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2 December 2009

Ms Stephanie Mikac
Secretary
Joint Standing Committee on
the National Capital and External Territories
Parliament House
CANBERRA ACT 2600

Dear Ms Mikac

I refer to the letter of 9 November 2009 from the Committee Chair, Senator Lundy, about the Committee's inquiry into the *Changing Economic Environment in the Indian Ocean Territories*. Thank you for allowing the brief extension for replying, which we requested.

I attach some general information about the Ombudsman's role in the Indian Ocean Territories and responses to the three questions put in the letter from the Chair.

My staff and I are available to provide any further information that the Committee may find helpful.

Yours sincerely



Prof John McMillan
Commonwealth Ombudsman

The Ombudsman generally

The office of Commonwealth Ombudsman is established by the *Ombudsman Act 1976* (Cth) and performs functions under that Act and others, in relation to investigation and oversight. The Ombudsman carries out a number of specialist roles, in areas such as law enforcement and immigration.

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

A person can complain to the Ombudsman by telephone, by letter, by e-mail, by facsimile or through a website service. A person may be represented by another person, and the Ombudsman Act contains express provisions to enable communications to and from people in detention or prison. The Ombudsman's office has strong investigative powers to require information and to issue reports, but in practice resolves a large majority of complaints less formally.

The Ombudsman and the Indian Ocean Territories

The Ombudsman Act expressly precludes the Ombudsman from investigating actions taken by Western Australian officials on Christmas Island and the Cocos (Keeling) Islands under WA laws that apply as Commonwealth laws.¹ The WA Parliamentary Commissioner for Administrative Investigations performs the ombudsman function in relation to such matters.

The Commonwealth Ombudsman has jurisdiction in relation to actions taken or deemed taken by Commonwealth agencies in the Indian Ocean Territories. In recent years, complaint numbers for Christmas Island have increased because of the presence on that island of a substantial immigration detention facility. The Ombudsman has regular dealings at that facility with its detainees, especially in relation to detention issues and visa matters.

The assessment of complaints

Complaints to the Ombudsman are received by the Ombudsman's Public Contact Team and are assessed there or by an Investigation Officer. The Ombudsman has delegated his powers widely to staff.

¹ See s 5(5), Ombudsman Act. See also s 8A, *Christmas Island Act 1958* and s 8A, *Cocos (Keeling) Islands Act 1955*.

The factors in assessing any approach to the Ombudsman are:

- Is it a complaint, or a request for information or advice?
- If it is a complaint, is it about an agency and action which the Ombudsman is authorised to investigate? If not, is there an appropriate avenue to deal with the matter?
- If it is a complaint that the Ombudsman can investigate, should the Ombudsman/delegate decide, as a matter of discretion², not to investigate?
- If there is to be an investigation, what is the most efficient way of doing this, ideally without the need to exercise coercive powers? Typically an investigation is done 'on the papers' examining information provided by an agency, talking to officials and others and weighing up the evidence. In the minority of cases, formal powers under s 9 of the Ombudsman Act are used, to compel the production of information, including requiring a person to give that information in person.

In 2008-09, the Ombudsman received 46,078 approaches, of which 19,719 were characterised as complaints within jurisdiction. The office investigated 5233 complaints.

Follow up of investigations

The Committee has asked whether the Ombudsman is obliged to follow up a complaint which has not been resolved. The Ombudsman's office will generally not persist with investigation when it has been decided that there is little possibility of achieving a better outcome for a complainant.

When informing an agency and a complainant that an investigation has ceased, the delegate may make comments and suggestions. This is an opportunity to identify ways in which a better result could be achieved in a future matter.

In some cases, even after resolution, the office may consider whether it should record that an agency's action fell short of an acceptable standard. In these cases:

- a senior delegate may consider whether to record 'administrative deficiency' after conducting a procedural fairness step with the agency³
- the Ombudsman may issue a report, and (where warranted) take action to inform the Prime Minister and report to the Parliament. This is much less common.⁴

The Ombudsman's office has an extensive database that enables records to be kept of investigations and that provides delegates with the tools to conduct a lawful and thorough investigation using the database as well as the knowledge of specialist investigation staff about complaint trends, the Ombudsman's office can identify areas where an agency's actions may require closer attention or where there may be a basis to initiate an investigation into a systemic issue.

² See s 6 of the Ombudsman Act, which provides a number of bases upon which such a decision may be made. The most common would be that a matter could and should be addressed and resolved in the first instance by the relevant agency, that there is another review process and that investigation would not be warranted in all the circumstances.

³ See pp 131-33 of the Ombudsman's 2008-09 Annual Report for examples of some of the 533 matters where this occurred.

⁴ See p 127 of the Ombudsman's 2008-09 Annual Report for a list of reports and public statements.

Where a remedy is recommended or suggested by the Ombudsman's office, or where an agency has proposed a remedy, this is recorded on the database. This source of information allows the Ombudsman, where warranted, to check at some reasonable point whether an agency has provided the remedy that was considered. As well, the Ombudsman would expect that a person who has not received an anticipated remedy within a reasonable time, would contact the agency or the Ombudsman's office to follow the matter up.

Mechanisms to deal with complaints

As indicated above, the Commonwealth Ombudsman has retained the jurisdiction to deal with the actions of Commonwealth agencies with activity in the Indian Ocean Territories.

Our databases record information on approaches to us since 1986. In 1992, WA legislation commenced to apply to on the Islands.⁵

Apart from immigration matters, we have had 23 complaints from the two Indian Ocean Territories about Commonwealth agencies since 1986. The breakdown of agencies complained about is a somewhat problematic as, during this time, there have been very many Machinery of Government changes, affecting the grouping of Portfolio agencies. However it appears that the breakdown of complaints received is as follows:

- eight about the Australian Federal Police;
- six about the departments administering Australian territories
- three about the departments administering environmental matters
- two about Australia Post
- one each about Centrelink, the Australian Taxation Office, the Child Support Agency and the Department of Finance.

There were four identifiable matters referred to in the Committee evidence attached to the Chair's letter. In brief, complaints about these matters could be dealt with as follows.

1. Mr Ledger's complaint about the WA Department of Fisheries would be handled under WA law, including by the Parliamentary Commissioner.
2. Mr Sorensen's oral evidence suggests the Commonwealth has declined to comply with a recommendation previously made by the Committee. The Ombudsman could investigate the actions of relevant Commonwealth agencies, but not decisions made or actions taken by Ministers. The Ombudsman could, however, investigate the advice given to the Minister by officials (to assess whether it was comprehensive and balanced).
3. Mr Sorensen also raises an issue related to the WA Planning Commission which could, again, be dealt with under WA law. While his suggestion (fourth) of a subsidy for tourism activities may have a Commonwealth aspect, there does not appear, at this stage, any action of a Commonwealth official that could be investigated.
4. Mr Sorensen referred to a decision taken in about 1988 in relation to some old Commonwealth housing. While this would be within the Ombudsman's jurisdiction, the passage of time and the changed oversight arrangements for the Island would be likely to make investigation impracticable.

⁵ From the *Territories Law Reform Act 1992*