

Submission by the
Commonwealth Ombudsman
Administrative Review Reform

Submission by the Commonwealth Ombudsman, Iain Anderson

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Introduction and summary

1. The Office of the Commonwealth Ombudsman (OCO) welcomes the opportunity to make a submission to the Attorney-General's Department (AGD) on the Administrative Review Reform Issues Paper (the Paper).
2. Our submission explains our role and functions as an entity in the Commonwealth administrative law system. It identifies key points of interaction between the OCO and the Administrative Appeals Tribunal (AAT), which we support re-establishing in a new administrative body.
3. Our submission also responds to the following consultation questions:
 - Q3: Should the Administrative Review Council (ARC), or a similar body, be established in the new legislation? What should be its functions and membership?
 - Q4: How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body?
 - Q8: Should the requirement that the President be a Federal Court judge be retained? Should any modifications be made? For example, should the requirement be extended to include former judges or judges of other courts?
 - Q67: Do you have any other suggestions for the design and function of a new administrative review body?

Our role

4. The purpose of the OCO is to:
 - provide assurance that the agencies and entities we oversee act with integrity and treat people fairly, and
 - influence systemic improvement in government administration.
5. We aim to achieve our purpose by:
 - independently and impartially reviewing complaints and disclosures about government administrative action
 - influencing government agencies to be accountable, lawful, fair, transparent, and responsive
 - assisting people to resolve complaints about government administrative action; and
 - providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

Our place in the administrative law system

6. The OCO is a part of Australia's administrative law system, which ensures that administrative decision making is legal, fair, consistent, transparent, and impartial. The primary function of the OCO is to investigate complaints received from members of the public about the administrative decisions and actions of government agencies. In investigating complaints, the OCO can make recommendations. Most OCO recommendations are not binding, but the OCO does have broad discretion and scope in the types of recommendations it can make. For example, the OCO could recommend an agency undertake:

- further consideration of a decision
- action to rectify or mitigate an unfair outcome
- cancel or vary a decision
- seek alteration of a law or practice
- give reasons for a decision, or
- take some other appropriate steps to address the complaint.

Importantly, the complaints function offers an accessible and relatively informal avenue for individuals to have their concerns heard.

7. The informality of the OCO's complaint mechanisms is important and distinguishes us from the more formal merits review systems of federal tribunals and judicial review by the federal courts. It provides an important avenue for individuals to seek actions or responses from the Government that may better meet their needs than through a formal merits review process.¹ For example, an individual may simply need more detailed reasons for a decision that has affected them to resolve their complaint.
8. In addition to the complaints function, the OCO has an important function of undertaking investigations under our own motion. This allows the OCO to identify and address broader systemic administrative law issues in government. For example, an own motion investigation may result in recommendations to a government entity to put in place mechanisms to ensure it more effectively communicates clear and adequate reasons for decisions to individuals affected by those decisions.
9. The OCO also has several statutory roles. The *Ombudsman Act 1976* (Ombudsman Act) provides for the Commonwealth Ombudsman to also be the Immigration Ombudsman, Law Enforcement Ombudsman, Defence Force Ombudsman, Postal Industry Ombudsman, Overseas Student Ombudsman, Private Health Insurance Ombudsman and Vocational Education and Training Student Loans Ombudsman. All these statutory roles involve the investigation of complaints about government administration as well as additional functions that may be conferred by relevant Acts or Regulations to meet the needs of each ombudsman.

¹ In 2021-2022 the OCO received a total of 25,135 complaints.

Intersection with the AAT

10. The Ombudsman Act and the *Administrative Appeals Tribunal Act 1975* (AAT Act) provide for several intersections between the OCO and the AAT. These points of intersection support a cooperative approach to ensuring effective administrative law practice by government. The OCO broadly welcomes the continuance of these arrangements with the new body with potential adjustments as discussed below.

Power to request an advisory opinion from the AAT

11. Sections 10A and 11 of the Ombudsman Act provide for the AAT to give an advisory opinion when requested by the Ombudsman. Specifically, s10A provides for the Ombudsman to refer a question to the AAT directly, while s11 provides for the Ombudsman to recommend the principal officer of a department or prescribed authority seek an advisory opinion from the AAT. Subsection 11(3) provides the principal officer **must** then refer the question to the AAT within 30 days or some other longer period agreed with the OCO.
12. The OCO has had this power, in some form, since its establishment in 1976. Its provision was instigated by a recommendation of the 1973 report by the Committee on Administrative Discretions led by Sir Henry Bland C.B.E (the Bland Report).² The power was intended to support the Ombudsman's role in the broader suite of reforms at the time, where "apart altogether from the outcome of resolving a problem affecting an aggrieved person, the process proposed would progressively establish authoritative guides to the administration at large".³
13. The OCO supports the retention of this advisory opinion framework between the OCO and the new administrative review body. The OCO understands the process has not been used in recent years. Only two requests have been made under s11 and only one resulted in an advisory opinion by the AAT.⁴ (The second request was withdrawn after the issue was resolved by the agency concerned changing the position which it had initially taken and which in the Ombudsman's view had been legally incorrect.) The advisory opinion that was given, by Justice Brennan as President of the AAT, was then not applied by the Director-General of Social Services (the advisory opinion concerned the purported making of a social services decision), who instead sought legal advice from the Attorney-General's Department on what steps it was necessary for the Director-General to take.
14. It is possible that an agency could in future decline to apply an AAT advisory opinion. The Ombudsman would however be able to publicise the opinion, including raising it with Parliament (through the process laid down in s17 of the Ombudsman Act), and it would be for the agency to publicly justify its position. The power to seek an advisory opinion provides an important option for the Ombudsman to compel an agency to confirm the legality of a particular policy position or decision and can provide an efficient way to address administrative law practice with cross-Commonwealth implications. It is also likely that the

² The relevant discussion is at paragraphs 69-71 and 229 (viii) of the Bland Report which may be accessed here: [PP no. 316 of 1973 \(nla.gov.au\)](#)

³ Paragraph 71 of the Bland Report.

⁴ Further information on these two applications is set out in the relevant annual reports of the OCO. The first use of this power in 1978 is summarised here: [1978/1979, PP no. 325 of 1979 \(nla.gov.au\)](#) and the second use of this power in 1980 is summarised here: [1979/1980, PP no. 5 of 1981 \(nla.gov.au\)](#).

Robodebt Royal Commission will comment in its report to the effect that seeking an advisory opinion from the AAT may have assisted to resolve the question of the legality of Robodebt.

15. The OCO would welcome further consultation with AGD and/or the new body on ways to clarify processes and practice for the referral of questions.

Power to issue a certificate of unreasonable delay

16. Section 10 of the Ombudsman Act provides for the Ombudsman to issue a complainant with a certificate of unreasonable delay where an agency has failed to make a reviewable decision. The certificate constitutes a deemed negative decision by the agency, which then enables the complainant to make an application for merits review by the AAT.
17. The OCO would support the retention of this power and recommend the new tribunal be prescribed as one to which such a certificate can be brought. It is important that administrative decisions are made, and complaints are handled, in a timely fashion. This power operates as a 'circuit breaker' to ensure that individuals can access AAT review, where it is available, within a reasonable time period.

OCO as a member of the Administrative Review Council

18. Section 48 of the AAT Act provides that there is an Administrative Review Council (ARC) and s49 provides that the Commonwealth Ombudsman is a member of the ARC. The OCO strongly supports the re-enlivenment of the ARC and would welcome the opportunity to continue being an ex officio member of that council.
19. The re-enlivenment of the ARC would open important opportunities to identify and explore potential reforms in administrative law and practice.
20. OCO notes that AGD has identified in the Issues Paper a potential role for the re-established ARC to oversee the new administrative body. OCO currently oversees the administrative actions of the AAT and would welcome further discussion on the future role and functions of the ARC with respect to the new tribunal as potential policies crystalise.

Proposals for a new administrative review body

Tribunal may refer questions of law to the Federal Court of Australia

21. Section 45 of the AAT Act empowers the AAT to refer a question of law arising in a tribunal proceeding to the Federal Court of Australia (FCA) for a decision. The OCO would support the provision of such a mechanism for the new tribunal. Allowing for a question of law to be referred to the FCA for determination can provide a quick and efficient avenue to resolve issues of significance to the community. The AAT could have used this mechanism with respect to Robodebt, particularly once it became apparent that the Department of Human Services and Department of Social Services were not appealing to the Federal Court AAT decisions that Robodebt was unlawful, and were also not changing their administrative practices with respect to the application of Robodebt.

Publication of tribunal decisions

22. Section 66B of the AAT Act provides a discretion for the AAT to publish decisions. The OCO would support amendments to this discretion for the new tribunal. There would be benefit in setting the publication of decisions as a 'default' with only strict carve outs in line with other privacy and national security regimes. It would be possible to have decisions published in a templated manner that did not include potentially identifiable material about a social security recipient, defence veteran or taxpayer, for example, but did include the core of the reasons for decision in terms of the interpretation and application of policy and legislation. It would be within the broader public interest to have greater visibility of tribunal decisions to strengthen public trust in the transparency and consistency of the administrative review framework, and would also enhance the normative effect of AAT decision-making.

Tribunal President to be a Federal Court judge

23. The OCO would support a requirement that the new tribunal president must be a Federal Court judge. This strengthens the relationship between the different components of the administrative law system. It also ensures that the president has independence. A judicial president would also maximise the practical utility of the matters we have commented upon:

- it would enable the new tribunal to provide the OCO with advisory opinions with sufficient legal weight
- it would provide an important judicial perspective to the ARC membership and the future work of the ARC, and
- it would facilitate the referral of questions of law to the FCA.

24. While it is not strictly a matter for the OCO, the Department may wish to consider whether the requirement should be that, in order to be eligible to be considered for the position of president, a candidate must be a current Federal Court judge. In the alternative, include a requirement that the Chief Justice of the Federal Court must be consulted on or agree to a proposed appointment of president.

25. By its nature the position of president is a term appointment, whereas a Federal Court judge is appointed to age 70. It may be most appropriate that a Federal Court judge with a particular interest in and aptitude for administrative law, chosen by the government after consultation with the Chief Justice of the Federal Court, take on the role of President for a term, rather than a person being appointed as president for a term that they may or may not serve but then being by dint of that appointment remaining a Federal Court judge (and the responsibility of the Chief Justice of that court) for many years.