

OFFICIAL



Establishing the Aviation Industry Ombuds Scheme—Consultation Paper

Department of Infrastructure, Transport, Regional Development, Communications & the Arts

Submission by the Commonwealth Ombudsman, Iain Anderson

17 October 2024

Introduction and summary

I welcome the opportunity to make a submission on the Aviation Industry Ombuds (AIO) Scheme Consultation Paper.

The proposed model is comparable to other industry ombudsman schemes, while being fundamentally different to traditional parliamentary ombudsman schemes.

Background

The purpose of the Office of the Commonwealth Ombudsman (**the Office**) 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.

We aim to achieve our purpose by:

- independent and impartial consideration of complaints and disclosures about government administrative action
- influencing government agencies to be accountable, lawful, fair, transparent, and responsive, 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.

Roles and functions of the Commonwealth Ombudsman

The Commonwealth Ombudsman is independent and impartial and empowered to receive and consider complaints that people make with respect to matters of Commonwealth government administration.

I have a range of statutory roles in addition to Commonwealth Ombudsman, including having oversight of some private sector bodies as the Private Health Insurance Ombudsman, Postal Industry Ombudsman, Overseas Student Ombudsman and Vocational Education and Training Student Loans Ombudsman.



Independence of the Aviation Industry Ombuds

The Consultation Paper states the Australian Government sees merit in establishing a governing board to oversee the AIO Scheme, including appointment of the AIO.

Independence is critical to the role of an ombudsman. Any governance supporting the operation of the AIO Scheme must ensure that the ombudsman is unfettered by anyone, including a proposed board, in their duties. Such safeguards should enshrine prohibitions on the proposed board to direct the ombudsman in the course of their duties, and define criteria concerning the ombudsman's dismissal, such as misbehaviour or physical and mental incapacity.

Powers of the Aviation Industry Ombuds

It is proposed that the AIO would have the power to make decisions that are binding on airlines and airports who are members of the AIO Scheme, and members would be required to comply with directions of the AIO. While such powers are not unusual for industry ombudsman, who may sometimes act more in a regulatory capacity, they are not typical for ombudsman more broadly.

Traditionally, and across most of the more than 100 countries where ombudsman have been established, an ombudsman cannot sanction or penalise an agency, impose outcomes, or award compensation for defective administration. I do not have such powers in my roles as parliamentary and industry Ombudsman. Rather, I have a variety of formal and informal tools available to me to influence an agency to take an action or seek an outcome. These formal and informal tools are generally effective for me to influence an agency to take an action or seek an outcome. In 2023-24, 93% of my formal recommendations in reports were accepted by the agency or entity.

Powers to conduct investigations

To acquit its complaint handling functions effectively, the AIO would require appropriate powers to conduct its investigations.

Once such power is to require information from AIO Scheme members within a specified timeframe. I note the Consultation Paper envisages this. The Department of Infrastructure, Transport, Regional Development, Communications and the Arts (**the Department**) should also consider other appropriate powers for the AIO to effectively

undertake investigations. For example, I have powers to require anyone to attend an interview and visit sites in the course of my investigations.

Enforcement action and information sharing with regulators

The legislation establishing the AIO is expected to impose certain requirements on the aviation industry, and the Consultation Paper proposes that enforcement action by a government agency may be necessary in instances of non-compliance. The AIO is not proposed as an enforcement body but is proposed to refer instances of systemic misconduct to a regulator. The AIO is also proposed to collect, compile and share information for enforcement purposes.

As noted above, traditionally an ombudsman has no regulatory powers: such powers are inconsistent with an ombudsman's impartiality and primary role as a complaints handling body intended to act in a much more informal and less legalistic manner than courts or tribunals. There is also a potential tension between having the powers of a Royal Commission to acquire information for an investigation, as my Office does, and having the ability to then impose a penalty or outcome as a result of the investigation. Like Royal Commissions, I can only make recommendations.

Should my Office gain the new function of National Student Ombudsman (**NSO**) under the Universities Accord (National Student Ombudsman) Bill 2024 currently before Parliament, higher education providers would be required to implement certain recommendations of the NSO through the proposed National Higher Education Code to Prevent and Respond to Gender-based Violence to be administered by the Department of Education. This model may be useful for the Department to consider when designing ways to strengthen or enliven implementation of the AIO's recommendations.

Should the NSO Bill pass, the NSO would also have the power to share information with or refer a matter to the Tertiary Education Quality and Standards Agency¹ and the Department of Education,² including if the NSO suspects a provider is failing to meet any regulatory obligations. Regulators can review this information and consider if an investigation or enforcement action is necessary or appropriate. The NSO would be able to exercise these powers at any point during a complaint process or investigation.

¹ Universities Accord (National Student Ombudsman) Bill 2024, clause 21AZG(1).

² Ibid, clause 21AZG(3).

Complaint eligibility

It is proposed that before the AIO accepts a complaint, a complainant would be required to seek to resolve their complaint with the airline or airport directly. However, there may be situations where it is appropriate for the complainant to complain to the AIO directly first and for the AIO to accept that complaint. For example, if the complaint is that the airline or airport has behaved in an unsafe or overtly discriminatory manner towards the complainant, it may be inappropriate to require the complainant to again engage with the airline or airport. For this reason, it would be preferable for the AIO to have discretion set out in its enabling legislation as to how it chooses to deal with a complaint, rather than a prohibition on the AIO accepting a complaint that has not been raised with the airline or airport first.

The Consultation Paper suggests it may be appropriate to impose further limits on complaint eligibility, for example in relation to complaints made after a certain period of time has elapsed, frivolous or vexatious complaints, complaints that are the subject of ongoing legal proceedings, and/or anonymous complaints.

I have discretion to decide which complaints my Office investigates.³ I can decide not to investigate a matter where the complainant knew of the action complained of more than 12 months before making the complaint, the complaint is frivolous or not made in good faith, the complainant does not have sufficient interest in the subject matter of the complaint, or an investigation is not warranted having regard to all the circumstances. I can also choose not to investigate a complaint which is subject to review by a court or tribunal or where I consider it could be subject to review by a court or tribunal. This discretion is necessary given the scale of complaints I handle and the wide variation in facts and circumstances; it allows me to use my judgement to filter complaints and focus my limited resources for example on systemic issues or other areas where I can influence improvement.

Procedural fairness

The AIO is proposed to provide a reasonable opportunity for airlines and airports to respond to information that might adversely affect them, before it is published.

³ *Ombudsman Act 1976*, section 6.



Following a Commonwealth Ombudsman investigation, section 15 of the Ombudsman Act empowers me to report to an agency where I consider its action to have been contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, was based on a mistake of law or fact, or was otherwise wrong in all the circumstances, and that action should be taken as a result. A precondition for the issue of an investigation report which sets out critical opinions of an agency or person is that before completing the investigation, the agency or person must be given the opportunity to make comments on the matter. A second precondition for the issue of a section 15 report is that the agency concerned is given the opportunity to comment on the report. This is a critical concept in administrative law, and I consider it appropriate that the AIO have similar requirements placed upon it.

Alternative Dispute Resolution

It is proposed that where the complainant was unable to reach a satisfactory resolution with the airline or airport, the AIO would seek to resolve the dispute between the parties by requesting information or compelling the provision of information. The Consultation Paper also flags alternative dispute resolution powers for the AIO.

As the Private Health Industry Ombudsman, I have the power to conduct mediations.⁴ Should the NSO Bill pass, I would have the power as the NSO to try to settle a complaint using alternative dispute resolution.⁵ For both ombudsman, participation in an alternative dispute resolution process is voluntary for complainants, however I would be able to direct the subject of the complaint (a higher education provider or private health insurer, for example) to participate.

Alternative dispute resolution powers give parties an opportunity to explain what has happened and to gain an appreciation of each other's viewpoints, which can be particularly useful where parties are likely to need to engage again in future. Unlike going to court, alternative dispute resolution provided by an ombudsman is free of charge to complainants and can lead to a speedy resolution of a complaint.

⁴ *Ombudsman Act 1976*, Part IID, Division 5.

⁵ Universities Accord (National Student Ombudsman) Bill 2024, clause 21AM.

