



Exercising discretion under the *Ombudsman Act 2001*

Purpose

The purpose of this document is to guide decision makers exercising discretion and making decisions under the *Ombudsman Act 2001*.

All complaints made under the *Ombudsman Act 2001* must also be assessed in light of the duties and obligations arising from the *Crime and Corruption Act 2008*, and the *Public Interest Disclosure Act 2010*.

Overarching principles

Decision makers have a duty to inquire into any relevant facts so as to be sufficiently informed to decide a complaint and this may include making inquiries of the complainant or an agency.

Nothing in this guideline limits the facts or matters arising on a particular complaint that a delegate may lawfully consider in exercising their discretion under the *Ombudsman Act 2001*.

All officers must have regard to a person's human rights and ensure their decisions under the Act are compatible with the *Human Rights Act 2019*.

Structure

This document sets out the legislative reference, short title for the decision being made and the factors the decision makers may consider and weigh in reaching a decision.

Anthony Reilly
Queensland Ombudsman



Guidance

Decision to be made	Factors to be considered
<p>Section 20(3)(a)</p> <p>Whether to decline to investigate an oral complaint until the complaint is put in writing</p>	<p>Wherever possible, the Office should receive complaints in the manner preferred by the person making the complaint.</p> <p>A complaint in writing may be required if:</p> <ul style="list-style-type: none"> • the matter has a complex history or series of interactions that requires lengthy explanation • for whatever reason, attempts to take the complaint in person or by telephone have been unsuccessful • the complainant's behaviour makes communication in person or by telephone inappropriate. <p>If considering making this decision the officer should also consider:</p> <ul style="list-style-type: none"> • any known impairments or limitations, such as literacy level, that may impact the complainant's ability to make the complaint in writing • whether the Office could arrange assistance for the complainant to put their complaint in writing.
<p>Section 20(3)(b)</p> <p>Whether to accept a complaint by a person apparently representing the complainant</p>	<p>Representative complaints will generally be accepted where:</p> <ul style="list-style-type: none"> • there is a written authority from the person apparently affected that authorises the person to make the complaint to the Ombudsman on their behalf • the person contacting the Office is a registered professional who typically assists people (eg. Lawyer, town planner, registered health practitioner) and who is bound by professional responsibilities in respect of the person. • an elected representative is referring the matter • a government agency is referring the matter • there is some other evidence the complainant wishes for the person to represent them and there is reason to believe the complainant cannot access the Office's services directly. <p>Caution should be exercised in accepting complaints without a clear basis for authority as inquiries with agencies and outcome advice provided to the person may include access or disclosure of information that is otherwise confidential or private.</p>

Decision to be made	Factors to be considered
<p>Section 20(3)(c)</p> <p>Whether to accept a complaint that is outside the time specified for making a complaint</p>	<p>Special circumstances may exist where:</p> <ul style="list-style-type: none"> • other processes (such as Court or Tribunal proceedings) needed to occur prior to progressing the complaint and this accounts for the delay • the complainant was given incorrect or misleading advice about their ability to complain to the Office • on the face of the complaint there is likely significant injustice to the complainant that could be addressed through an investigation by this Office • the action complained of could be systemic in nature • any impairment or circumstances relating to the complainant that diminished their ability to progress their complaint for reasons beyond their control.
<p>Section 20(3)(d)</p> <p>Whether to accept a complaint that is not on the face of it about an administrative action but is likely caused by an administrative action</p>	<p>Officers should generally accept a complaint in circumstances where the complainant believes the cause for complaint is an administrative action unless there is no identifiable administrative action with any logical connection between the action and the matter complained of.</p>
<p>Section 20(5)</p> <p>Deciding that a person is a suitable representative for a complainant who has died or is unable to make a complaint</p>	<p>Officers should consider:</p> <ul style="list-style-type: none"> • the nature and extent of the relationship between the representative and the other person • whether there is another more suitable person to represent the interests of the person.
<p>Section 23(1)(a)</p> <p>Whether a complaint should not be investigated because it is trivial</p>	<p>Officers should consider whether the impact on the person's rights or interests are so minor or isolated so as to be considered unimportant and considering the complaint further would not be a reasonable use of public resources.</p>
<p>Section 23(1)(b)</p> <p>Whether a complaint should not be investigated because it is frivolous or vexatious or not in good faith</p>	<p>Officers should consider whether:</p> <ul style="list-style-type: none"> • there is evidence that the person is attempting to burden or harass an agency or officer of an agency or this Office by making the complaint • repeated complaints or unreasonable demands are not being made in good faith • the complaint is being made or pursued seriously by the complainant.

Decision to be made	Factors to be considered
<p>Section 23(1)(c)</p> <p>Whether a complaint should not be investigated because the complainant does not have sufficient direct interest</p>	<p>Direct interest in administrative action includes persons whose rights or interests are, or could be, impacted in some way.</p> <p>Declining to investigate a complaint on this ground may not be appropriate where:</p> <ul style="list-style-type: none"> • a Public Interest Disclosure indicates wrongdoing but does not affect the person making the complaint • a complaint indicates serious maladministration the complainant may have special knowledge of • a complaint indicates systemic maladministration the complainant may have special knowledge of.
<p>Section 23(1)(d)</p> <p>Whether a complaint should not be investigated because:</p> <ul style="list-style-type: none"> • The complainant has a right of appeal, reference or review, or another remedy, that the person has not exhausted; and • It would be reasonable in the circumstances to require the person to exhaust the right or remedy before the ombudsman investigates, or continues to investigate, the complaint 	<p>If a right of appeal, reference or review, or another remedy (internal to the agency or external) is available to a complainant, it is considered reasonable for that right to be exhausted prior to a complaint being accepted by the Office, unless exceptional circumstances exist.</p>

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<p>Section 23(1)(e)</p> <p>Whether a complaint should not be investigated because:</p> <ul style="list-style-type: none"> • The complainant had a right of appeal, reference or review, or another remedy that is exhausted; and • In the circumstances, the investigation, or the continuance of the investigation, of the action complained of is unnecessary or unjustifiable 	<p>Where a right of appeal, reference or review, or another remedy has elapsed or been exhausted the officer should consider whether:</p> <ul style="list-style-type: none"> • the agency or third parties' rights or interests that might be disturbed by this Office investigating a complaint given the expiration of other rights of review • whether the right was a statutory right of review through a tribunal established by parliament and the party was given appropriate notice of that right • whether a court or tribunal has determined a matter and made comment about the actions of the agency or the findings may indicate systemic maladministration?
<p>Section 23(1)(f)</p> <p>Whether a complaint should not be investigated because in the circumstances it is unnecessary or unjustifiable</p>	<p>The officer should consider:</p> <ul style="list-style-type: none"> • is there sufficient information to meaningfully assess the complaint? • whether on the face of it the complaint indicates maladministration? • the proportionality of resourcing the investigation to the benefit that might flow to the complainant or others? • has the assessment or investigation revealed maladministration on the part of the agency? • is there any meaningful remedy that might flow from investigating, or continuing to investigate the matter having regard to the resources of this office? • are the outcomes sought by the complainant reasonable or proportionate to the alleged maladministration? • has the agency already taken reasonable steps to rectify the matter? • is there civil or criminal litigation between the agency and complainant relating to the matters subject of complaint?

Decision to be made	Factors to be considered
<p>Section 23(2)</p> <p>Whether a complaint should not be investigated because a complaints entity has or will investigate the matter at a level at least substantially equivalent to the level at which the ombudsman would otherwise investigate the complaint</p>	<p>The officer must identify the complaints entity and be satisfied that its processes will represent an investigation of at least the same standard. An investigation includes an assessment of the matter.</p>



Contact us

Call: (07) 3005 7000 | **Freecall:** 1800 068 908
Interpreter: 131 450 | **Speak & Listen:** 1300 555 727
ombudsman@ombudsman.qld.gov.au
GPO Box 3314, Brisbane, 4001
Level 18, 53 Albert Street, Brisbane

www.ombudsman.qld.gov.au

