

Investigations Policy – Ombudsman Act 1976 (Cth)

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About this document	
Purpose	This policy is a high-level description of how the Office of the Commonwealth Ombudsman (the Office) conducts investigations, intended to guide staff conducting investigations.
User/s	While the principles in this policy apply to all staff conducting investigations, it specifically covers investigations using the powers under the <i>Ombudsman Act 1976 (Cth)</i> outlined in the Appendix (including in the Commonwealth, DFO, PIO, OSO, PHIO and VSLO Ombudsman jurisdictions) and our functions as the Commonwealth NPM under the OPCAT. See section 2.1 ('Scope') for further details.
Outcome	This policy promotes consistency and best practice in conducting investigations under the <i>Ombudsman Act 1976 (Cth)</i> .
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1 Purpose

This high-level description of how the Office of the Commonwealth Ombudsman (the Office) conducts investigations is intended to guide staff conducting investigations.

2 Introduction

The explanatory memorandum of the Ombudsman Bill 1976 describes the primary function of an Ombudsman as ‘to investigate complaints made to him about administrative actions of officials’. While the legislation governing the Ombudsman has been amended since and the Office’s jurisdiction and functions have expanded, the Office’s core function remains investigating administrative actions, particularly those complained about by the public.

Under the *Ombudsman Act 1976* (Cth) (the Act), the Commonwealth Ombudsman (the Ombudsman) is empowered to investigate administrative action by a Department, a prescribed authority¹ or other entity prescribed by the Act.² The Ombudsman can investigate either in response to a complaint received or initiate an investigation on their own motion (referred to as Own Motion Investigations, or OMIs).³ In practice, OMIs are generally conducted into systemic issues. The concept of ‘administrative action’ is not defined and covers a broad range of activities – for example, the decisions or actions of individual officers or implementation of departmental policies. The Ombudsman Act also empowers the Ombudsman to consider the policy or legislation that enabled the administrative action under investigation and, if the requirements of the Act are met, recommend that the legislation or policy should be altered.

The Ombudsman is an independent authority and is not subject to government direction. The Ombudsman can choose what to investigate and how an investigation should be conducted, as well as what conclusions are drawn. The Ombudsman is

¹ ‘Department’ and ‘prescribed authority’ are defined under s 3 of the Act.

² For example, Australia Post or registered Private Postal Operator in the postal industry Ombudsman jurisdiction (s 19M(3)); or a private registered provider within the meaning of the *Overseas Students Act 2000* in the Overseas Students Ombudsman jurisdiction (s 19ZJ(3)).

³ For the Ombudsman’s Commonwealth jurisdiction, see s 5(1)(a) and s 5(1)(b) of the Act; for further information about other jurisdictions, see the table at Appendix A.

bound by the Act but, subject to that Act, can conduct investigations ‘in such manner as the Ombudsman thinks fit’.⁴

This policy outlines Better Practice Principles in Chapter 3 that apply to all investigations. It then provides an overview of how investigators should conduct both systemic investigations either initiated via own motion or from systemic issues identified through 1 or more complaints (in Chapter 4) and investigations into discrete issues raised in a complaint (in Chapter 5).

This policy should be read, and is intended to comply, with the [Australian Government Investigations Standard 2022](#) (AGIS).

2.1 Scope

This policy covers investigations conducted by the Commonwealth Ombudsman under the Act using the powers outlined in Appendix A. This includes investigations in the Commonwealth, Defence Force (DFO), Postal Industry (PIO), Overseas Students (OSO), Private Health Insurance (PHIO) and VET Student Loans (VSLO) Ombudsman jurisdictions; and visiting places of detention and other functions relating to our role as Commonwealth National Preventive Mechanism (NPM) under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

The principles in this policy, particularly those set out in sections 3, 4.6, 4.8 and 4.9, should be applied in any investigation the Office conducts. However, this policy does not cover in detail the legislative processes and powers for investigations conducted under the *Public Interest Disclosure Act 2013*; assessing VET FEE-HELP debts under the VET FEE-HELP Redress Measures; responding to reports of serious abuse in the Australian Defence Force; or inspecting law enforcement and integrity agencies’ use of covert and intrusive powers and oversight of coercive examination powers. Further, while the foundational principles apply equally to the ACT Ombudsman investigations, the detail on powers does not cover the functions of the Ombudsman’s role as ACT Ombudsman, including the ACT Ombudsman’s functions relating to the OPCAT; own motion investigation power; complaint investigation power; the Reportable Conduct Scheme; our oversight of the ACT Judicial Council; or the Office’s role under the *Freedom of Information Act 2016* (ACT).

⁴ Section 8(2) of the Act.

3 Better Practice Principles

The Office's purpose is to provide assurance to the Parliament and the public that the agencies we oversee act with integrity and treat people fairly, and to influence enduring systemic improvement in public administration. The way we conduct investigations can impact the way the Office is perceived, the outcomes we achieve and the effectiveness of our influence.

Officers conducting an investigation are responsible and accountable for their decisions and actions and should have regard to the below Better Practice Principles when managing investigations.

It is also important that investigators have an investigative mindset.⁵ This means they:

- approach their work with curiosity, critical thinking and tenacity
- utilise all available resources and investigative strategies to make reasonable, proportionate and necessary decisions
- are respectful in all dealings with internal and external stakeholders, act with integrity at all times and demonstrate commitment and accountability.

Under the AGIS, investigators must also hold (or obtain within a reasonable timeframe) a vocational education and training qualification in investigations, unless another qualification, internal training or other recognition of prior learning is determined as equivalent.⁶ Staff qualifications and any decisions regarding equivalency to investigation training must be documented. We are currently considering how best to give effect to the requirements of the AGIS in this regard.

3.1 High ethical standards and responsibility

The Office promotes high ethical standards and behaviours for its staff. Investigators must conduct investigations in accordance with the Australian Public Service (APS) Values and Code of Conduct as set out in the [Public Service Act 1999](#), the Act and related legislation.

⁵ See AGIS section 1.4.

⁶ See AGIS section 1.3.

The Australian Public Service Commission's Ethics Advisory Service is available to all APS employees who wish to discuss and seek advice on ethical issues that occur in the workplace.

Officers must also operate in accordance with the Office's [Accepting Gifts, Benefits or Hospitality Policy](#), which provides guidance to prevent an actual or perceived conflict of interest where an official is offered a gift, benefit or hospitality from a third party in the course of official business.

3.2 Flexibility

A one-size-fits-all approach will not yield the best outcomes for the varied and complex issues faced in the broad range of investigations undertaken by the Office.

To ensure the Office effectively and efficiently uses its wide range of investigation tools and powers to deliver good investigation processes and outcomes, investigators must have a strong knowledge of the powers and options available. Such knowledge, and the confidence to utilise these tools, will enable the Office to engage flexibly and creatively with the investigation process.

Using the Office's broad range of powers effectively allows us to be more responsive and influential in engaging with agencies, seeking solutions, removing roadblocks and delivering fair and timely outcomes from investigations and to influence improved public administration.

3.3 Lack of bias and conflict of interest

The Office is independent and impartial. We do not represent complainants or agencies but rather conduct impartial and independent investigations of administrative decisions and actions. Our actions and decisions should be free from actual or perceived bias and conflicts of interest.

If a conflict of interest exists but is not identified and effectively managed, this poses a risk to the integrity of an investigation. Examples of conflicts of interest relevant to an investigation include, but are not limited to, where the investigator previously worked at the Department subject to the Office's investigation or where the investigator has a social or personal relationship with a staff member from the other agency engaging

with the Office in relation to the investigation. A conflict of interest can exist at the start of an investigation or emerge during an investigation. Where a conflict of interest is realised, it must be managed in accordance with the Office's [Conflict of Interest Guidelines](#).

The [Public Service Act 1999](#) requires us to 'take reasonable steps to avoid any conflict of interest (real or apparent)' in connection with our duties.⁷

The [Australian Public Service Commission Guidelines](#) on official conduct provide guidance on pecuniary (financial), personal and other interests.

3.4 Secure and confidential information and asset handling

Secrecy provisions and safeguards in the Act provide assurance to agencies when responding to our requests for information, fostering cooperation, trust and strong working relationships with the agencies we oversee.

When conducting an investigation, we may request information from an agency under s 8(3) of the Act,⁸ which permits the Ombudsman to obtain information from such persons, and make such inquiries, as he or she thinks fit. The Act provides certain protections for agencies that disclose information to the Office for the purpose of our investigation.⁹ In certain circumstances,¹⁰ however, we may use our formal power under s 9 of the Act¹¹ to compel the production of information or documents, or to attend before the Ombudsman and answer questions. The Act provides additional protections for agencies when responding to a formal notice to produce, including assurance to agencies when providing particularly sensitive documents such as Cabinet-in-confidence or documents protected by legal professional privilege.¹²

Confidentiality obligations imposed by the Act apply to information the Office obtains for the purpose of an investigation, which requires that our investigations 'be

⁷ See s 13(7)(a) of the *Public Service Act 1999*.

⁸ Section 8(3) of the Act does not apply to PHIO investigations. See instead s 20T (investigation function) and ss 20ZD and 20ZE (information gathering tools).

⁹ See ss 8(2A), (2B), (2C), (2D), and 2(E).

¹⁰ See section 4.4.2, Further methods for obtaining information, in particular "Power to issue notices to attend interview or seek information – formal".

¹¹ Section 9 does not apply to PHIO investigations. See instead s 20ZE of the Act.

¹² See ss 9(4), (5), and (5A).

conducted in private'.¹³ It is a criminal offence to divulge or communicate information obtained during the course of an investigation, except 'for purposes connected with the exercise of the powers and the performance of the functions of the Ombudsman' or where other legislative exceptions apply.¹⁴

The explanatory memorandum to clause 35 of the Ombudsman Bill 1976 explains the importance of this statutory obligation of confidentiality:

'It is essential to the success of the operations of an Ombudsman that he [sic] should have the greatest possible access to departmental and other official files relating to the matters under investigation. The complement to this is that officials should be able to rely on information they give to the Ombudsman and his staff being kept confidential except to the extent to which it must be disclosed for a report by the Ombudsman to be meaningful. The purpose of these sub-clauses is to put the Ombudsman, the Deputy Ombudsmen, the staff of the Ombudsman and others who operate under his authority under obligations of secrecy in respect of information obtained by them under the Act.'

As a further safeguard, s 9(3) of the Act permits the Attorney-General to issue a certificate on public interest grounds certifying that the Ombudsman is not entitled to require a person to furnish particular information. As the Office is an independent authority, in practice a matter would need to be very serious for the Attorney-General to contemplate taking such action.

See Section 4.4.2 about 'Further methods for obtaining information'.

The Office is committed to the principles outlined in the Privacy Act 1988 (Privacy Act). The Privacy Act regulates the collection, use, storage and disclosure of personal information about individuals.

The Office is subject to the [Freedom of Information Act 1982](#).

The Office values its reputation and is responsible for protecting its information, personal and physical assets. Investigators are expected to be aware of, and abide by, security guidelines always.

¹³ Section 8(2) of the Act.

¹⁴ Section 35 of the Act.

When scoping an investigation, investigators must consider the highest security classification of information that officers undertaking the investigation may be required to handle and ensure staff security clearances are current and appropriate.

The [Policy 8: Classification system | Protective Security Policy Framework](#) specifies how to correctly assess the sensitivity or security classification of their information and adopt marking, handling, storage and disposal arrangements that guard against information compromise.

3.5 Accurate record keeping

When conducting an investigation, investigators must comply with the Office's [Information Management Policies](#), which are critical to ensuring transparency, accountability and managing reputational risk.

The [Records Authority Office of the Commonwealth Ombudsman Policy](#)¹⁵ provides specific information about the requirements for keeping records for the core business areas, including investigations.

The Office values its information assets as critical to its business activities, decision making, service delivery, accountability, and business continuity. It is committed to effective information and records management that meet its business needs, accountability requirements and stakeholder expectations. As a public administration oversight and educative body, there is an onus on the Office to maintain excellent records and demonstrate a high standard of information management.

The APS Values and Code of Conduct in practice require employees to 'document significant decisions or actions consistent with the *Archives Act 1983* and to a standard that will withstand independent scrutiny'. The *Public Governance, Performance and Accountability Act 2013* requires the Australian Government to provide meaningful information to the Parliament and the public and to accountably govern and manage public resources, including information assets. These Acts are part of a legislative framework that ensures that the Australian Government is accountable for its performance and the Australian community can understand why decisions are made or actions taken.

To maintain impartiality and independence, good decision-making and record-keeping processes during any investigation are critical. Every decision made about the

¹⁵ Currently under review.

investigation must be documented, whether by appropriate action in Resolve, electronic note, email, executive minute or brief or central decision register and stored in Objective. The record should explain who made the decision, when the decision was made, the reason for the decision, the context of the decision and the decision itself, including actions required to implement it.¹⁶ This is particularly important when analysing information or views provided by an agency in response to a request for information or comments in response to procedural fairness (e.g. comments on a draft report). Documented decisions on our assessment of the agency's view, reasons for our assessment and what action to take, reaffirm our independence and ensure the decisions are transparent, justified, independent and stand up to review or scrutiny.

When conducting own motion investigations, investigators must maintain a log of all communications with the agency/department under investigation (this was an express recommendation of the Robodebt Royal Commission for our Office.) The log should be a 'live' document stored in Objective which records the date, time, people involved and details of each communication with the agency or department. Links to further file notes or documents stored in Objective can also be included in the log. A template has been developed for the communications log and can be found [here](#). Guidance on completing the communications log is available [here](#).

See also Section 4.9, 'Procedural Fairness'.

3.6 Proactive risk management

The Office is committed to managing risk. To meet this commitment, risk analysis and mitigation must be properly integrated into the Office's day-to-day functions and responsibilities, including our investigations. All officials are responsible and accountable for managing risk insofar as is reasonably practicable within their area of responsibility.

Refer to the Office's [Risk Management Framework](#) and [Risk Matrix](#).

¹⁶ AGIS – 3.2.3.

3.7 Effective and independent engagement

Effective and regular engagement with an agency is instrumental to the success of an investigation and the Office's ability to influence improvement. However, when engaging with agencies, it is important to remember that the Ombudsman is an independent authority. The Ombudsman can choose what to investigate and how an investigation should be conducted.

The Ombudsman may consult with the agency or organisation during any phase of the investigation.

- In the planning phase we may choose to share an investigation scope or request for information with the relevant agency or organisation if we think it will assist us in our investigation, for example if we need the agency's subject matter knowledge to finalise the scope. We have no obligation to do so. In most cases it will be preferable to simply settle the scope ourselves and then request (or require) the provision of specified information and documents, rather than risking being perceived to be allowing the agency to influence the scope of our independent investigation.
- During the information gathering and analysis stage we will request information from the agency or organisation to assist the Ombudsman to draw conclusions and make findings.
- At the end of the information gathering and analysis phase, the Ombudsman may decide to prepare a report. If a report is prepared, we will provide a non-editable copy (i.e. PDF) of the draft report to the agency or organisation and invite comment on any errors or omissions of fact as well as a formal response to the recommendations.
- The draft report should be accompanied by a clear statement alerting the agency or organisation to the confidentiality of the report and that it should not be shared outside their agency or organisation, or within their agency to staff without a need to know, without first consulting with our Office. The statement may permit sharing the draft report with an agency or organisation's audit committee.

It is important to keep accurate and comprehensive records of engagement with agencies as we may seek to rely on the information in drawing conclusions at the end of the investigation. For example, minutes should be taken of meetings with agencies,

recording the attendees, matters discussed and meeting outcomes. It is good practice to send the minutes to the agency as an opportunity for the agency to confirm the accuracy of the details in the meeting record. Similar records should be kept of telephone calls with agencies. It is generally not necessary to ask agencies to confirm records of telephone calls, although if the discussion is critical to the investigation it may be desirable to do so.

As mentioned in the previous section, when conducting own motion investigations, investigators should maintain a log of all communications with the agency/department under investigation. The log should be a 'live' document stored in Objective which records the date, time, people involved and details of each communication with the agency or department. Links to further file notes or documents stored in Objective can also be included in the log.

See also section 4.5, 'What options do we have to address issues we are unable to resolve with an agency during an investigation?' and section 4.9, 'Procedural Fairness'.

3.7.1 Engagement with government agencies as stakeholders in Industry jurisdictions

The Office, in performing its private entity oversight functions, should also maintain regular engagement with government agencies as joint stakeholders in monitoring concerns that arise in complaints about private entity providers. For example, in the PHIO jurisdiction, the Office should regularly engage with the Department of Health, and in the OSO jurisdiction, the Office should regularly engage with the Department of Education.

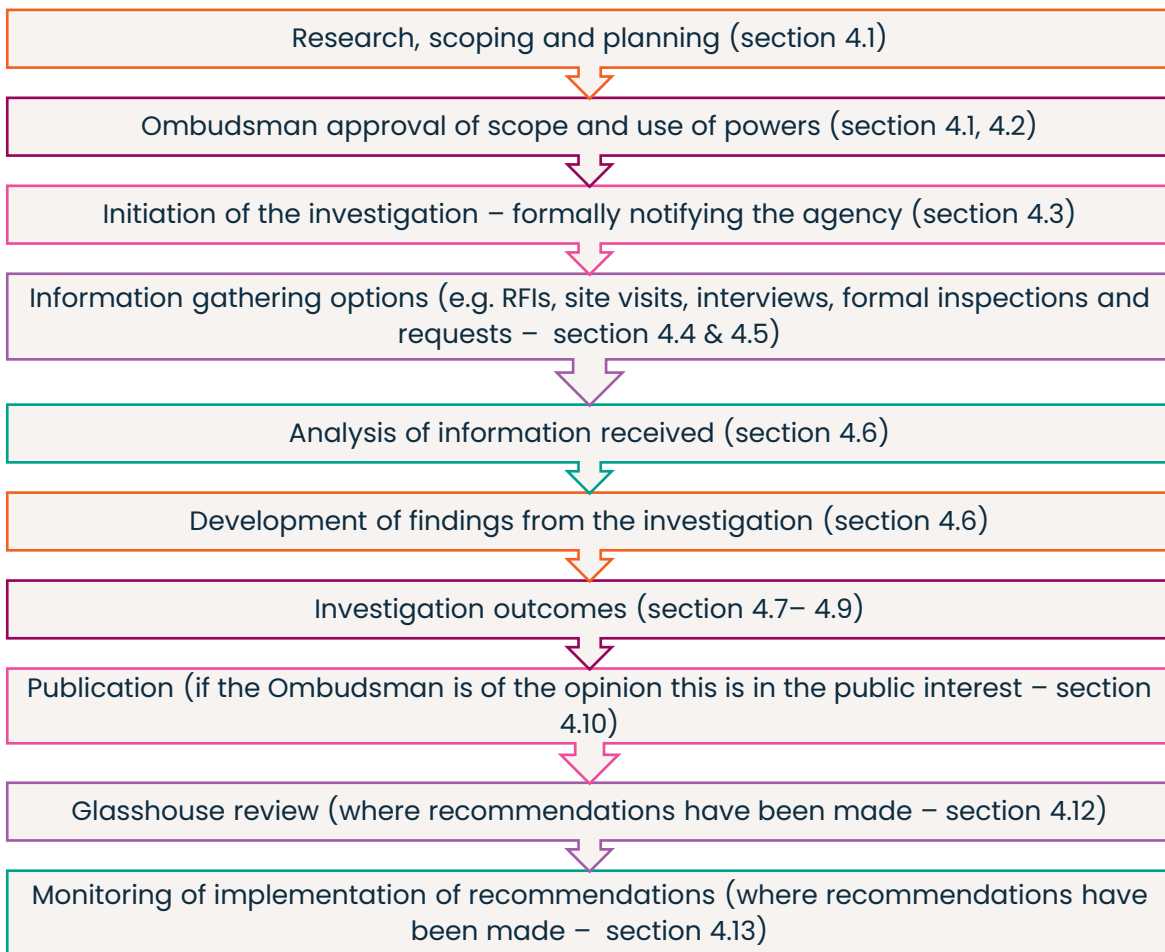
This is engagement of a different kind, as the purpose is not to support the Office's role in overseeing the actions or decisions of Commonwealth government agencies. The purpose may be for the Office to share complaint issues that agencies may wish to respond to with legislative change or information campaigns, and for agencies to share information that may impact on the Office's operations in handling complaints about an industry.

In engaging with government agencies, the Office should not:

- disclose information about a complainant or private entity provider, unless compliant with all relevant provisions of the Act, nor

- make comments suggesting the Office endorses administrative or other action the agency has taken, in case the Office later subjects the agency to scrutiny with respect to these actions.

4 Systemic investigations¹⁷



Note: This process is not necessarily linear, and investigations can move back and forward through various stages multiple times throughout the course of an investigation. In particular, the Office engages with the agency regularly throughout the entire process, and the investigator(s) engage regularly with the Ombudsman throughout the process.

The Office provides independent oversight of public administration. As part of this role, we may identify systemic issues in a complaint that extend beyond the individual issue

¹⁷ Investigations conducted into systemic issues identified either in response to an individual complaint or several complaints, or initiated by the Ombudsman’s own motion.

or instance of that issue raised by a complainant. Complaints are an excellent source of information regarding systemic issues; we may identify trends across several complaints, or spot issues in environmental scanning, that suggest that beyond any one individual instance of an issue is a root cause. The Office can investigate these systemic issues either in response to an individual complaint about the issue, or if there is no individual complaint to investigate, the Ombudsman can use the OMI power to initiate an investigation.

Ombudsman office staff are responsible for assisting the Ombudsman to conduct each systemic investigation. Each systemic investigation will differ depending on the complexity of issues under investigation. We can conduct short and targeted systemic investigations (for example into a single instance of agency conduct, or a specific issue within a program administered by a specific agency) as well as longer and more complex systemic investigations (for example into issues underlying a program or issues spanning across multiple agencies). However, the main phases of systemic investigations outlined in this chapter remain the same, no matter the size and scope of the investigations.

4.1 Before commencing a systemic investigation

Prior to commencement, all systemic investigations, whether straightforward or complex, require a planned and structured approach. Having a clear plan at the outset helps us to investigate effectively and efficiently. It also means we can come back and check to ensure that all key elements of the investigation have been properly accounted for. While our understanding of issues can evolve in the course of an investigation such that issues initially thought important might turn out to be less so, where this occurs we must still ensure we have a clear record of why we have decided to downgrade such issues and not investigate them to the extent initially planned. It may also be important to explain any such decision publicly, at the end of the investigation.

Prior to initiating a systemic investigation, investigation teams will research, scope and plan the investigation. Investigations teams should take a risk-based approach to inform how the investigation will be conducted and what investigative strategies and methods will be applied having regard to considerations including our Office's previous engagement with the relevant agency, the nature of the issue under investigation (including whether the issue is ongoing or historical) and the objectives of the investigation (see section 4.4, 'Requesting information from agencies' and section 4.5,

‘What options are available when we are unable to resolve issues with an agency during an investigation?’)

The investigation scope must show:

- the objective of the investigation
- the legislative power we are using to investigate
- key guiding questions we seek to answer by investigating
- who is responsible for conducting the investigation, and
- targeted timeframes for the investigation.

To inform the development of the project scope, the investigations team may need to meet with the relevant agency.

After completing the project scope, staff will complete a project initiation plan which sets out, among other things: project deliverables, assumptions, constraints, key stakeholders, what is out of scope for the investigation, project milestones, timeframes, risk management and financial estimates. These documents will inform the development of the methodology for the investigation.

If needed, the Ombudsman also has formal powers under s 7A of the Act¹⁸ to conduct preliminary inquiries to determine whether or not the Ombudsman is authorised to investigate the action or, if authorised, determine whether or not the Ombudsman wishes to investigate the action.

In certain circumstances, the Ombudsman also has the power to conduct joint investigations, including with the AFP or a State police force, state Ombudsman and other investigative authorities.¹⁹

The investigation team should liaise closely with the Ombudsman throughout the investigation, including during project scoping and initiation. If the investigation results in a s 15 report (see section 4.7, ‘Outcomes of a systemic investigation’), the Ombudsman must personally consider and approve all findings and recommendations. Close and regular engagement with the Ombudsman ensures that the Ombudsman is aware of and can influence the direction of the investigation and preliminary findings as they are made.

¹⁸ Section 7A of the Act does not apply to PHIO investigations.

¹⁹ Section 8(12), s 8A, s 8B, s 8C and s 8D of the Act.

The Office has templates for the project scope ([available here](#)) and project initiation plan ([available here](#)).

4.1.1 Performance

Our Office's planned performance under the Public Governance, Performance and Accountability Act 2013 as reported in the Portfolio Budget Statements, our corporate plan and the performance framework 2023–24 has two KPIs that relate to own motion investigations:

- Percentage of recommendations in reports accepted by agencies and organisations is 75% or above
- The number of reports published per year (no target).

Each branch reports quarterly on performance against these criteria to the Executive, and annually to the public in an annual performance statement in the Ombudsman's Annual Report.

In addition to tracking the external KPIs, the following internal KPIs apply to own motion investigations:

- 100% of own motion investigations have a project plan (including timeline, scope and risk analysis) in place prior to commencement of the investigation
- 75% of own motion investigations are delivered within agreed timeframes
- 100% of decisions to depart from original timeline and/or scope are well-documented and communicated to the Executive within 2 weeks
- 100% of own motion investigations recommendations/suggestions are entered into Resolve within 2 weeks of publication/finalisation of statement/report
- Target of 2 major investigations and/or projects conducted per financial year per Strategic Investigations team
- 100% of published own motion investigations have media management strategy prepared and approved by Comms prior to publication.
- 100% of major investigations and projects have a post-finalisation review completed within 4 weeks of publication/finalisation to identify, and plan actions to address (for future) any issues that posed a risk to timeliness, productivity, service or quality.

4.2 Power to initiate an own motion investigation

While systemic issues may be investigated in response to an individual complaint, s 5(1)(b) of the Act states the Ombudsman ‘may, of his or her own motion, investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department or by a prescribed authority’. Each of the DFO, PIO, OSO, PHIO and VSLO jurisdictions have an own motion investigation power, set out in **Appendix A**.

It is Office policy that only the Ombudsman and the Deputy Ombudsman can approve the initiation of an OMI.²⁰ The Ombudsman or Deputy Ombudsman’s decision to begin an OMI under the Act must be clearly documented, with legislative references.

4.2.1 Defence Force Ombudsman OMIs

Part IIA of the Act establishes the functions, powers and duties of the Defence Force Ombudsman. The functions of the Defence Force Ombudsman are to investigate complaints made under the Act and perform such other functions conferred by the Act, the *Ombudsman Regulations 2017* (the Regulations), or another Act or regulations made under another Act.

Such other functions include investigating complaints and initiating an investigation on the Ombudsman’s own motion. The Defence Force Ombudsman can investigate a matter of administrative action that is related to the service of a member of the Defence Force or that arises in consequence of a person serving or having served in the Defence Force.²¹ Under the Regulations, the Defence Force Ombudsman also has the function to inquire into matters relating to complaints of abuse, including procedures relating to making and responding to such complaints and the effectiveness and appropriateness of those procedures.²²

²⁰ In some instances, this is also limited by the Office’s internal delegations.

²¹ Section 19C(3) of the Act.

²² Regulation 14(1)(c) of the Regulations.

4.2.2 Postal Industry Ombudsman OMs

Part IIB of the Act establishes the functions, powers and duties of the Postal Industry Ombudsman. The functions of the Postal Industry Ombudsman are to investigate complaints made under the Act, and perform such other functions conferred by the Act, the Regulations, or another Act or regulations made under another Act.

The Ombudsman may, on his or her own initiative, investigate action taken by Australia Post or a registered Private Postal Operator with respect to the provision of a postal or similar service.²³

4.2.3 Overseas Student Ombudsman OMs

Part IIC of the Act establishes the functions, powers and duties of the Overseas Students Ombudsman. The functions of the Overseas Students Ombudsman are to investigate complaints made under the Act, to give private registered providers advice and training about the best practice for the handling of complaints made by overseas students; and perform such other functions conferred by the Act, the Regulations, or another Act or regulations made under another Act.

The Ombudsman may, on his or her own initiative, investigate action taken by a private registered provider in connection with an overseas student, an intending overseas student, an accepted student, or a former accepted student, within the meaning of the Overseas Students Act.²⁴

4.2.4 Private Health Insurance Ombudsman OMs

Part IID of the Act establishes the functions, powers and duties of the Private Health Insurance Ombudsman. The functions of the Private Health Insurance Ombudsman are to deal with complaints made under the Act, to investigate complaints made under the Act, to publish the State of the Health Funds Report, to collect and publish information about Health Insurers, to publish information about complaints, to perform various reporting and recommendatory functions to the Health Minister or Health Department, to promote the role, and to perform any other incidental functions.

²³ Section 19M(2)(b) of the Act.

²⁴ Section 19ZJ(2)(b) of the Act.

The Private Health Insurance Ombudsman is unique in that it can handle complaints from insured persons, private health insurers, health care providers and insurance brokers against private health insurers, health care providers and insurance brokers.

The Ombudsman may, on his or her own initiative, investigate the practices and procedures of a private health insurer or a private health insurance broker, or a health care provider together with an investigation of a private health insurer.²⁵

4.2.5 VET Student Loans Ombudsman OMs

Part IIE of the Act establishes the functions, powers and duties of the VET Student Loans Ombudsman. The functions of the VET Student Loans Ombudsman are to conduct investigations, and make recommendations and other reports in relation to VET loan assistance and compliance by VSL providers with relevant legislation; to give VSL providers advice and training about the best practice for the handling of complaints made by VSL students about their loans; to develop and review a Code of Practice for VSL providers, to make recommendations for recredit under the VET FEE-HELP redress measures, and perform such other functions conferred by the Act, the Regulations, or another Act or regulations made under another Act.

The Ombudsman may conduct an investigation on his or her own initiative.²⁶

4.2.6 Commonwealth National Preventive Mechanism

In 2019, the Ombudsman Regulations 2017 were amended to confer on the Ombudsman the functions of NPM Body²⁷ and NPM Coordinator.²⁸ Although the powers and protections provided in the Ombudsman Act and Regulations do not fully address all of OPCAT's requirements for an NPM, they do enable the Office to conduct preventive visit activity to places of detention in furtherance of the OPCAT mandate. The Commonwealth NPM team conducts their visit activity under the auspices of an own

²⁵ Section 20T(1) and (2) of the Act.

²⁶ Section 20ZO of the Act.

²⁷ Regulation 16 of the Regulations. The 'NPM Body' function is commonly referred to as the 'Commonwealth NPM', noting its scope of activity relates specifically to places of detention under the control of the Commonwealth.

²⁸ Regulation 17 of the Regulations.

motion investigation under the Ombudsman Act, and may use other powers in the course of carrying out their duties.

4.3 Commencing a systemic investigation

As with all investigations under the Act, before starting the investigation the Ombudsman must notify the principal officer of the agency under s 8(1) of the Act²⁹ that the Ombudsman intends to investigate the action.

Once the agency receives this notice, the investigation is considered to have commenced and the confidentiality protections for agencies are enacted (see 3.4 – Secure and confidential information and asset handling). The Office may have a relationship protocol with the agency which governs contact; if so, any requirements from the relationship protocol should be followed when notifying the agency of our intention to investigate.³⁰

4.4 Requesting information from agencies

When investigating, the Ombudsman has broad discretion over how an investigation is conducted and broad powers to request information.³¹ Consequently, the Office has broad discretion over what sources of evidence to request, the questions to ask of an agency, and who to request the information from.

4.4.1 Written requests for information

Systemic investigations will generally include sending at least one written request to the agency for information. This is usually sent at the time of, or shortly after notifying the agency an investigation has commenced. If appropriate, an investigation could alternatively commence with a formal requirement (rather than a request) that the

²⁹ Section 8(1) does not apply to PHIO investigations. See instead s 20T of the Act.

³⁰ Relationship protocols are available here: [Contact Protocols \(ombudsman.gov.au\)](https://ombudsman.gov.au/contact-protocols)

³¹ See ss 8(2) and 8(3) of the Act. Section 8(3) does not apply to PHIO investigations. See instead s 20T of the Act.

agency provide specified information and documents. While usually a formal legal requirement will only be issued if a request has not produced the requested material, if there are concerns about an agency's past conduct it may be appropriate that the investigation goes straight to formally legally requiring the production of materials. (See section 4.4.2 below on requiring production.)

The documents requested and questions asked are informed by the project scope and the background research performed before reaching the investigation initiation stage.

While any documents can be requested (including draft documents), examples include:

- Policy documents
- Internal correspondence
- Complaint records
- Legal advice (should also include copies of requests for legal advice, documents referring to requesting legal advice, drafts of legal advice, and all documents discussing or analysing legal advice. If draft legal advice was not finalised, we should ask for reasons why the draft advice was not finalised (as a matter of proper administration))
- Minutes relating to the action
- Notes of meetings
- Guidance documents, and
- Fact sheets.

The request for information should make it clear that full copies of the actual documents are requested (as opposed to extracts from documents).

Agencies are protected by the Act when providing information to the Office as part of an investigation (discussed at section 3.4). This supports agencies to provide sensitive documents, including legal advice, deliberations on policy decisions and records of senior members of staff, to the Office.

While there are no requirements for the format of a written request for information, it should reference the section of the Act (usually s 8(3)³² or s 9(1)) under which the Office is requesting information and include a timeframe for the agency's response. Also, where the Ombudsman proposes to make a s 9(1) request, s 8(7A) of the Act

³² Section 8(3) of the Act does not apply to PHIO investigations. See instead s 20T (investigation function) and ss 20ZD and 20ZE (information gathering tools).

requires the Ombudsman to inform the responsible Minister that the action is being investigated, if the Ombudsman has not previously done so.

There is no set timeframe for a response to a request for information and it should be tailored for each request.³³ Staff should actively consider where shorter timeframes are appropriate (for example where the scope of the request is narrow).

Some general principles to consider when drafting written questions are:

- Consider the scope of the investigation and the assessment framework prepared, and how the information requested will assist to assess the issue or action.
- Use open, neutral language that does not prejudge a conclusion.
- Think critically about when it is appropriate to use open questions or when more targeted questions may be needed.
- While broad requests for information may be appropriate in some cases, consider the time it will take the agency to compile and provide the information and also the time it will take us to review and analyse voluminous information; we may discuss this separately with the agency and arrange for a partial or staged response if necessary.
- When asking questions, be clear whether we are requesting evidence or requesting an opinion or assertion (or both).
 - i.e. *“When making X decision, did you consider Y factor?”* vs *“Please provide supporting evidence, for example any minutes or correspondence, informing X decision”*
- When requesting specific documents relating to the issue under investigation, consider whether to also request:
 - draft versions of the document
 - correspondence relating to the development of the document
 - any discussion or commentary related to the document, and
 - any deliberations, notes or other written records related to the document.
- Use background research to inform the questions and avoid requesting information the Office already has or could access itself.

To avoid delays when requesting information, engage with the agency early on regarding:

³³ For larger requests for information, 28 calendar days is usually considered appropriate. For smaller or simple requests, a shorter timeframe such as 14 calendar days may be preferable.

- any security requirements for accessing the documents (e.g. if they are a particular security classification, how access will be managed)
- whether the agency holds and has access to all the documents requested, or if you will need to contact other agencies to obtain the documents requested. This is particularly relevant when you are requesting information from a co-ordination point within a large agency, rather than requesting information from a specific part of an agency that holds the information itself, and
- in the case of a large volume of documents, how it will transmit the information (e.g. by email or physically transferring the information to us, or remote access to the agency’s systems).

4.4.2 Further methods for obtaining information

For some systemic investigations, the agency’s written responses to our questions, internal guidance and decision documents will provide the information we need to confidently analyse the issue and make findings.

However, if investigators cannot obtain the information needed or reach the level of confidence in the information obtained via request to progress or finalise the investigation, investigators do have additional options:

Options	Power	Application to jurisdictions
<p>Escalation</p> <p>If experiencing delays or pushback from an agency, escalating the matter to Senior Assistant Ombudsman (SAO), Deputy Ombudsman or Ombudsman to contact the agency may result in the information being provided.</p>	Not applicable	<p>Cth:³⁴ Yes</p> <p>DFO: Yes</p> <p>PIO: Yes</p> <p>OSO: Yes</p> <p>PHIO: Yes</p> <p>VSLO: Yes</p> <p>NPM: Yes</p>
<p>Interviews – see also – ‘Power to issue notices to</p>	Under s 8(3) of the Act, the Ombudsman may ‘obtain	<p>Cth: Yes</p> <p>DFO: Yes</p>

³⁴ OMI’s initiated under s 5(1)(b) of the Act.

Options	Power	Application to jurisdictions
<p>attend interview or seek information – formal’ (under s 9), below</p> <p>Interviews can be useful to obtain information quickly, provide anecdotal information that otherwise might not be able to be obtained from documents alone and to gain evidence of personal experiences.</p> <p>Interview audio should be recorded digitally with the interviewee’s consent, with notes taken contemporaneously.</p>	<p>information from such persons’ as he or she sees fit. This empowers the Office to ask to interview anyone with relevant information. Note that as with other requests under s 8, this is a request rather than a requirement (compare with s 9 below).</p>	<p>PIO: Yes OSO: Yes VSLO: Yes NPM: Yes</p>
	<p>Under s 20ZD of the Act, the PHIO may obtain information, and make such inquiries, as he or she thinks fit.</p>	<p>PHIO: Yes</p>
<p>Site visits</p> <p>We can request to visit a site where the agency operates. This may be useful when we need to review documents that may be impractical to transfer (either due to volume or security to classification), make observations or see how a particular policy or process works in practice, or engage with the agency staff in person (or example to gain firsthand experience of how the administration of policy is impacted by the agency’s culture).</p>	<p>Under s 8(2) of the Act an investigation shall be conducted in such manner as the Ombudsman thinks fit.</p> <p>Under s 8(3) of the Act, the Ombudsman may ‘obtain information from such persons’ as he or she sees fit.</p>	<p>Cth: Yes DFO: Yes PIO: Yes OSO: Yes VSLO: Yes NPM: Yes</p>
	<p>This is a request, not a requirement – compare with formal inspection powers below. Under s 20SA of the Act, the PHIO may conduct inspections and audits. This empowers the Office to enter premises at any reasonable time of day, inspect documents or other records and take extracts from or make copies of records.</p>	<p>PHIO: Yes</p>

Options	Power	Application to jurisdictions
<p>Contemporaneous notes should be made for any observations, and any notes, documents, photos or videos obtained must be filed.</p>		
<p>Making further inquiries in writing This can include writing multiple requests for information from the same agency, and/or requesting information from a third-party agency which may hold relevant information.</p>	<p>Under s 8(3) of the Act, we can obtain information and make inquiries during investigations.</p>	<p>Cth: Yes DFO: Yes PIO: Yes OSO: Yes VSLO: Yes NPM: Yes</p>
<p>Meeting with the agency – informal We can use informal meetings to identify why information has not been provided or is significantly delayed, and identify and address any concerns from the agency about providing information. For example, explain the legal protections provided by s 8 of the Act – see section 3.4. However, in some cases it may be necessary to use the Office’s coercive powers to obtain this information (see ‘Power to</p>	<p>Under s 20ZD(1) of the Act, the PHIO may obtain information, and make such inquiries, as he or she thinks fit.</p> <p>Under s 8(2) of the Act an investigation shall be conducted in such manner as the Ombudsman thinks fit.</p> <p>Under s 8(3) of the Act, the Ombudsman may ‘obtain information from such persons’ as he or she sees fit.</p>	<p>PHIO: Yes</p> <p>Cth: Yes DFO: Yes PIO: Yes OSO: Yes VSLO: Yes NPM: Yes</p>
	<p>Under s 20ZD(1) of the Act, the PHIO may obtain information, and make such inquiries, as he or she thinks fit.</p>	<p>PHIO: Yes</p>

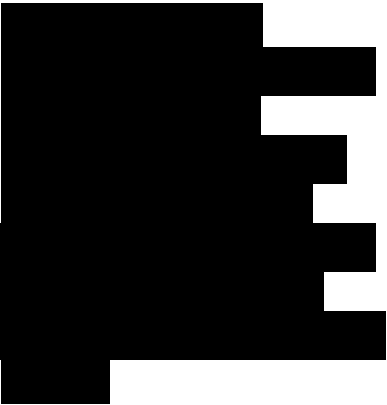
Options	Power	Application to jurisdictions
<p>issue notices to attend interview or seek information – formal’ and ‘Inspection – formal’ below).</p>		
<p>Power to issue notices to attend interview or seek information – formal</p> <p>The Ombudsman has strong powers to <i>require</i> an agency or person to provide information relevant to an investigation.</p> <p>Circumstances where we may decide to use these powers include if an agency or third party will not or cannot provide the information voluntarily or asks us to use the powers to provide additional protection. Any investigator considering exercising these powers must understand the relevant provisions and how they impact the rights and</p>	<p>Section 9 of the Act provides powers to:</p> <ul style="list-style-type: none"> • require production of any information including documents or other records³⁵ • copy, take extracts or retain documents,³⁶ and • require attendance at a specified place and answer questions.³⁷ <p>The following protections and penalties apply when exercising the s 9 powers:</p> <ul style="list-style-type: none"> • the person is not subject to penalties or civil actions by complying with the s 9 notice³⁸ • a person is not excused from complying on grounds that it would contravene an Act, it might incriminate the person or make them liable to a penalty, it would disclose legal advice given to a Minister, Department or a prescribed authority, legal 	<p>Cth: Yes DFO: Yes PIO: Yes OSO: Yes VSLO: Yes NPM: Yes</p>

³⁵ Sections 9(1) and 9(1AA) of the Act.

³⁶ Section 9(1A) of the Act.

³⁷ Section 9(2) of the Act.

³⁸ S 9(5) and s 37 of the Act.

Options	Power	Application to jurisdictions
<p>obligations of the parties involved.</p> 	<p>professional privilege, or it would be contrary to the public interest³⁹</p> <ul style="list-style-type: none"> • section 36 of the Act makes it an offence to refuse to comply unless there is a reasonable excuse,⁴⁰ and • section 11A(2) allows the Ombudsman to make an application to the Federal Court of Australia for an order to direct the person to comply with the notice.⁴¹ <p>The Ombudsman must consider and sign all s 9 notices.</p> <p>The Act requires that the relevant Minister be informed of an investigation when a s 9 notice is sent to an agency or person within that Minister’s portfolio (see s 8(7A) of the Act). This power can be exercised only by the Ombudsman and Deputy Ombudsman.</p> <p>Exercising s 9 powers without proper delegation is unlawful and constitutes a breach of the APS Code of Conduct.</p>	

³⁹ S 9(4) of the Act.

⁴⁰ The *Criminal Code Act 1995* (Commonwealth Criminal Code) provides substantial penalties for people who make false or misleading statements to officials (see for example s 137.1(4)). If we consider it necessary, we can advise interviewees prior to the interview that giving false or misleading information is a serious offence, but there is no requirement to do so.

⁴¹ The Ombudsman and the Legal Team must be consulted if purporting to exercise s 11A(2).

Options	Power	Application to jurisdictions
	<p>Section 20ZE of the Act provides powers to require the production of information or records.</p> <p>This power is delegated to SAO and above.</p>	PHIO: Yes
<p>Inspection – formal</p> <p>Inspections are useful when we want to view documents that are classified or voluminous, or when the agency prefers that we view the documents at their premises rather than deliver a paper or electronic copy.</p>	<p>Section 14 of the Act gives investigators the power to enter agency premises and inspect documents. We can also enter premises at the invitation and agreement of the agency without exercising any formal powers.</p>	<p>Cth: Yes DFO: Yes PIO: No OSO: Yes VSLO: Yes NPM: Yes</p>
<p>PIO – Transfer to Commonwealth Jurisdiction</p> <p>Where a complaint is transferred by the PIO to the Commonwealth Ombudsman, it is taken to be a complaint that was made to the Commonwealth Ombudsman. The same legislative powers apply as if the complaint was original made under the Commonwealth jurisdiction.</p>	<p>Section 20SA of the Act</p> <p>Under s 19N of the Act, the PIO may transfer a complaint to the Commonwealth Ombudsman.⁴²</p> <p>This applies where a complaint is made to the PIO and in the opinion of the PIO, it would be more appropriate to deal with, or to continue to deal with, the complaint or part of the complaint in his capacity as the Commonwealth Ombudsman.</p>	PHIO: Yes

⁴² Note the Commonwealth Ombudsman may also transfer a complaint to the PIO under this section.

It is also important to document any difficulties encountered in obtaining information or documents, as this may be something the Ombudsman wishes to comment on in a s 15 report or otherwise.

4.5 What options are available when we are unable to resolve issues with an agency during an investigation?

Where we are unable to resolve an issue of fact, legality or our findings with an agency during an investigation, the following methods (in addition to the information gathering options in section 4.4) may assist:

Option	Power	Application to jurisdictions
Disclosing information or making a statement	Under s 35A of the Act, the Ombudsman has broad power to disclose information or make a statement about an investigation, or the performance of the Ombudsman's functions. Some EL2s, all SAOs and the Deputy Ombudsman have delegation to make s 35A disclosures.	Cth: Yes ⁴³ DFO: Yes PIO: Partial ⁴⁴ OSO: Partial ⁴⁵ PHIO: Yes VSLO: Yes NPM: Yes

⁴³ OMs initiated under s 5(1)(b) of the Act.

⁴⁴ Section 35A(3)(a) does not apply to PIO jurisdictions.

⁴⁵ Section 35A(3)(a) does not apply to OSO jurisdictions.

Option	Power	Application to jurisdictions
	<p>Prior to making the disclosure, the delegate must be satisfied:</p> <ul style="list-style-type: none"> • in their opinion, the disclosure or statement is in the interests of a Department, prescribed authority, person, or in the public interest; AND • if the information relates to an investigation, they have satisfied procedural fairness requirements under s 8(5) of the Act (more information on s 8(5) is in section 4.9 below); AND • the disclosure is not likely to interfere with an investigation or the making of a report. <p>While we typically use s 35A of the Act to publish our investigation reports, we can also use this power to notify Ministers, or other oversight agencies, about agency action or inaction as part of an investigation.</p> <p>This may be used to escalate unresolved issues between the Office and the agency.</p>	
<p>Reporting</p> <p>Certain powers under the Act allow the Ombudsman to make a report when, <i>in</i></p>	<p>Under s 15 of the Act if the Ombudsman forms the view the legislative criteria are met, they shall prepare an investigation report and</p>	<p>Cth: Yes DFO: Yes NPM: Yes</p>

Option	Power	Application to jurisdictions
<p><i>the opinion of the Ombudsman</i>, certain triggers are met.</p> <p>If an agency has not fully complied with requests for information but the Office has been able to obtain sufficient information to form a view upon the key issues, the agency's lack of response could be commented on in the report. Similarly, the Ombudsman can report on contested issues that it has been unable to determine in a report. This can encourage an agency to prioritise resolution and transparently report the outcome of their analysis</p>	<p>provide it to the agency (s 15(2)) and the responsible Minister (s 15(6)). Under s 34 of the Act, only the Ombudsman may make a s 15 report.</p> <p>See also section 4.7 below for a description of s 15 power and process.</p>	
	<p>Under s 19V of the Act, if the PIO forms the view the legislative criteria are met, they must report accordingly to the investigated body (s 19V(2)) and the responsible Minister (s 19V(6)).</p>	<p>PIO: Yes</p>
	<p>Under s 19ZQ of the Act, if the OSO forms the view the legislative criteria are met, they must report accordingly to the private registered provider (s 19ZQ(2)) and the responsible Minister (s 19ZQ(6)).</p>	<p>OSO: Yes</p>
	<p>Under s 20R of the Act, the PHIO may report and make recommendations after completing an investigation under Subdivision D of Division 3(s 20R(1)). The PHIO may also report to the Health Minister on the outcome of the investigation (s 20R(2)).</p> <p>Under s 20V of the Act, the PHIO may report to the Health Minister on the outcome of the</p>	<p>PHIO: Yes</p>

Option	Power	Application to jurisdictions
	<p>investigation under Division 4 (s 20V(1)).</p> <p>Under s 20ZV of the Act, if the VSLO forms the view the legislative criteria are met, they must report to the VET student loan scheme provider (s 20ZV(2)) and the Secretary of the relevant Department (s 20ZV(6)).</p>	VSLO: Yes
Escalation to the relevant Minister	Under s 8(8) of the Act, the Ombudsman may, either before or after the completion of an investigation, discuss any matter relevant to the investigation with the responsible Minister or any other Minister concerned with the matter.	Cth: Yes DFO: Yes PIO: No OSO: No PHIO: No VSLO: No NPM: Yes
Refer question to Administrative Appeals Tribunal (AAT)	<p>Under s 10A of the Act, during an investigation, the Ombudsman can refer a question about an agency's actions or exercise of power to the AAT for an advisory opinion.</p> <p>Under our current delegation instrument, only the Deputy Ombudsman and the Ombudsman may make referrals to the AAT.</p> <p>Once the Office has referred a question to the AAT, we must inform, in writing, the principal officer of the agency we are</p>	Cth: Yes DFO: Yes PIO: No OSO: No PHIO: No VSLO: No NPM: Yes

Option	Power	Application to jurisdictions
	investigating about our referral (s 10A(2)).	
<p>Recommend principal officer refer questions to the AAT</p>	<p>Under s 11 of the Act, the Ombudsman can recommend that the agency’s principal officer refer a question, or questions, to the AAT for an advisory opinion.</p> <p>We can make this recommendation before we complete our investigation (s 11(2)(a)) or include this recommendation in a s 15 report (see more information about s 15 reporting and the relevant thresholds above).</p> <p>Following a s 11 recommendation by the Office, the principal officer must refer the question to the AAT within 30 days (or longer if agreed by the Ombudsman and the principal officer) (s 11(3)).</p> <p>The Deputy Ombudsman is delegated to make a s 11 recommendation during an investigation. If the recommendation is to be included in a s 15 report, only the Ombudsman has delegation to make a s 15 report.</p>	<p>Cth: Yes DFO: Yes PIO: No OSO: No PHIO: No VSLO: No NPM: Yes</p>
<p>Powers of the Federal Court of Australia</p> <p>This power may be used as a last resort to resolve</p>	<p>The Ombudsman or the principal officer of an agency may apply to the Federal Court of Australia to determine a</p>	<p>Cth: Yes DFO: Yes</p>

Option	Power	Application to jurisdictions
<p>disputes about the Ombudsman’s use of powers during an investigation, or as part of reporting.</p>	<p>question about the exercise, or proposed exercise, of the Ombudsman’s functions or powers.</p> <p>Prior to making an application to the Federal Court of Australia, the Ombudsman must inform their Minister of reasons for the application in writing (s 11A(4) of the Act).</p>	<p>PIO: Partial⁴⁶</p> <p>OSO: Partial⁴⁷</p> <p>PHIO: Yes</p> <p>VSLO: Partial⁴⁸</p> <p>NPM: Yes</p>
<p>Recommend AAT refers question of law to the Federal Court</p> <p>We could recommend to an agency that it ask the AAT to make such a referral in the next matter before the AAT raising the relevant issue, or we could ask the President of the AAT to consider doing so (see more information about reporting and the relevant thresholds above).</p> <p>If we asked the agency to do this, we could also recommend that it pay the legal costs of the other party, given that the other party should not have to bear the legal costs of</p>	<p>The President of the AAT has the power (s 45 of the <i>Administrative Appeals Tribunal Act 1975</i>), either on own motion or on the application of a party, to refer a question of law arising in a proceeding before it to the Federal Court for determination.</p>	<p>Where the matter under investigation is within jurisdiction of the AAT.</p>

⁴⁶ ss 11A(1) and (5) do not apply.

⁴⁷ ss 11A(1) and (5) do not apply.

⁴⁸ ss 11A(1) and (5) do not apply.

Option	Power	Application to jurisdictions
<p>being chosen as a test case.</p> <p>These options could be suggested to an agency informally, or if necessary made as recommendations in a report.</p>		
<p>Seek external legal advice</p>	<p>If a question of legality arises that we are unable to determine, the following options are available:</p> <ul style="list-style-type: none"> Request that the agency seek external legal advice <p>The Office can ask the agency to seek legal advice (for example from the Solicitor General) and provide a copy to the Office. If the agency declines this request, the Ombudsman may make this a formal recommendation in a report. This option is preferable, as influencing the agency to take action to resolve the issue enhances government administration.</p> <ul style="list-style-type: none"> The Ombudsman seeks its own external legal advice. <p>In doing so, the Office would need to comply with the Legal Services Directions 2017 which require, among other things, that the Office consult with the agency that administers the</p>	<p>Cth: Yes DFO: Yes PIO: Yes OSO: Yes PHIO: Yes VSLO: Yes NPM: Yes</p>

Option	Power	Application to jurisdictions
	relevant legal advice before advice is sought unless the matter is urgent, and provides a copy of the advice to the agency. Importantly, the agency's consent is not required, and the consultation does not need to be protracted.	
<p>PIO – Transfer to Commonwealth Jurisdiction</p> <p>Where a complaint is transferred by the PIO to the Commonwealth Ombudsman, it is taken to be a complaint that was made to the Commonwealth Ombudsman. The same legislative powers apply as if the complaint was originally made under the Commonwealth jurisdiction.</p>	<p>Under s 19N of the Act, the PIO may transfer a complaint to the Commonwealth Ombudsman.⁴⁹</p> <p>This applies where a complaint is made to the PIO and in the opinion of the PIO, it would be more appropriate to deal with, or to continue to deal with, the complaint or part of the complaint in his capacity as the Commonwealth Ombudsman.</p>	PIO: Yes

The Office does not use its powers under s 10A, 11 and 11A of the Act often, but they are a viable option in certain circumstances. Staff should read the text of these provisions before considering using the power/s and discuss with their Director, Senior Executive and the Legal Team before preparing advice for the Deputy Ombudsman or Ombudsman.

Where a report expressing doubt about a matter of legality is proposed to be published, an agency may express concern that this could prejudice current or pending legal

⁴⁹ Note the Commonwealth Ombudsman may also transfer a complaint to the PIO under this section.

proceedings. It is unlikely that a statement or opinion published by the Ombudsman could prejudice civil proceedings, given a judge has their own duty to determine issues in proceedings. If there are pending criminal proceedings that will involve a jury, it may be appropriate to seek legal advice on whether the report could prejudice proceedings, and the report should be expressed in a manner that is not likely to cause prejudice.

4.6 Analysing information received and development of findings

As part of preparing for the systemic investigation, the investigation team should research the issue or action to be investigated thoroughly to assist with the analysis once the information is received. While the issue investigated in systemic investigations can vary in size and scope, in general the team should have a good understanding of the background (including any complaints received by the Office) and the legislative and policy framework around the issue, and what 'best practice' looks like in that area.

Generally, all information provided by the agency should be reviewed. If a decision is made not to review a document, the reasons for this decision should be clearly documented, carefully considering the scope of the investigation, the timeframes and resources available.

Analysis of the material gathered in the investigation must be objective and based solely on the facts. Analysis of the evidence and any findings must be documented, including if the assessment of a document or piece of information is that it is not relevant or out of scope. It is best practice to develop an assessment framework for investigators to use when conducting their assessments and recording their analysis and findings. An assessment framework should clearly set out the authorities and standards against which the agency's information should be assessed. This helps ensure consistency and objectivity in each investigators' analysis and findings.

Any proposed findings in an investigation must be objective and based on the evidence. Where, following an investigation, there remains an open question or unresolved doubt concerning agency action it is open to the Office to report on this and, if appropriate, make a recommendation, suggestion or comment (for example, where there is a question of legality that we are unable to determine, we may wish to make a recommendation that the agency seek external legal advice). If, following an investigation, the investigators assess that the agency has acted in a way that is contrary to law, unreasonable or meets any of the other criteria in the relevant

reporting provision of the Act,⁵⁰ or that the action was in accordance with a rule of law, legislation or a policy but the rule, provision or policy is unreasonable, unjust, oppressive or improperly discriminatory, those proposed findings must be presented to the Ombudsman for a final decision. The power to report under s 15 of the Act, discussed below, is non-delegable. In the event a s 15 report is prepared, any findings, recommendations, suggestions or comments within are the Ombudsman's.

4.7 Outcomes of a systemic investigation

The Office may take a range of actions following a systemic investigation. When deciding what action to take, the Office will consider the legislative requirements, how to effectively influence improvements in public administration and the most appropriate format. In general, the outcomes of a systemic investigation will be:

- No further action
 - The investigation may assure us that further investigation of the administrative action is not warranted (for example, the issue has been fixed or we have confirmed that the agency's actions were reasonable, not contrary to law), and we can conclude the investigation without a report.⁵¹ We could, however, also choose to issue a public statement about our investigation, for example if the issue investigated and/or the fact of our investigation had been of significant public interest and it was important to explain our conclusions.
- Informal action
 - The investigation may identify issues that warrant less formal exploration with the agency or agencies, for example, by seeking agency updates at routine engagement, or monitoring future complaints received about the issue.
- Statement to the agency – no recommendations, suggestions or comments.
 - The investigation may result in a statement without any suggestions, comments or recommendations being made.

⁵⁰ See table above for the relevant reporting provision for the various jurisdictions.

⁵¹ See the Ombudsman's discretion not to investigate under s 6 of the Act and notice requirements under s 12 of the Act where the investigation relates to a complaint that has been made to the Ombudsman.

- Statement to the agency – s 12(4) comments or suggestions⁵²
 - The investigation may result in a statement to the agency that includes suggestions or comments under s 12(4) of the Act where the thresholds for a s 15 report have not been met.
- Report to the agency⁵³
 - The investigation may identify serious issues requiring a report to the agency, including any recommendations the Ombudsman sees fit. A report may also include suggestions and comments made under s 12(4) of the Act (where s 12(4) applies to the relevant jurisdiction).
- Statement to public service agencies or private entities – no recommendations, suggestions or comments
 - The investigation may result in a statement to all or a sector of public service agencies or private entities without any formal recommendations, suggestions or comments being made.

The Ombudsman may choose to publicly disclose any information, statement or report during or following an investigation under s 35A of the Act⁵⁴ if the legislative requirements under this provision are met (see ‘Publishing an investigation report’ below). Refer also to the [Recommendations, Suggestions and Comments Policy](#).

If the Ombudsman forms the opinion, either before or after completing an investigation, that there is evidence that there has been a breach of duty or of the APS Code of Conduct, or misconduct, the Ombudsman has certain obligations under the Act to notify agency heads or Ministers.

4.8 Recommendations, suggestions and comments

Recommendations, suggestions and comments are covered in detail in the [Recommendations, Suggestions and Comments Policy](#). For further guidance on making recommendations, suggestions and comments, refer to this document.

Recommendations, suggestions and comments are tools the Office can use as part of investigations or inspections to raise issues with, and seek action from, agencies,

⁵² Does not apply to the PHIO jurisdiction.

⁵³ See table above for the relevant reporting provision for the various jurisdictions.

⁵⁴ Section 35A(3)(a) does not apply to PIO or OSO jurisdictions.

prescribed authorities and providers we oversee to influence systemic improvement in administration.

Any report or statement following an investigation must include reasons for the Ombudsman’s opinions, or findings, and can include recommendations, suggestions and comments for remedial, corrective or preventative action or for improvements that the Ombudsman thinks fit to make.

In relation to systemic investigations, in certain circumstances it is open to the Ombudsman to make recommendations in reports.⁵⁵ For some jurisdictions, the Ombudsman is required to report when certain legislative triggers are met.

Section 12(4) of the Act gives the Ombudsman the power to furnish comments or suggestions with respect to any matter relating to or arising out of an investigation by the Ombudsman.⁵⁶ Section 12(4) precludes the Ombudsman from providing these comments or suggestions to an agency where the Ombudsman has already furnished a report to the same agency under s 15 relating to the same matter. This should not be interpreted too broadly, however: the prohibition against formally furnishing comments or suggestions in such a situation does not necessarily prevent the Ombudsman from communicating with an agency head about the matter.

4.9 Procedural Fairness

Section 8(5) of the Act⁵⁷ requires that, before finalising a report of an investigation (including a s 15 report), if the Ombudsman intends to include opinions that are either expressly or impliedly critical of an agency or individual in the report, the Ombudsman must give that agency or individual the opportunity to make submissions either orally or in writing to the Ombudsman. This requirement must also be met before making the report public under s 35A of the Act.

To fulfil this requirement, the Office must:

- If we have not already, notify the relevant Minister of the investigation (s 8(7A)(b)).⁵⁸

⁵⁵ See table above for the relevant reporting provision for the various jurisdictions.

⁵⁶ The Ombudsman has delegated the s 12(4) power to Executive Level 2 Officers. Section 12(4) does not apply to the PHIO jurisdiction.

⁵⁷ Section 8(5) does not apply to PHIO investigations.

⁵⁸ Section 8(7A)(b) does not apply to the PIO, OSO, PHIO or VSLO jurisdictions.

- Provide notice of the criticism in the draft report to the individual or principal officer of the agency and invite them to make submissions orally or in writing in response.

For PHIO investigations, the relevant procedural fairness requirements are set out in s 20R and s 20V of the Act.

In practice for systemic investigations about agencies, we usually meet this requirement by drafting a letter for the Ombudsman's signature, addressed to the principal officer of the agency, enclosing the draft report. The draft report should be provided to the agency in a non-editable format (i.e. PDF). The letter will:

- Include a clear statement alerting the agency or organisation to the confidentiality of the report and that it should not be shared outside their agency or organisation, or within their agency to staff without a need to know, without first consulting with our Office. The statement may permit sharing the draft report with an agency or organisation's audit committee.
- Request any comments or submissions in response to the express or implied criticism.
- Where we have given recommendations or suggestions to the agency, ask whether the agency accepts or does not accept our recommendations or suggestions.
- If agencies are going to accept a recommendation or suggestion, ask them what action they will take to implement the recommendation or suggestion and by when the recommendation or suggestion will be implemented. We may provide indicative reasonable timeframes for implementation.
- Inform the principal officer whether we intend to make the investigation report public under s 35A of the Act.
- Invite the agency to respond in writing to our report and any recommendations or suggestions made. The written response will be included as an attachment to the final published report.

We typically give the agency 28 calendar days to respond to the draft report; however, this is practice and not a requirement, so we should consider whether 28 days or a shorter period is appropriate for the specific investigation and report. To ensure that the report accurately explains the issues, it may help to meet with the agency either immediately before or at the same time as providing the draft report to explain the

issues outlined in the report and invite the agency to make submissions as part of the s 8(5) process.⁵⁹

If the report is critical of an individual rather than an agency, it is general practice to only provide the individual with the section(s) of the report relevant to them. If both an individual officer and the officer's agency need an opportunity to comment, consider providing an opportunity to the officer first and incorporate any changes into the report sent to the agency. (For this reason, when conducting interviews, staff should also ask interviewees their preferred official email address so that they can send a draft to the interviewee without alerting the agency to that process. If the agency becomes aware that we are offering a s 8(5)⁶⁰ opportunity to an officer, then the agency may assume that the draft is critical of that officer.)

The Office should consider all submissions and comments received in response to the procedural fairness process and decide whether the information provided should change the report or its conclusions (for example, if the agency has raised any errors of fact in the report). Section 8(5)⁶¹ does not require that the agency agree with the draft report, require the Ombudsman to make any changes to the report or prevent the Ombudsman from expressing an opinion that is expressly or impliedly critical of an agency or person but, rather, ensures that an agency or person can make submissions in response to criticism. While the agency or individual may disagree with the report and its conclusions, the Ombudsman has ultimate discretion over the conclusions drawn and the content of their report. The report is a statement of the Ombudsman's independent opinion.

Following agency or individual submissions, the Ombudsman will clear the final report. In the unlikely event the changed report contains new opinions that may be critical of an agency or individual, those will need to be put to the agency or individual again.

The respective reporting powers for each jurisdiction also permit the agency, once it has received the final report, to provide comments to the Ombudsman about the report. These comments should be appended to any published version of the report.

⁵⁹ Or equivalent process for PHIO investigations.

⁶⁰ Or equivalent process for PHIO investigations.

⁶¹ Or equivalent provision for PHIO investigations.

4.10 Publishing an investigation report or statement

The Ombudsman can (under s 35A of the Act)⁶² disclose information or make a statement regarding an investigation to any person or to the public in general if, in the opinion of the Ombudsman, it is in the interest of any agency, person or the public generally to do so. The Office uses this power to publish investigation reports, including systemic investigation reports.

Before publishing the investigation report under s 35A of the Act, the Office must ensure it has met the following requirements:

- The Ombudsman (or a delegate) must be satisfied it is in the interests of any Department, prescribed authority or in the public interest to publish the report under s 35A(1) of the Act.
- The disclosure must not interfere with the carrying out of any other investigation (s 35A(2) of the Act).
- The report must not set out any express or implied critical opinions of a person or agency unless s 8(5) has been complied with (s 35A(3)(a) of the Act).
- The report must not enable any complainant to be identified unless it is fair and reasonable in all circumstances to do so (s 35A(3)(b) of the Act).

4.10.1 Reports under s 15 of the Act

If the systemic investigation report is produced, the Office must give a copy of the final report to the agency and/or responsible Minister, depending on the reporting requirements.⁶³

If the Ombudsman decides to then publish the report under s 35A of the Act, we will notify the agency's Minister, the principal officer of the agency or organisation, and our working level contacts. Any published report will include the agency or organisation's response to the report and our recommendations. The Ombudsman may also share the report with other interested bodies like parliamentary committees and other Ministers.

⁶² Section 35A(3)(a) does not apply to PIO or OSO jurisdictions.

⁶³ See reporting requirements for each jurisdiction in the table above.

4.10.2 Reports or statements not produced

If the report is not produced under the respective reporting power for each jurisdiction, the Office is still empowered, under s 35A of the Act, to disclose the details of the investigation to any person, agency or the public if satisfied it is in the public interest to do so. This allows the Office to publish the results of a systemic investigation even where the Ombudsman is not of the opinion that the action investigated was wrong or otherwise meets the criteria to report.

Some EL2s, SAOs, the Deputy Ombudsman and the Ombudsman have the power to authorise s 35A disclosures. However, as a matter of policy the Ombudsman typically makes the decision whether to publish investigation information (or reports).

4.11 Delegations

Section 34 of the Act allows the Ombudsman to delegate all and any of their powers under the Act, other than those powers specifically excluded under s 34. When conducting investigations, staff must ensure they check the current delegation instructions before exercising any powers under the Act. The current delegation instruments are available here: [Delegations \(ombudsman.gov.au\)](https://ombudsman.gov.au/delegations).

4.12 Glasshouse reviews

Shortly after an investigation is finalised, the investigation team should conduct a 'Glasshouse' review to consider whether the recommendations provided in any systemic investigation report apply to the Office and, if so, whether the Office complies with them. It is important that our Office holds itself to the same standard as that expected of other public service agencies or private entities we oversee.

If a recommendation applies but the Office is assessed as not compliant, this process will identify action to be taken by the Office to ensure compliance, including recording the recommendation, action to be taken and timeframes for implementation in our Internal Recommendations Monitoring.

Further procedural instructions on Internal Recommendations and Assurance can be found [here](#).

4.13 Monitoring agency implementation of recommendations

Taking action to follow up and assess an agency's progress in implementing our recommendations is a crucial aspect of our ability to influence enduring systemic improvement.

When we report to an agency, we request that the agency indicate in its response whether it accepts or does not accept our recommendations. We also ask the agency to outline its plan for implementation of the accepted recommendations, including action it purports to take and timeframes in which this action will be completed.

After the implementation period, and potentially in conjunction with the Office's reporting cycle of recommendation implementation, the Office will follow up with the agency on each accepted recommendation and request information and/or documents setting out the action that has been taken. We assess whether the recommendation is fully implemented or not implemented, and report on the outcomes of our assessment.

Refer to the Office's [Monitoring Recommendations Policy](#) (under review) for further detail.

4.13.1 Where appropriate action is not taken on Ombudsman's report

Where the Ombudsman has issued a s 15 report and, in the opinion of the Ombudsman, adequate and appropriate action has not been taken by the agency with respect to the matters and accepted recommendations in that report within a reasonable time, the Ombudsman may inform the Prime Minister in writing.⁶⁴ In considering whether to inform the Prime Minister, the Ombudsman must consider any comments provided by the agency.⁶⁵

⁶⁴ Section 16(1) of the Act. Section 16 of the Act does not apply to PIO, OSO, PHIO and VSLO jurisdictions.

⁶⁵ Section 16(3) of the Act. Section 16 of the Act does not apply to PIO, OSO, PHIO and VSLO jurisdictions.

Once the Ombudsman has reported to the Prime Minister under s 16, the Ombudsman may also furnish a special report to the Presiding Officers of Parliament for presentation to the Senate and House of Representatives.⁶⁶ If the matter is not resolved by the report to the Prime Minister or the report to Parliament, the Ombudsman can continue to discuss and attempt to resolve the matter with the principal officer of the Department.

5 Complaint investigations

In addition to systemic investigations, the core business of the office is investigating complaints received by the public. The principles, investigative methods and strategies outlined in this policy apply to all investigations the Office conducts (where consistent with legislative requirements), whether into a systemic issue or into an individual occurrence of an issue raised in a complaint.

Extensive guidance for investigating individual complaints can be found in the Parliamentary Complaint Handling Procedures and supporting documents found on the intranet [Parliamentary Complaint Handling Procedures \(ombudsman.gov.au\)](http://ombudsman.gov.au).

5.1 Notifying a complainant when a s 15 report has been provided to an agency

Under s 12(5) of the Act, if the Ombudsman provides a s 15 report to an agency containing recommendations with respect to action in respect of which a complaint has been made:

- where the Ombudsman is of the opinion that adequate and appropriate action has not been taken by the agency within a reasonable time after the recommendations are provided, give the complainant a copy of the recommendations with any comments the Ombudsman thinks fit, or
- in any other case, provide the complainant with a copy of the recommendations with any comments the Ombudsman thinks fit.

⁶⁶ Section 17 of the Act. Section 17 of the Act does not apply to PIO, OSO, PHIO and VSLO jurisdictions.

[Additional policies currently under development by Complaints and Investigations Branch to be linked once finalised]

6 Approval

Document Owner: Strategic Investigations 1, Investigations Branch
Strategic Investigations 2, DIAL Branch

Review Cycle: Annual

Version	Date Approved	Approved by	Comment
1.0	14 August 2023	Iain Anderson, Ombudsman	
1.1	21 December 2023	Penny McKay, a/g Ombudsman	<p>Updates:</p> <ul style="list-style-type: none"> • Minor grammatical and formatting changes • Include reference to s 12(5) of the Act • Amendments requested by the Executive Committee to implement improvements identified from the Income Apportionment OMI 1.

Appendix A: Source of powers to investigate

Jurisdiction	Investigation on Own Motion/into Complaint	Section of the Act	Text of section
Commonwealth	Complaint	Section 5(1)(a)	<i>“Subject to this Act, the Ombudsman shall investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department, or by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman”</i>
	Own motion	Section 5(1)(b)	<i>“Subject to this Act, the ombudsman may, of his or her own motion, investigate any action, being action that relates to a matter of administration, taken either before or after the</i>

Jurisdiction	Investigation on Own Motion/into Complaint	Section of the Act	Text of section
			<i>commencement of this Act by a Department or by a prescribed authority"</i>
Defence Force	Complaint	Section 19C(2)(a)	<i>"Subject to this Act, the Defence Force Ombudsman, shall investigate action that he or she is authorized by this Act to investigate and in respect of which a complaint has been made to him or her"</i>
	Own Motion	Section 19C(2)(b)	<i>"Subject to this Act, the Defence Force Ombudsman may, of his or her own motion, investigate action that he or she is authorized by this Act to investigate"</i>
Postal Industry	Complaint	Section 19M(2)(a)	<i>"Subject to this Act, the Postal Industry Ombudsman, is to investigate action that he or she is authorised by this Act to investigate and in respect of which a complaint has been made to</i>

Jurisdiction	Investigation on Own Motion/into Complaint	Section of the Act	Text of section
			<i>him or her (other than a complaint excluded by subsection (4))”</i>
	Own Motion	Section 19M(2)(b)	<i>“Subject to this Act, the Postal Industry Ombudsman, may on his or her own initiative, investigate action that he or she is authorised by this Act to investigate”</i>
Overseas Students	Complaint	Section 19ZJ(2)(a)	<i>“Subject to this Act, the Overseas Students Ombudsman, is to investigate action that he or she is authorised by this Act to investigate and in respect of which a complaint has been made to him or her”</i>
	Own Motion	Section 19ZJ(2)(b)	<i>“Subject to this Act, the Overseas Students Ombudsman, may on his or her own initiative, investigate action that he or she is authorised by this Act to investigate”</i>

Jurisdiction	Investigation on Own Motion/into Complaint	Section of the Act	Text of section
<p>Private Health Insurance</p>	<p>Complaint</p>	<p>Section 20P(a) and (b)</p>	<p><i>“The Private Health Insurance Ombudsman may investigate a complaint if:</i></p> <p><i>The complaint is not resolved to the complainant’s satisfaction by mediation under Division 5; or</i></p> <p><i>The Private health Insurance Ombudsman is not satisfied with the outcome of a referral under Subdivision C.”</i></p>
	<p>Own Motion</p>	<p>Section 20T(1) and (2)</p>	<p><i>“The Private Health Insurance Ombudsman may, on his or her own initiative, investigate the practices and procedures of a private health insurer or a private health insurance broker.</i></p> <p><i>The Private Health Insurance Ombudsman may, on his or her own initiative,</i></p>

Jurisdiction	Investigation on Own Motion/into Complaint	Section of the Act	Text of section
			<i>investigate the practices and procedures of a health care provider together with an investigation of a private health insurer under subsection (1) ..."</i>
VET Student Loans	Complaint	Section 20ZO(a)	<i>"In performing his or her functions, the VET Student Loans Ombudsman, may conduct an investigation in relation to a complaint made under section 20ZP"</i>
	Own Motion	Section 20ZO(b)	<i>"In performing his or her functions, the VET Student Loans Ombudsman may conduct an investigation on his or her own initiative"</i>