in *Botany Bay Council v NSW Ombudsman* provides guidance ...

“Action”

Includes inaction



Section 3 Interpretation

(7) In this Act, unless the contrary intention appears, a reference to the taking of action includes a reference to:

- (a) the making of a decision or recommendation;
- (b) the formulation of a proposal; and
- (c) failure or refusal to take any action, to make a decision or recommendation or to formulate a proposal.



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The interpretation section of the Ombudsman Act (section 3) also provides a legal definition of action.

Example of the “making of a decision or a recommendation”?

- The decision by Centrelink to deny a pension entitlement
- The decision of an agency to refuse compensation for a mistake (compensation for defective administration – CDDA scheme)

Example of a “failure or refusal to take action”

- Delay around an internal review
- Delay around a visa decision

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Common examples

- Service delivery – Is the department accessible? ✓
- Following policy – Did a government agency adhere to timeframes? Procedural fairness? ✓
- A judicial decision made by a High Court judge ✗
- A legislative decision such as a refusal under FOI legislation ✗



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Common examples of administrative action includes the delivery of service by the entity, or whether they followed procedure.

People often complain about legislative decisions. When we look at these complaints we cannot touch the decision itself – that's for a court to decide. However we can investigate the administration under it (e.g. how service was conducted, was policy followed etc).

QUIZ 1

Jurisdiction of the office

- 1. Which of the following entities may our agency interact with because they are within our jurisdiction?**
- a) National Disability Insurance Agency (NDIA)
 - b) Australia Post
 - c) BUPA Health Insurance
 - d) NSW Department of Education
 - e) Australian National University (ANU)



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NDIA is within our Commonwealth Jurisdiction

Australia Post is within our Commonwealth Jurisdiction as a commonwealth controlled company. Also in our Postal Industry Ombudsman jurisdiction

BUPA is within our Private Health Insurance Ombudsman jurisdiction

ANU falls in our ACT Ombudsman jurisdiction (ANU College – OSO)

NSW Department of Education is not in our jurisdiction → NSW Ombudsman.

QUIZ 1

Commonwealth Ombudsman jurisdiction

2. When are we allowed to investigate actions?

- a) If the officer takes, or purports to take, the action in the exercise of powers or the performance of functions conferred on him or her by an enactment
- b) Actions and decisions taken by a minister
- c) Actions taken by a Justice or Judge of a court created by Parliament
- d) Actions and decision made by an employee working for Centrelink

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Answer: A and D

A = Section 3(5) & 3(6)

Remember – we cannot investigate ministers and judges

QUIZ 1

Jurisdiction

3. Which of these is a matter of administration?

- a) Implementation of Departmental Policies
- b) Decision or actions of staff
- c) High level government policy
- d) Court members where they exercise the powers of the court



A, B and C.

OFFICIAL

Section 6 (Procedure 7)

The power *not to investigate*; and
The power *to stop investigating*

- Exercising of a discretion to close the complaint.
- The complaint must fit into one of the listed reasons for section 6 to be applied.
- More on this later...



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Now on to section 6 – a section you’ll become very familiar with once you hit the ground running with our Commonwealth jurisdiction.

Section 6 of the Ombudsman Act is the exercise of a discretion. So the officer considers the complaint and decides that the office **will not investigate** the complaint or **will stop investigating** it.

The legislation lists the circumstances when the discretion can be applied (for example – “because it’s not warranted in the circumstances”).

Needs to be more than “the vibe!”

While s 6 applies to the Commonwealth Ombudsman function, there are similar discretionary provisions for our other functions within the Act.

Section 12

Works in conjunction with s 6

12 Complainant and Department etc. to be informed

(1) Where the Ombudsman does not investigate, or continue to investigate...the Ombudsman shall...inform the complainant and the Department or authority of the decision and the reasons for the decision.



Section 12 works with Section 6.

Section 12 requires the Office to advise complainants and agencies of our decisions. This can be done either verbally or in writing.

OFFICIAL

Preliminary Inquiries

Section 7A

- (1) Where a complaint has been made to the Ombudsman...we may make inquiries...for the purpose of
- (a) determining whether we are authorised to investigate the action; or
 - (b) determining whether we may decide not to investigate....



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Section 7A allows the office to make “preliminary inquiries” into a complaint. We use 7A to determine if an investigation is warranted.

A common example of s 7A in action is our Early Resolution Team writing to the agency being complained about to ask for an explanation of what has occurred in relation to the complainant.

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Investigation

Section 8 – Procedure 10

- (1) Before commencing an investigation, the Ombudsman must inform the Department or authority that the action is to be investigated.
- (2) An investigation shall be conducted in private and in such manner as the Ombudsman thinks fit.
- (3) the Ombudsman may obtain information and make inquiries, **as he or she thinks fit.**



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Section 8 requires the Office to inform the Department or agency that an investigation has commenced.

Our Investigations branch use our powers under section 8 to request documents from agencies to help us undertake an investigation.

Section 8 requires our investigations to be conducted in private.

Investigation

Section 9 – Power to obtain information and documents

(1) Where the Ombudsman has reason to believe that a person is capable of furnishing information or producing documents...relevant to an investigation... the Ombudsman may ... served on the person...the notice:

- (a) to furnish ... any such information; or
- (b) to produce ... such documents or other records as are specified in the notice.



Section 9 gives the Office the power to obtain information and documents from people who we believe may hold such information and documents that are relevant to an investigation.

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Sections 35 and 35A

Keep it secret! Keep it safe!

Section 35 – Prevents the Office from disclosing information we get in the course of doing our job.

Section 35A – allows certain officers to disclose information if they think it is in the Department's interest or the public interests to do so.



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Section 35 is an extension of the requirement to conduct investigations in private ...

S 35 requires the office to observe confidentiality. For example, if the Office receives a response to a s7A request, this cannot be shared with a complainant.

S 35A allows certain officers to disclose information if its in the Department's interest or in the public interest to do so.

For example, if someone calls to lodge a complaint and within the discussion, they threaten suicide, I can use my delegated power as an EL 1 in the Complaints Assessment Team, to call the police to conduct a welfare check.

Quick break



2 Deciding not to Investigate



Return to section 6 – The power to exercise the discretion to not investigate a complaint or to stop investigating it.

This power is exercised every day by all parts of the complaints continuum – whether you are placed in the Complaints Assessment Team, Early Resolution or the Investigations Branch of the office.

Refer to procedure 7 of the Parliamentary Complaints Handling Procedures.

OFFICIAL

Section 6 – Discretion not to investigate certain complaints

- This decision can be made at any time of handling the complaint.
- Must refer to a specific listed reason under s 6



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Discretions not to investigate

Discretion	Commonwealth	ACT
Complaint not previously raised with agency	§ 6(1A)	§ 6(2)
Agency is still considering the complaint	§ 6(1B)	§ 6(3)
Other review available	§ 6(4)	§ 6(7)
Courts and tribunals Could be, could have been, has been or is being considered ...	§ 6(2), 6(3)	§ 6(6)
Older than 12 months	§ 6(1)(a)	§ 6(1)(a)
Frivolous, vexatious or not in good faith	§ 6(1)(b)(i)	§ 6(1)(b)(i)
Not warranted in all of the circumstances	§ 6(1)(b)(iii)	§ 6(1)(b)(iii)
Insufficient interest	§ 6(1)(b)(ii)	§ 6(1)(b)(ii)
Commercial activity	§ 6(12)	N/A
Complainant refuses to clarify in writing	§ 7(2)	§ 7(2)

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Remember that these are discretions – common sense judgement call based on the known facts.

Complaint not previous raised with agency

- It is reasonable for us to expect an agency to try to resolve a problem with the complainant before we become involved.
- However, if there are barriers or if the complaint is of high urgency, then you wouldn't exercise this discretion.

Agency still considering the complaint

- Exercising this discretion prevents our office from prematurely commencing an investigation.
- However if an agency is delaying their response then it might not be reasonable to exercise this discretion.
- *What does an agency's service charter say?*

Internal review available

- Where a complainant has a right to have a decision reviewed or reconsidered by the agency, we will generally decline to investigate.

Courts and tribunals

- Where a person has a right to have the decision being complained of reviewed by a court or tribunal and they have chosen not to exercise that right, we can decline to investigate.
- Notable exception – We cannot rely on this discretion if the person has a right to have a decision reviewed by the Federal Court under the Administrative Decisions (Judicial Review) Act (ADJR Act).
- Where a person has had an action/decision reviewed by a court or tribunal or its currently underway, our office cannot investigate (not a discretion).

Older than 12 months

- Recognises the difficulties of investigating aged complaints and recognises the principle of 'finality'.
- Use with caution – e.g. where a complaint is aged because an entity has made a resolution difficult.

Frivolous, vexatious or not in good faith

- Authority sits with EL 2, who will generally only exercise this in extreme cases of unreasonable complainant conduct.

Not warranted in all of the circumstances

- Recognises that there will be a wide range of circumstances in which investigation is not warranted (hence, undefined)
- Used often due to the broad nature
- Common examples include: no indication of maladministration (there's nothing wrong with what was done), no substance, lack of meaningful or viable outcome to be achieved, a known systemic issue that is being pursued at an agency level, internal priority considerations

Example – Brisbane Flight Path Community Alliance cohort

Insufficient interest

- Where the complainant isn't directly impacted by the action being complained about
- e.g. their concerns are as a "citizen" or "taxpayer" and they're not impacted by the policy being complained about

Commercial activity

- Rarely used discretion.
- Generally doesn't extend to grants or procurement processes (we generally look at these processes as matters of administration)

QUIZ 2

Section 6

1. You are the decision maker. You could decide not to investigate a complaint if...

- a) The customer was aware of the action and has not complained to the Ombudsman within 6 months
- b) If the complaint is frivolous and not made in good faith
- c) If the complainant has not yet raised their complaint with the agency
- d) If the customer is not directly affected by the action



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B, C and D

The time frame under s 6(1)(a) is 12 months.

QUIZ 2

Section 6

2. Section 6 allows you to make what decisions...

- a) Investigate
- b) Not to investigate
- c) Request more information from an Agency
- d) Stop investigating



B & D

*The Ombudsman may, in his or her discretion, decide **not to investigate** the action or, if he or she has commenced to investigate the action, **decide not to investigate the action further***

QUIZ 2

Section 6

3. The Commonwealth Ombudsman may decide not to investigate the action if the complaint issue can be reviewed by a court or tribunal.

- a) True
- b) False



True

QUIZ 2

Section 6

4. Provide a reason why an investigation may not be 'warranted in all of the circumstances'



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Common examples

- No indication of maladministration
- Lack of specific details
- No substance
- Lack of meaningful or viable outcome
- Investigation unlikely to be effective
- Systemic issues
- Trivial matter
- Policy or internal priority considerations
- Significance

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Things to consider

All the circumstances!

- What is the complaint about?
- Is there any maladministration indicated in the complaint?
- Has the person complained to the agency?
- Requested review of the decision?
- If there is maladministration indicated, could we provide a meaningful outcome?
- Is there an office policy on the particular type of complaint? if there is, should I depart from the policy?



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When assessing a complaint, you need to consider all of the circumstances.

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3 Putting it into Action

- Case studies



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Case Study 1

A complainant advises our Office that their JobSeeker payments (JSP) have stopped over the past month.

They ask our Office to do something about it and they advise that they have not yet raised a complaint with Centrelink regarding the issue.



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Complaint not previously raised with agency (s 6(1A))

Case Study 2

A complainant advises our Office that they are dissatisfied with the outcome of a case that went through the Family Court of Australia. They want our Office to investigate the decision.



S 6(2) – Has been considered by a Court or Tribunal.

Remember – this is NOT a discretion. We should not investigate this unless a very special reason exists (for example, where the court didn't address issues that our office could address)

This is a decision that would be made by a Director

OFFICIAL

Case Study 3

A complainant advises our Office that when they attended a Centrelink service Centre in 2009, a staff member was unprofessional.

The complainant lodged a complaint with Centrelink in 2024. Centrelink advised that due to the passage of time it was unable to determine what occurred.



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6(1)(a) – older than 12 months.

Remember to take care using this discretion. On the facts, it would appear reasonable to exercise the discretion here.

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Any Questions?



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DOCUMENT 3



Released under the Freedom of Information Act 1982 (Cth)

OFFICIAL

1 DECIDING NOT TO INVESTIGATE

Released under the Freedom of Information Act 1982 (Cth)

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5(1) Subject to this Act, the Ombudsman:

(a) **shall investigate action...that** relates to a matter of administration...by a Department or a prescribed authority

6 (1) ... the Ombudsman **may decide not to investigate...or**, if he or she has commenced to investigate the action, **decide not to investigate the action further**

IF...

WHERE...

Section 6

The power not to investigate and
the power to stop investigating

Reasons listed in subsections, including if we are satisfied
investigation *is not warranted in all the circumstances*

Key principles

See Procedures Chapter 8

- This decision can be made at any time.
- Must use specific subsection, rather than general.
- Special delegations apply to:
 - 6(1)(b)(i) - frivolous, vexatious or not in good faith (EL2 and above)
 - 6(2) - determining that there are special circumstances warranting investigation of a matter which is or has been, considered by a court or tribunal (EL1 and above)
- Special consideration for s 6(3) – nb s 10 ADJRA

The guidelines in the PCHP explain the office's approach to making a decision under s 6

s 6(1)(a)

Complaint not raised within 12 months

The discretion recognises that when significant time has elapsed, it becomes increasingly unlikely that a meaningful remedy can be achieved. This is particularly the case when investigation would be dependent on the memory of participants, where relevant officers or records may no longer be available, or when an action has been irretrievably overtaken by later events.

However, this discretion should not be slavishly applied!

For example, where the action complained of has had a significant effect on the complainant and the issue is still 'live' and there is still a possibility of a remedy, we may consider investigating.

s 6(1A)

Not raised with agency

It is reasonable for an agency to have the opportunity to resolve a problem before the Ombudsman becomes involved. Therefore, if a person has not complained to the agency, and we believe it is reasonable to ask them to do so, this discretion may be applied.

However.....

s 6(1A)

Continued...

We need to consider:

- Does the person have the ability to complain to the agency?
- Is the complaint likely to be addressed by the agency?

s 6(1B)

Still being considered by agency

If a person has complained to the agency but the agency has not yet responded (or had a reasonable opportunity to respond), it may be appropriate to exercise this discretion. This avoids premature involvement by this office and duplication of effort.

However.....

s 6(1B)

Continued.....

Before deciding not to investigate, it may be appropriate to:

- satisfy yourself that the agency is addressing the complaint (possible s7A)
- invite the complainant to contact us again if they are dissatisfied with the response or do not receive one within a reasonable timeframe.

s 6(4)

effective internal review / appeal mechanism

If there is an internal review or appeal pathway available to the person, it is appropriate to exercise this discretion.

This pathway may be

- Legislative or
- Administrative

s 6(2)

Is being, or has been considered by, a court or tribunal

- This is a weird subsection!
- The delegation is split!
- It is not a discretion – it is a prohibition on investigating unless an EL1 or above determines there are special reasons to do so.

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s 6(3)

Right to be reviewed by a court or tribunal

If a person has or had the right to lodge an appeal to a court or tribunal but has not or did not exercise that right, the Ombudsman may decide not to investigate, if we form the view that, in all the circumstances, it would have been reasonable for them to do so.

BUT....

s 10 ADJRA

This discretion cannot be exercised on the basis that a complainant has a right to seek judicial review of the administrative action under the [Administrative Decisions \(Judicial Review\) Act 1977](#).

Section 10(1)(b) provides that any right to seek judicial review must be disregarded when considering whether to not to investigate a complaint.

s 10 ADJRA

What does this mean?

You cannot exercise the discretion under s 6(3) just because the person has ADJR rights.

If you believe it is appropriate to decline, you must use another discretion!

s 6(1)(b)(iii)

Not warranted in all the circumstances

This provision can be used for a wide variety of reasons, including where:

- there is no indication of maladministration
- there is no remedy available or we cannot achieve the remedy the person wants
- agency has already remedied the matter and we believe the remedy is reasonable and appropriate
- action complained about is relatively minor and complainant did not suffer detriment or disadvantage

ACT Ombudsman

More funky stuff!

The [Ombudsman Act 1989 \(ACT\)](#) also reproduces many of the reasons in the Commonwealth Act, as cause to decide not to investigate. Note that where we have decided not to investigate under s 6(3) and the complainant later returns, s 6(4) requires the ACT Ombudsman to investigate the complaint if they form the view that adequate redress was not provided by the agency.

Defence Force Ombudsman

More funky stuff!

All the s 6 subsections apply to the DFO jurisdiction, except s 6(1A), which relates to complaints not raised with the Department/authority within 12 months, if the approach is by a member of the Defence Force.

There are three additional, specific reasons that apply to DFO complaints:

- s19E(1)(a)—redress sought but not completed.
- s19E(1)(b)—redress granted
- s19E(2)—has not sought redress.

s 7(2)—Written complaint not received

Written complaint not received

Although we can receive complaints verbally, the Act allows us to require a person to put their complaint in writing and decline to investigate until the complaint is provided in writing.

This provision should only be used when we cannot assess the complaint without more information and / or relevant documentation. You should always speak to the person first.

The complainant should be advised of the requirement to provide the complaint in writing and/or to provide the necessary background materials. They should also be advised that no further action will be taken unless and until a written complaint is received and if we do not receive it, we will close the complaint.

However, before exercising this discretion, you must be sure that the person is capable of putting the complaint in writing and providing documents.

What to consider?

All the circumstances!

- Has the person complained to the agency?
- Requested review of the decision?
- Is there any maladministration indicated in the complaint?
- If there is, could we provide an outcome?
- Is there an office policy on the particular type of complaint?
if there is, should I depart from the policy?

s12

How does s 12 work with s 6?

(1) Where the Ombudsman does not investigate or continue to investigate...the Ombudsman shall...in such manner as the Ombudsman thinks fit, inform the complainant and... the Department...of his or her decision and of the reasons for his or her decision.