

COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE

ON

FOREIGN AFFAIRS, DEFENCE AND TRADE

COMMONWEALTH OMBUDSMAN

CANBERRA

Tuesday, 25 September 1996

OFFICIAL HANSARD REPORT

CANBERRA

WITNESSES

**SMITH, Ms Philippa, Ombudsman, Commonwealth Ombudsman's Office, Level 6,
1 Farrell Place, Canberra City, Australian Capital Territory 2600 2**

JOINT COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

Public Briefing

Commonwealth Ombudsman

CANBERRA

Wednesday, 25 September 1996

Present

Mr Brereton (Acting Chair)

Mr Barry Jones

Mr Price

Mr Taylor

The subcommittee met at 4 p.m.

Mr Brereton took the chair.

SMITH, Ms Philippa, Ombudsman, Commonwealth Ombudsman's Office, Level 6, 1 Farrell Place, Canberra City, Australian Capital Territory 2600

ACTING CHAIR (Mr Brereton)—Welcome. I now invite you to make an opening statement.

Ms Smith—My office deals with the every day human rights of citizens and their dealings with government agencies of various kinds. Our major brief is to ensure the fairness and transparency in the way that they are dealt with. That can be very important because of the strong statutory powers that different agencies have and the impact that they will have on the entitlements and their very livelihood.

You will see in the annual report that our office is accessed by all levels of society, predominantly individuals, but also small business and sometimes large business, right down to very disadvantaged groups including at the moment a major project on Aboriginal communities in the town camp areas outside of Alice Springs. That is something I would like to touch on later because in fact some of our outreach programs are at risk at the moment. That raises a number of concerns for me in our ability to be accessible to probably the most disadvantaged groups. I would like to talk about some of the trends and issues emerging from the complaints that we have received over the last year or so. I would also like to talk about some matters as they relate to the operation and effectiveness of the Ombudsman's office itself.

Just to recap, I think the Ombudsman's office is a fairly bipartisan affair. It was first thought of by the Whitlam government but was introduced in 1977 by the Fraser government. At the time of its introduction the second reading speech talked about the need to ensure that departments are responsible, adaptive and sensitive to the needs of citizens. My office is independent and it is a statutory office. I report directly to parliament and I believe that that is a very important feature of the office.

We receive individual complaints and our brief is to look at whether it is legal, whether things are operating in the way intended by parliament, and whether it is transparent and fair in all the circumstances. The other important part of the brief is the feedback to parliament. In recent years, deliberately, we have been taking a more systemic approach in the work that we do in looking at the trends and patterns of complaints and therefore being able to understand what the causes are and hopefully to identify some ways of preventing those.

Without deliberating on that too far, on page 40 of the annual report you will find a listing of the reports we made public last year. On page 155 of the report you will find an index. Actually there are two parts to that: on page 155 and page 106 there are indexes of investigations that we have under way at the moment which we have deliberately designated as major projects.

ACTING CHAIR—Is that page 155 of the red book?

Ms Smith—And page 106 which deals specifically with tax matters. A small proportion of our work is taking issues and matters which are more systemic in nature. We know there is a pattern of complaint behind them. We know that they are likely to have a demonstration effect in terms of the practices and procedures of the agencies involved. And that, I think, is becoming an increasingly important feature of the work that we can do and the importance of our office in giving feedback to parliament and effecting broader range changes rather than just resolution for individual complaints.

Last year we received 22,000 complaints and another 21,000 inquiries. The seven agencies that attracted most complaints were the Department of Social Security, the Child Support Agency, the Australian Taxation Office, the Federal Police and the department of immigration. That is not surprising in itself because those are agencies with big public contact. What is probably of more concern is that they were also the areas where we saw the biggest increases. All up, it was a bumper year for the Commonwealth Ombudsman's Office. We had a 28 per cent increase over all of our complaints.

ACTING CHAIR—Was that a record?

Ms Smith—That is a record increase. Trends are indicating that that is continuing.

Mr PRICE—Do you get paid extra for these?

Ms Smith—That is a sore point, and I will come to that.

ACTING CHAIR—She gets paid less!

Ms Smith—The biggest increases were: Department of Social Security, up 56 per cent; DEETYA, which I should have mentioned before, up 68 per cent; the Child Support Agency—and, largely through our work and the work that the Price committee did it is now starting to see some improvement in its practices and communication, and so there is cause for cautious optimism there—with a fairly small increase; the Taxation Office up 40 per cent; and the Australian Federal Police up by 24 per cent.

Some of those areas, with the exception of the ATO, are certainly dealing with some of the most vulnerable groups in our community. The ATO is important because of the strength of its statutory powers and, as I will indicate later, I have some concerns on their understanding about conflict of interest and the divide between use of their statutory powers and their private lives and, in fact, the proper use of statutory powers.

What I would like to do is first talk about the general cross-agency themes and then target some of the agency specific things—

ACTING CHAIR—We would welcome that.

Ms Smith—With the cross-agency complaints, if I look at the causes of the complaints, I think there are a number of things that are behind the causes. Just the sheer complexity of government administration and rules is a constant theme. Others are the gaps and overlaps between departments, the need for clear and more timely advice, and just a common transparency thing with people wanting information and explanation about what and why decisions are being made about them.

So they probably have been there for years now. The complexity of legislation, I think, is getting harder and more difficult in recent times in terms of the eligibility rules. The thing about transparency has always been there, but I think the expectations of consumers is greater at this point in time about what they expect of government. There has also been a trend of governments, because of the new practices and procedures and the less time they have, of becoming more reluctant to give people the assistance and help that they need at various points and to take the time out to explain how and why decisions were made.

Certainly on FOI, I am finding that for the freedom of information people have to know the magic words, they have to say 'freedom of information' before they get information that should have been given to them without any exercising of that legislation in any way. Sometimes that is an obstruction in terms of giving information that would have helped people in knowing their rights and entitlements.

On some other practices and procedures, oral advice is a new thing for government and agencies and it is a way in which agencies have streamlined what they are doing. There are some good features in that it is immediate. There are some bad features because the risks of that have not been thought through, such as the record keeping and what happens if the advice is incomplete, wrong or ambiguous. At this point it is difficult for the person to argue their case, let alone even say that a conversation occurred. The risks of responsibility are being transferred to individuals rather than being assumed in an even-handed way with the agencies.

Contracting out is another issue which is raising quite a number of issues, both from the consumers of the service and the contractors themselves; we are getting complaints from both parties. Issues raised from contractors are issues about due process and tender arrangements, the use of selective tenders, the lack of clarity about service delivery standards, which becomes very important, and those sorts of things. From the consumers perspective, I am finding it is the lack of clarity about whose responsibility it is when things go wrong. There is real buck passing between the government agency, the contractor and, on occasions, the insurance contractors, as to who eventually takes responsibility.

There is a need for clarity about who the principle agency is: I would say in most cases that it is the government agency. I hold up as a role model what Australia Post have now done in some of their contracts: they have the right to settle responsibility or liability and then reclaim it from the contractor. That is written into the contracts, and becomes an important feature.

They are some of the backdrop issues. I do not know whether you have any questions on those backdrop issues.

ACTING CHAIR—Just proceed at this stage.

Ms Smith—The Department of Social Security: I have mentioned the issues about oral advice. I have mentioned the issues about self-help and what I call self-assessment, which are very real when you are talking about DSS because you have a group of people who are not necessarily particularly articulate in what they are trying to attain. You have very complicated legislation and yet the way that it is set up is that people have to know the questions to ask and what specific entitlements they are asking for before they get anywhere.

Mr PRICE—And no backdating.

Ms Smith—That was the issue I was going to raise. That is compounded now by very unfair legislation, I say, which is what is called the three-month rule. That means that if someone applying for Department of Social Security entitlements does not apply for the right entitlement or does not put in train a review procedure within a three-month period, there can be no backdate, they forfeit their rights, even if they would have been entitled.

ACTING CHAIR—In many cases they forfeit rights that they did not know they had.

Ms Smith—Absolutely.

ACTING CHAIR—Because no-one had explained it to them in the first instance; is that the case?

Ms Smith—That is the case. They may even forfeit rights where the Department of Social Security gave them wrong information or their own administration was defective.

ACTING CHAIR—You could have a situation where the bureaucrat is saying, 'Unfortunately, you have no rights because we did not tell you your rights,' or even, 'We gave you incorrect information.'

Ms Smith—Or, 'We told you your wrong rights and, yes, according to our advice you applied for something else. We accept that that was wrong but because of the statutory bar we cannot backdate it beyond three months.'

ACTING CHAIR—Would you agree that the application of such a rule is grossly unfair to the victims?

Ms Smith—It is grossly unfair, and also out of kilter with what happens in other agencies. Tax office, for example, allows four years of readjustment of rights and entitlements.

ACTING CHAIR—Do you think the difference in treatment is because one is dealing with people's tax obligations and the other is dealing with people's entitlements?

Ms Smith—Perhaps, but they are people's entitlements. That is the important thing.

ACTING CHAIR—We are not talking about the big end of town; we are talking about some of the most vulnerable people.

Ms Smith—And the people who are least capable of really sorting through that maze of eligibility and complex legislation, and putting their case forward.

ACTING CHAIR—People who might not have a major law firm to assist them.

Mr PRICE—You cite the case of a veterans' affairs person—a widow, I think—who got \$97,000 back payment. Clearly, if she was a DSS person in the same situation she would not have got a zack.

Ms Smith—No. The only proviso would have been if she had put into play a review.

Mr PRICE—Yes.

Ms Smith—Because of the silliness of the law, the sensible thing would be to advise almost every social security applicant to put in a review, which would make a nonsense. But the three month rule on limited back pay is grossly unfair at this point in time.

ACTING CHAIR—That sounds to me like a dreadful state of affairs, and one that must, in fairness, be rectified. It is certainly one that this committee would be very keen to pursue with the responsible minister. Would you like to proceed?

Ms Smith—There are some other issues that we raised in the annual report. One was the payment of special benefits to newly arrived migrants, and there have been some recent policy changes foreshadowed by the government in terms of requiring greater family responsibility for newly arrived migrants from their family, by way of support, or a guarantee that they will have employment when they arrive. It is the right of government, obviously, to make policy changes. What I highlighted in this report, though, is the unfairness that has happened, in that the application of that policy has really been pre-empted by the department in a discretionary way.

Individuals have gone to their embassies in their country and have sought advice. They have been given advice, have come to Australia on the basis of that advice, and have then found, when they arrive, that the rules have changed and that they are literally left destitute, because there will be no special benefits being paid.

ACTING CHAIR—What needs to be done to rectify that most unfair situation?

Ms Smith—The issue needs to be debated in parliament and the parliament needs to decide whether it wants those changes in the first place. Prior to that, I believe the old special benefit arrangements should apply.

Mr PRICE—Even so, is there no discretion at the moment, where someone has received advice from an embassy and acted on it, for the new policy to be waived on the basis of the advice given to the client?

Ms Smith—We are pursuing at the moment whether it can be classified as defective administration, in terms of some particular cases we have got. I believe it can be. The departments at this point in time are not agreeing with my analysis.

One issue which I believe is important to this committee is, again, not an easy question of administration for the department, but it relates to the provision of Department of Social Security payments to indigenous people. It is on page 85. In that section, we were drawing attention to some research and work we are doing which relates to Aboriginal people living in the town camp areas around Alice Springs.

ACTING CHAIR—This relates to the major work that you are doing in respect of Alice Springs?

Ms Smith—Yes. It arose because of a number of specific complaints we received from counsellors in the Alice Springs area, who drew to our attention quite a number of indigenous people who do not get social security. One counsellor estimated that there were 40 per cent—but I have not been able to verify that—of indigenous people who, he believed, should be eligible for social security but were not receiving any. We investigated a number of specific complaints, but we had taken a broader brief in terms of looking at some of the practices and procedures.

Quite simply, what becomes very clear when you look at the situation is that the Department of Social Security does have access or outreach programs, but only to indigenous people in very remote areas. They do not include the town camp people as being in a remote area, and they assume that they have access to the Department of Social Security in Alice Springs.

What we have found is that, culturally, there is a great divide which means that those people will not go to those offices. Also, the administrative procedures which the department has as a normal practice—such as written letters of notification and requests to please write to them—do not suit. When you are sending those letters to illiterate people, they do not understand what the letters are saying, in the first instance. They also are transient people who might be moving around and might not receive the letters. It is a problematic area for the department. There is not an easy answer, but it is certainly one that I think a department of

that kind has to try and meet in terms of the flexibility of its own administrative procedures so it is accessible to people of those special needs.

Mr PRICE—I have found cases, admittedly not Aboriginal ones, in my electorate where, because of similar problems with mailing to the ones you highlight here, the client goes to the department, the department concedes that they are entitled to a cheque but sits on their dig and refuses to issue it and says, 'Go to welfare organisations,' which have limitless capacity, according to the department. I think it is morally wrong when the department forces on the community sector an obligation when it knows it has a responsibility to issue the cheque.

Ms Smith—Yes. I think there has to be more of a proactive mentality of ensuring that people with entitlements who you know will not easily be able to move through the system, that there is the backup there for them. In this case it probably means some administrative changes where you do not need the fortnightly or the quarterly written statements or interviews from certain groups of people, you take a more commonsense approach as to what are the right checks and balances between entitlements and ensuring that risk does not occur. In this area what has been happening is that people have just fallen through all the administrative gaps.

ACTING CHAIR—You have revealed a very significant gap, particularly the instance that you gave us of people living in camps on the fringes of places like Alice Springs. What do you believe needs to be done by the DSS to provide an adequate level of service and treatment for these people who are neither in the town itself nor in a remote location?

Ms Smith—I think it requires a more flexible approach by them in terms of their administrative requirements. It also requires a consciousness that sending letters will not be appropriate, that they could well need on a regular basis someone to go out to the camp areas and see those people face to face rather than require them—

ACTING CHAIR—Have you had any feedback from DSS?

Ms Smith—We are in debate at the moment with DSS and I am sending them a full report of our findings. I think DSS are not unsympathetic to what I am saying, but the trend is really for them to have a more streamlined approach, for the administrative requirements to be even more rigid and more streamlined and more computerised, rather than what I am recommending as being necessary.

ACTING CHAIR—Do you think that is partly budget driven?

Ms Smith—I am sure. They have limited resources, like everyone else. In talking with the department, they agree with me about the need to be proactive but they say flatly that they cannot afford to be.

Mr PRICE—But what about urban areas as well? Thirty per cent of our population is functionally illiterate; a goodly percentage are completely illiterate. If the whole system operates on the basis of computer generated mail and people either responding or not responding, where does that leave those people?

Ms Smith—It leaves people in a very difficult position.

Mr PRICE—Yes, and if they are homeless as well.

Ms Smith—I guess that is one area where you have to say that the use of telephone advice and telephone access is a very important feature. If we can get the right backup and safeguards there, I think that does become very important for people. The other issue is if we can get the notion of one-stop shops right, for want of a better word, because it will never be a total one-stop shop but more of a facility where someone can come in, state what their position is, fill out a simple generic form about their position—

Mr PRICE—Or have the form filled out for them.

Ms Smith—Yes, and then for them to be given active advice about the full range of options and entitlements they have, rather than having to be sent around to a range of different agencies and the like.

Mr PRICE—Amen to that.

Ms Smith—Yes. The one-stop shop issue is important and it has been foreshadowed. As I have just said, there are quite a number of positive features. There are some risks that need to be sorted through about that and clarified also, for example, exactly what the level of information is that they are getting because if it is no more than the current level of service provided by teleservice then that is not going to be enough because teleservice just provides a very bald level of information which is not adequate at this point in time.

Mr PRICE—Have you tried using it? I have gone absolutely troppo using it.

Ms Smith—We get a fair number of complaints from people not being able to get through to teleservice at all.

Mr PRICE—Do you think that Australian citizens have a basic right to be able to contact the public servant actually dealing with their issue rather than these anonymous queuing systems or teleservice?

Ms Smith—It becomes a complex issue I know for follow-up on particular issues. They certainly need to know ideally the same person, certainly the area and for that same person following up on the advice so that you do not get the mismatch or information and inconsistency of information that can so easily happen at this point in time. Whether it needs to

be exactly the same person all the time obviously has huge case management problems attached to it.

Mr PRICE—But is it not the problem that as the Public Service seeks greater efficiency it is resorting to greater anonymity and greater difficulty for people to actually get to the person handling their case.

Ms Smith—Certainly, what we are seeing is a lot of streaming of information in different ways. A lot depends on how you manage that. If you can stream basic information then that can be good because it frees up extra time for the more complex discussions that you need. The frustration we are hearing is people who cannot get through to the teleservice, they are just getting call-back machines, a whole range of technological barriers in other words from what you are saying.

ACTING CHAIR—So you have complaints to the effect that people exhaustively pursue the teleservice only to get to their quarry and find an answering service taking a message.

Ms Smith—Yes. To be fair to the teleservice people, this time last year we were receiving a huge number of complaints about teleservice. In the last little while they have been trying to improve their service markedly, like the Child Support Agency which is trying to improve the quality of the information of the service they are giving. I have to give them marks for that. They themselves though would acknowledge that at certain times of the day people still cannot get through. I would say that the information that has been given is too simplistic for a lot of the circumstances and does not follow through on the next question, which means that unless you are skilled in knowing what questions to ask, you will not get the information that you need.

ACTING CHAIR—I find myself always streamed into the visa section when I am really looking for the ambassador.

Ms Smith—That is because your finger has hit the wrong button, probably!

ACTING CHAIR—Often there is not a spot for the ambassador in its options table. Anyway, we all experience that.

Ms Smith—One issue about the one-stop shop I would like to raise because it is important is the proposal for DEET and DSS to be combined. On top of that you have the service delivery agency, the PEPEs and the EPEs, the PEPEs being the public employment case managers and the EPEs being the private case managers.

At this point in time and again in fairness because all these questions have not been pursued, but I just flag it as an issue, it is going to be critically important that accountability mechanisms like the Ombudsman, the Freedom of Information Act and the like cover those

service delivery mechanisms, regardless of whether they are public or private, because they will have an impact. Their recommendations will mean whether people get their entitlements or they do not.

We have experiences from last year about the new ESRA case manager arrangements. There are complaints about people feeling as though they are being harassed into signing activity arrangements, of being referred to training or jobs that are clearly inappropriate.

ACTING CHAIR—What are the limitations of the ombudsman's role with EPEs now?

Ms Smith—I do not know. It is a question mark. It has not been clarified. In terms of the case managers under the ESRA arrangements, for the purposes of my act they were named as prescribed authorities which meant that I did have jurisdiction over it. But that was a deliberate decision by government.

ACTING CHAIR—And there has not been a decision of government in respect of this?

Ms Smith—There has not been a decision of government over this.

Mr PRICE—But following on from your previous report, *Contracting out and chasing the dollar*, has the Prime Minister's department responded with legislation; to give you the grant of legislation?

Ms Smith—No.

Mr PRICE—Why would you now be confident, given their indifference as a result of the last report?

Ms Smith—It is still in the legislative queue, so there has not been a formal response.

Mr PRICE—When you say a 'legislative queue', have they made a decision in principle to give you a grant?

Ms Smith—No. There has not been a response. The Productivity Commission has made a report to the government about contracting out. The government as yet has not made a formal response to that report. I have it in a queue of legislative changes that I have indicated I want for the Ombudsman's Office. That is one of the recommendations I have made, but again I have not got a formal response, in terms of our jurisdiction being able to cover third parties, or contractors, who are the service delivery agents of the government.

Mr PRICE—Can you provide the committee with a list of outstanding requests for legislative cover that have failed to be enacted?

Ms Smith—There is a list of requests on page 7 of the report.

Mr PRICE—Yes, there are three on there—

Ms Smith—And the last one there is about the broadening of our jurisdiction to cover the new service delivery arrangements.

Mr PRICE—So could I just run through them. In what report was the first one made?

ACTING CHAIR—That is the introduction of a time limit.

Ms Smith—Yes. All of these I put up to the government probably six months ago and it is a matter of just being put in the legislative queue at this point.

Mr PRICE—For me the legislative queue is when the agreement is given in principle and then you have got to get your drafting instructions et cetera.

Ms Smith—Yes.

Mr PRICE—So strictly speaking this is in a policy queue, isn't it? And even once they have agreed in policy terms, it would probably be 12 months before the parliament would see legislation, wouldn't it?

Ms Smith—I was told it would probably be next year's sitting some time.

ACTING CHAIR—Some time next year?

Ms Smith—Yes. The most important ones from my point of view are the last dot point, because it goes to the heart of us being able to—

ACTING CHAIR—That is the broadening of your jurisdiction to allow investigations of complaints about core government services being provided indirectly by contractors.

Ms Smith—The other one is important also, that is, the establishment of the Ombudsman's Office as a parliamentary office. The reason that that is important is it makes it more explicit what the role of the Ombudsman is meant to be, which is as an independent statutory office reporting to parliament. As it stands at the moment, I would have to say that the budget cuts which I have had to endure were more a matter of a government agency, namely, the Prime Minister and Cabinet, looking for spots—

ACTING CHAIR—Within its global budgeting requirements—

Ms Smith—within its global budget which were an easy cut for it.

Mr PRICE—Greater than its own.

Ms Smith—Yes.

Mr PRICE—I have tried to get some definition about the difference between, say, the Auditor-General, which comes under the Treasury portfolio, and the Ombudsman. I must say—maybe I was poorly advised—that they could not establish a real difference. Is it possible for you to just assist me—

Ms Smith—My understanding is that the audit office is treated, in fact, as a parliamentary office.

Mr PRICE—What does the legislation look like that establishes you as a parliamentary office?

Ms Smith—I cannot give you a detailed answer about that. In simple, lay terms, it would be, as I understand it, a discrete office, and the funding would be deliberately decided by parliament.

ACTING CHAIR—The parallel would be the ONA.

Ms Smith—Yes.

Mr PRICE—I apologise. As you know, I introduced a private member's bill, and Senator Conroy has done so in the Senate, but neither of us are understanding the difference. So we might go and have a look at ONA.

Ms Smith—Yes, ONA is really the model that we will be going for.

Mr PRICE—We will have a look at that model, and we might try to get an amendment to the private member's bill.

Ms Smith—It becomes important because, in PM&C terms, we are just a tiny outsider group that becomes a niggle in their side.

ACTING CHAIR—Talking about this resource issue, your report indicates that you think the Ombudsman's Office faces an uncertain future as a result of these strictures on your financial capacity. Would you like to take us through that?

Ms Smith—Yes. The simple fact is that last year our complaints went up by 28 per cent.

ACTING CHAIR—This year, what is your money going down by?

Ms Smith—It is 10 per cent and then 10 per cent, so it is 20 per cent over two years. That is \$1.7 million. Our budget starts at \$9.3 million.

ACTING CHAIR—It is not a success reward, is it?

Ms Smith—No, not exactly. The trend is that the complaints are continuing upwards at this point. What I have had to do already to live within those strictures—

ACTING CHAIR—Can you take us through the issue of public accessibility to your office?

Ms Smith—I have had to close my Tasmanian office.

ACTING CHAIR—Close Tasmania.

Ms Smith—Yes, and now I have a toll-free number to Melbourne, but it does not really allow for face-to-face contact, which is what many people want when they deal with the Ombudsman's Office.

I have also had to remove what I regard as key positions, which were special liaison officers for what we knew were very disadvantaged groups. So we had a special liaison officer for indigenous Australians and a special liaison officer for non-English speaking people. The importance of that was that, when I first became Ombudsman, there was a survey done about knowledge of the Ombudsman's Office and accessibility. Knowledge overall was about 50 per cent, which I am prompted is pretty good, but it tended to be of the better educated people.

We knew that it was the most disadvantaged who were not coming to us, those who probably need us most. So the work of these special liaison people was really working out what the key issues were of those groups, finding out who the key contact groups for those groups were and setting up contact points and a network with them.

ACTING CHAIR—And you have had to close down those key positions?

Ms Smith—I have had to close down those two positions. Also, just by the sheer force of volume and the reduction of staff, our discretion rates are having to go up. These are complaints that we receive but we have to decline any investigation. We might be able to tell people where else to go and offer them a bit of advice.

ACTING CHAIR—So it is now being budgetary driven, is it?

Ms Smith—Yes it is.

Mr PRICE—Could I just tease that out a little bit more. If we could just use simple, say, percentage terms, when something prior to the cuts goes into the discretion category—

you decline to investigate it—what percentage of confidence do you have that there is something legitimate there? I presumed there would be a low confidence level in that complaint, presumably less than 50 per cent.

Ms Smith—Over the last year, because of the volume of complaints, our discretion rate has increased from 40 per cent to 50 per cent.

Mr PRICE—That is in terms of volume?

Ms Smith—Of complaints received. I ask my staff to go through step process—

ACTING CHAIR—So there is a 25 per cent increase in the number of cases where you have had to apply discretion and not proceed to investigate, and that increase is due to budgetary constraint?

Mr PRICE—Sorry, 25 per cent?

Ms Smith—It has moved from 40 to 50 per cent.

Mr PRICE—Yes, that is a 25 per cent increase.

Ms Smith—In relation to the layers we go through, we have always been an agency of last resort so if someone has not gone back to the agency or checked it themselves in most circumstances we would ask them to do unless there are some overriding circumstances, for example, the person is so scared of the agency or we know that they would never make it back. We have always had the flexibility. Now we are having to exercise that with more stringency. So we are doing that, and if they have an avenue to other review tribunals we are more often referring them there too. And now we are having to make guesstimates—and I have to say guesstimates—up front as to the likely outcome of the investigation.

Mr PRICE—So you are sort of doing a legal aid thing—it is like a merit test?

Ms Smith—We are having to, yes, otherwise we do not have the staff to—

Mr PRICE—So what is the confidence level that your staff are placing in those cases that they take up on merit?

Ms Smith—They are in the results really in that, of those we investigate, about 60 or 70 per cent result in an outcome in favour of the complainant.

Mr PRICE—So that percentage has presumably got to go higher—

Ms Smith—No—that is the interesting thing. Even when I was exercising a lower discretion, the outcome was about the same. I have to say it gives me great unease, because

our role is to be accessible to the ordinary citizen, even for simple things about why decisions were made.

Mr PRICE—Is it fair to say that those being passed now—the higher numbers going to the discretion category—are still likely to have had a high probability of having a favourable decision for the person making the complaint?

Ms Smith—If I can compare this year's annual report and last year's, the results are similar but our discretion rates are higher this year.

Mr PRICE—That is really an appalling situation for ordinary citizens when their only choice is to fall—

ACTING CHAIR—Would you not agree with that?

Ms Smith—I would have to say it makes me extraordinarily uneasy, because I think it is undermining the role of the ombudsman's office in providing an accessibility to ordinary citizens, in getting a transparency about how they are being treated and an assurance that they have been treated fairly.

ACTING CHAIR—Can we get back to the overall issue of funding. Your office, which is funded under PM&C, faces a cut of 10 per cent this year and had a cut of 10 per cent last year. How does that compare with the overall cut in the budget of PM&C?

Ms Smith—I have not looked at it line item by line item, but I get the feeling that we were treated more harshly than some other areas.

ACTING CHAIR—How does that make you feel?

Ms Smith—It is a very unfair result. I would have thought that parliament as a whole would have accorded a higher priority to the Ombudsman's office and the role that the Ombudsman's office plays in ensuring accountability for the ordinary citizen, resolving their complaints. Also, in a period of change in the way programs are being delivered, that is precisely the time when parliament needs feedback as to what is happening at the ground level.

ACTING CHAIR—Absolutely.

Ms Smith—What I am having to report to you here is that I am not able to give access to the ordinary citizen. My ability to do some of the broader major projects, looking at the systemic issues, will also have to be compromised.

Mr PRICE—Without wanting to comment on the changes and when the Public Service is rapidly changing as in the—

Ms Smith—In any period people want to be able to go to an independent agency, checking the—

Mr PRICE—But as a result they are probably not going to have the redress that they ought to have.

Ms Smith—There are a lot of changes happening at the moment. The streamlining of the way things have been done, the changes to the way things are being done, will mean that mistakes will happen.

Mr PRICE—Yes, absolutely.

Ms Smith—Unless there are very strong accountability mechanisms and unless there are very strong charters about what standards are expected so that those performance aspects are very clearly articulated, it will very easily lead to shoddy service.

ACTING CHAIR—Given the 22,000 complaints that you indicated for the year 1995, could one conclude that as a result of the financial strictures placed upon you that there are some thousands of people whose cases you are unable to pursue?

Ms Smith—Yes.

ACTING CHAIR—Does it run into thousands?

Ms Smith—Twenty per cent of 20,000 is 4,000.

ACTING CHAIR—Yes, 4,000.

Ms Smith—I have been talking to my staff about what we do if the complaint trends go up. Already their caseloads are operating at such a high level that I do not want to give them higher caseloads because the quality of what they will do will be impaired, and not to mention the increase in their own stress levels, and we are having a fair amount of stress leave by staff as it is in terms of just the sheer workload we are dealing with.

Mr BARRY JONES—There are three things I am not sure about. First of all, concerning the regional significance of what you are doing, is it harder for word of mouth to get out into the sticks? Do you find you have a significantly smaller number of complaints from the regions? How is your office set up?

Ms Smith—I did look at the statistics at one point. We do not do too badly in regional representation. Our regional offices are very important, they are the ones in the capital cities. It is important for our investigation processes that we have people in place in the capital cities who deal directly with the regional offices there and know the people there and can get things fixed.

Mr BARRY JONES—Have you got subregional offices?

Ms Smith—All we have at this point is an office in each capital city. There is one person in Darwin. In Brisbane, Perth and Adelaide they are only offices of three to five people.

Mr BARRY JONES—Do you drum up much business in those very remote electorates like Kalgoorlie or Leichhardt?

Ms Smith—We piggyback as much as we can off the state ombudsman, I have to say. When the state ombudsman does regional trips, he also takes out literature about us and often does the initial registration for us of quite a number of complaints. That has been very valuable to us. We used to do what we call clinics, with our own staff going out, but we have actually found that the more valuable way of outreach has been outreach to the community groups in different areas. So setting up an ongoing relationship with those groups rather than—

Mr PRICE—With the community workers, rather than any—

Ms Smith—Yes, rather than an ad hoc 'we are here one day a year' recipe.

Mr BARRY JONES—The other thing is, page 5 leaps in and refers to section 15, reports to the agency, but I cannot find any reference earlier on which explains to the lay reader, who does not have an act in front of him, what the significance of section 15 is.

Ms Smith—If you go to page 38, it gives you slightly more of a description about that. We go in layers in our investigation. The bulk of stuff we can resolve relatively quickly. If we cannot get a satisfactory resolution, we go into a more formal mode. We initially have to give the department warning that we are forming views that are critical of them and our reasons why. The section 15 report becomes a mechanism by which we can document what we regard as being the defective administration and the recommendations.

If we get no satisfaction there, my options are writing to the minister concerned or writing to the Prime Minister, and that is the section 16 report. If I get no favour there, I have the option of taking it to parliament. But that actually raises why I was recommending the legislative change also in terms of my formal reporting to parliament. As it stands at the moment, there is a bit of a gap. Normally I get to section 15 and the department graciously or ungraciously at that point agrees to the range of recommendations. But there can still be some quite significant matters of public interest that are involved there, which really go to what standards of public administration we want and service delivery, those sorts of things.

I can make that report public by what is called, in the jargon of the Ombudsman Act, a section 35 report, where I can release reports or information in the public interest. I can certainly make it public to the media. In the past, I have asked certain politicians to table the report but, by having to do that, it almost politicises it and that is not a satisfactory thing. I

would prefer a mechanism which the New South Wales ombudsman has, where you could give it to the Clerk of the Senate or House of Representatives and they have a specified period to table it. That takes it out of the party political arena which I should not really be in.

Mr BARRY JONES—With regard to the actual format of the report, it seems to me—and I wish I had had it earlier, then I could have worked through it—that you could use footnotes a bit more effectively. For example, when you refer to the section 15, then you have an asterisk or a footnote that simply says `See page so-and-so'. If you take the case of Mrs Garms and Telstra, her particular case, if you look up the index—yes, there is a reference there to page 25—

Ms Smith—It cross-references to quite a number of things, if that is what you are saying.

Mr BARRY JONES—Yes.

ACTING CHAIR—I think Barry wants more.

Ms Smith—Do you want more about Mrs Garms? I can give you a whole—

Mr BARRY JONES—Not so much that, but I think you ought to be able to get a quick fix. The final thing I wanted to mention was—because it seems to me that I may have in my own experience as a member, taken a radically different view from some other colleagues. There have been a number of cases where, in fact, I have suggested that the person go directly to the ombudsman and not so much with you, but with one of your predecessors, there are a number of very tricky cases that I was really not able to handle because of the sheer complexity of them and because it seemed to me that, if you took this person's case in isolation, it was a nightmare for the individual member to deal with. But if you pull it through to an organisation like yours, you say `Ah, yes, this fits into category 15 so-and-so'.

Ms Smith—Yes, and then you have a specialist team that can deal with that.

Mr BARRY JONES—But what is the impression, I mean if you have a self-denying ordinance, if a member is involved in it, you do not touch it?

Ms Smith—No. The only thing we guard against is having a few people dealing with the same issue at the same time.

Mr BARRY JONES—Sure.

Ms Smith—That just becomes messy in duplicating the issue. So if someone says to me, `And the local member is also investigating it,' we will say, `Sort it out. Who do you want to deal with it? If you want the local member to deal with it, fine, but we'll leave it to him. If you want us to deal with it, we will, but it is silly for us both to deal with it.' If the local

member refers to us, we would always accept.

Mr BARRY JONES—Yes.

Ms Smith—But it is more a matter of just trying to clarify who the investigating party is going to be at any point in time.

Mr PRICE—In one case you accepted, but I realise now it went into the discretionary basket.

Mr BARRY JONES—What amazed me was that I would have expected that you would have had very many more investigations relating to immigration and multicultural affairs. In fact, the numbers are very modest.

Ms Smith—That is in part because there are specialist tribunals now in operation so you have the immigration review tribunal and the IRT. That is why the numbers are down. Prior to their existence our numbers about that were proportionately much higher.

Mr BARRY JONES—But if there were a denial of natural justice in one of those tribunals, you would have to go to the AAT, would you?

Ms Smith—Yes. We do, in fact, get complaints about the practices and procedures of some of those tribunals and we would make an assessment as to whether it is a merits review. If it is a merits review we would, in fact those complaints cannot go to the AAT. There is not a recourse to the AAT at the moment. So it goes to the Federal Court, if it is going to go somewhere. But we have dealt with some complaints about whether observers can or should be present and those sorts of things.

Mr PRICE—Concerning feedback to the parliament, I think this is the first time you have appeared before the Human Rights Subcommittee.

Ms Smith—Yes, I think it is. I usually appear before the Legal and Constitutional Affairs Committee. That is my normal—

Mr PRICE—Would it be fair to say, compared to the Auditor-General, the parliament itself, via its committee system, is not really serviced, as the Auditor-General gets serviced by the public accounts committee?

Ms Smith—I would like far more interaction with parliament. We tried to write this report, for example, in a way that tries to look at some of the systemic issues behind complaints or issues that are raising policy or legislative matters which, at the end of the day, have to be for parliament to deal with. What has been very useful in the past are the parliamentary committees or inquiries that have sprung out of this—for example, your inquiry into the Child Support Agency. There was also a parliamentary inquiry into Austudy

arrangements. That is where the best interaction can be between my office and parliament, in a constructive way.

Mr PRICE—Has there been a committee report by any committee tabled in the parliament as a result of you appearing before it?

Ms Smith—The only one I can think of is Austudy and your own, I suppose.

Mr PRICE—But they have been substantial inquiries that have since generated your own report.

Ms Smith—No. The section 35 reports that I listed were issues where the departments had, by that stage, agreed to changes to the practices and procedures we had recommended. There was one about customs, and one about detention centres and the transfer of detainees to prisons. There was also one about the ABA. With all of those, the agency itself had agreed to our recommendations. So it fell in that category that we made public. I suppose to a certain extent there was nothing specifically tangible for the parliament to do but they do raise issues about broader issues.

Mr PRICE—Comments about freedom of information are of concern. Given the case mentioned by Barry, I assume that if Telstra is privatised people will not have a freedom of information entitlement.

Ms Smith—That becomes a moot point, doesn't it. I do not know what the answer is. The series of COTs—casualties of Telecom—cases very clearly highlights that large agencies such as Telstra should not be exempt from the freedom of information law or the Ombudsman's office. I think the COTs case was a case where arguments were put up about commercial incompetence which, at the end of the day—

Mr PRICE—Will not stand up.

Ms Smith—Did not stand up in terms of the relevance but was put up as a barrier for why there should be a scrutiny of what happened. But much more serious defective administration came to light through our investigations.

Mr PRICE—The extensive way you deal with the failure of departments to properly implement freedom of information, I think is, if you like, alarming. If FOI was under criminal law, there would be a criminal sanction on either the department or the responsible officer for breaching the Crimes Act. Here we have freedom of information to protect citizens, yet your report is a damning indictment of incompetence, indifference or a lack of care that is damaging to those individuals. I suppose it is a hard line response to suggest that the parliament should start considering penalties for the failure of public servants to implement legislation. What do you see as a solution so that we can look forward next year to a report that is not so replete with so much damning—

Ms Smith—I think it is as much a cultural issue as it is anything else.

Mr PRICE—We cannot exterminate them all: that is not a solution!

Ms Smith—I was not going to suggest that! Hopefully, in the next session, there will be some recommendations coming forward to parliament, and I do not know what the response of government will be. Certainly there had been some recommendations about the need for enhancement through an FOI commissioner.

Mr PRICE—But that is more educational, you are saying.

Ms Smith—Yes. I think education is probably an important element; I think more audits, if you like. More of a progressive audit as to how agencies are implementing the freedom of information could in fact have quite an important influence on the way it has been implemented. You will see here that there are a few repetitive agencies that are being named. I think it is quite often in that crossover where they are dealing with more commercial activities. Somehow the commitment to that is given a higher value than, say, the aspects of transparency. It was just a straight lack of training of Telstra staff about their FOI obligations and how to handle it. Rather than putting people in prison there might be slightly more positive ways to take action. The tax office, I guess, is another area that keeps coming up again and again as examples of concern in their administration of freedom of information.

Mr PRICE—Are you satisfied with departmental procedures across departments that where, for example, the department acts incorrectly or ultra vires, or whatever, citizens or small businessmen are being as adequately compensated as they should be? An easy one to give you is an example where, say, a tax refund cheque is seized incorrectly and the person loses that money totally.

Ms Smith—We have detailed in the tax area examples where there has been a failure of the agency to provide the information for people to claim entitlements. Equally, in one case we highlight here they conducted an audit which was very wrong—the statutory powers were wrongly used, information had been wrongly collected and the assessment was wrong. It involved 52 taxpayers. We received a complaint from one and money was repaid to that one. The others that put in objections also got their money back, but there were numbers of others that the tax office did nothing about. I think, given that the audit was so seriously flawed, they should have taken a more positive response. They have since, I have to say, because we went back to them and said, 'Really, you should be looking at this as a global thing.' More generally though the defective administration scheme has been put into play. The tax office has had its own defective administration scheme for quite a number of years, but the defective administration scheme that has been put into play for the Department of Social Security and others I think really needs retwiggling again.

What I am finding is that the new scheme has narrowed down the situations under

which an act of grace payment will be paid, so you have to be extraordinarily exceptional to be paid under an act of grace payment, much tighter than it ever used to be. At the other end you have your legal liability and then there was meant to be the defective administration scheme in between. But I am finding that really payments are not being made under the defective administration scheme. It either has to be up the legal liability end or right down in the totally exceptional end of act of grace. There is an enormous gap in between where people are not being paid out on what you would have to regard as defective administration. I will be bringing a special report to parliament about that because I do not think it was the intent of parliament in terms of how it is operating in practice.

Mr PRICE—The child support scheme: the government has picked up, I think, 53 recommendations—110 are still outstanding—including things like getting a decent review system in and a proper external review. Do you believe that if the remaining 110 were picked up the agency would have a much better chance of improving its service delivery?

Ms Smith—I have to confess that I do not know what the remaining 110 are.

Mr PRICE—For example, the review system has not been—

Ms Smith—Yes, they put in play the internal complaint mechanisms and we are crossing our fingers about that because—

Mr PRICE—You do not have a proper external review at the moment.

Ms Smith—No.

Mr PRICE—It is still this internal review office purporting to be external.

Ms Smith—Yes, it is a very muddy arrangement, still.

Mr PRICE—Would you welcome a situation, or would it be inconvenient to you, should the committee extend an invitation, say in six months, to come back before your next report is tabled and just crosscheck what is happening.

Ms Smith—On the child support or generally?

Mr PRICE—Generally.

Ms Smith—I would be happy to do that and if there are specific areas like child support I would come equipped with my specialist on the child support area.

Mr PRICE—Thank you.

Mr BARRY JONES—You spoke about the state ombudsman's offices and so on.

Something that has been interesting me over a long period has been the difference of approach between the people who are, in a sense, classic outsiders, into which category, if you will forgive me, I have put you, and those who have been classic insiders. If I may go back, when I was in the state parliament I was really very irritated when they appointed a chap called Sir John, J.V. Dillon, as the first ombudsman. I said that it was—not a very original line; you have probably used it many times—the worst appointment since Caligula made this horse a consul.

In fact, I was absolutely, totally wrong because he was the insiders' insider and he knew exactly where all the bodies were buried and he was in a position to say, 'Look, don't give me that stuff,' and he seemed to get reports back in about 10 minutes. So I apologised very handsomely to him, which he was pleased about. What happens in the other areas? On the whole, have they appointed people who have come through the bureaucracy or have they appointed somebody who has had a public role outside the bureaucracy?

Ms Smith—It has been a real mix. New South Wales is an outsider; probably she and I would be the two outsiders at this point, if you want to give us those tags. The critical thing, in terms of the appointment of the ombudsman, is that you do not want someone who wants a career after being an ombudsman; that is one point. The other is that there is a decent set term of office that they have to work in.

If I think of my appointment process, ideally the selection should be by both sides of politics so that the confidence can be there.

ACTING CHAIR—How long is your term?

Ms Smith—It is five years; I have another 18 months.

ACTING CHAIR—Thank you, Philippa, for your attendance. If there are any matters that are outstanding for which we need additional information we will be in touch with you. There will be a *Hansard* of today's proceedings and any corrections you wish to make can be forwarded. I thank Hansard for their efforts in looking after us this afternoon and in compiling that record.

Resolved:

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Subcommittee adjourned at 5.16 p.m.