



COMMONWEALTH OMBUDSMAN

Complaints: 1300 362 072
Tel: (02) 6276 0111
Fax: (02) 6249 7829
www.ombudsman.gov.au
Level 6, 1 Farrell Place
Canberra ACT 2600
Australia
GPO Box 442
Canberra ACT 2601

SUBMISSION14.....

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Senator Ross Lightfoot
Chairman
Joint Standing Committee on the National Capital
and External Territories
Parliament House
CANBERRA ACT 2600

Dear Chairman

Thank you for your letter of 4 April 2003 inviting my office to make a submission to the Committee's inquiry into Governance on Norfolk Island.

I have attached my office's submission for the Committee's attention. My officers and I are available to speak with the Committee about this matter if so requested.

My contact officer for this matter is Paul Bluck, (02 6276 0155) paul.bluck@comb.gov.au .

Yours sincerely

Professor John McMillan
Commonwealth Ombudsman

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**JOINT STANDING COMMITTEE
ON THE
NATIONAL CAPITAL
AND
EXTERNAL TERRITORIES**

**NORFOLK ISLAND
GOVERNANCE INQUIRY**

**SUBMISSION BY
THE OFFICE OF THE
COMMONWEALTH OMBUDSMAN**

Scope of submission

1. This submission is in response to an invitation from the Committee to the Commonwealth Ombudsman to make a submission on the following matter:

[P]ossible ways to improve governance on Norfolk Island and, in particular, on the steps that could be taken to assist the Island community to develop a financially sustainable and accountable system of representative self-government for Norfolk Island.

2. Consistently with the limited function of the Ombudsman to improve public administration, this submission deals only with that aspect of governance arrangements for Norfolk Island. A general description of the role and operations of the Commonwealth Ombudsman is given in the final section of this submission.

3. As a general point, I note that the present jurisdiction of the Administrative Review Tribunal does not appear to include important decisions under what would (were it not for the Schedules to the *Norfolk Island Act 1979*) be decisions made under Commonwealth law, in relation to social services and migration. On the mainland, corresponding decisions are subject to high quality merits review.

The Commonwealth Ombudsman and Norfolk Island administration

4. The Commonwealth Ombudsman does not presently have jurisdiction to investigate complaints about the administration of Norfolk Island. The jurisdiction of the Ombudsman, conferred by the *Ombudsman Act 1976* (Cth), applies to action taken by a Department or a "prescribed authority", defined to mean an authority established under an enactment other than the *Norfolk Island Act 1979* (Cth). Consequently, action taken under the *Norfolk Island Act 1979*, or under any law enacted by the Norfolk Island Legislative Assembly, does not come within the jurisdiction of the Commonwealth Ombudsman. This limitation is reinforced by s 18 of the *Norfolk Island Act 1979* which provides that Commonwealth Acts are not in force in Norfolk Island, unless expressed to extend to the Territory.

5. The Commonwealth Ombudsman does, however, have jurisdiction to investigate a complaint made by a Norfolk Island resident against a Commonwealth agency (for example, the Australian Taxation Office, the Department of Immigration, Multicultural and Indigenous Affairs or, more relevantly, the Department of Transport and Regional Services). There have been relatively few complaints for which a Norfolk Island address is given for the complainant: for example, the Commonwealth Ombudsman database records only 8 such complaints for the previous 12 years.

6. The position as outlined is similar to the role of the Commonwealth Ombudsman in relation to the government administration of the Australian Capital Territory and the Northern Territory, following self-government in those territories. Specifically, as to the Northern Territory, the Commonwealth Ombudsman cannot investigate complaints against the Northern Territory government administration: a separate office of Northern Territory Ombudsman has been established by the Northern Territory Legislative Assembly. There is a similar exclusion of ACT matters from the jurisdiction of the Commonwealth Ombudsman. However, the Commonwealth Ombudsman also holds office as the Australian Capital Territory Ombudsman, under an arrangement made pursuant to subsection 28(3) of the *ACT Self-Government (Consequential Provisions) Act 1988* and funded through a Memorandum of Understanding.

Should there be an Ombudsman function for Norfolk Island?

7. My office has not separately researched whether consideration has previously been given to establishing an Ombudsman function for Norfolk Island. To that extent the following discussion deals with the issue as a matter of first principle. The main purpose of this submission is to raise for serious consideration the option of establishing an Ombudsman function in Norfolk Island.

8. The office of Ombudsman is now an integral feature of government administration in Australia. The first Ombudsman office was established in Australia 30 years ago, and there is an Ombudsman office in each State and Territory. The model has also been copied widely in specialist aspects of government administration (for example, water and energy ombudsmen) and in the private sector (for example, Banking Industry Ombudsman, and Telecommunications Industry Ombudsman). As those developments illustrate, the contribution that the Ombudsman can make to improved decision-making and public administration is well recognized.

9. The office of Ombudsman also symbolizes another important value of the system of democratic accountable government in Australia. The essential feature of the Ombudsman model is the right it confers upon people to complain to an independent agency about a government administrative action that has adversely affected the complainant. The right to complain against government – surely one of the most fundamental of all individual human rights – is thereby guaranteed in a practical and workable fashion. The impact of government decisions on individuals thereby becomes a routine feature of policy formulation and implementation. Ombudsman investigations also contribute greatly to transparency in public administration. In summary, the Ombudsman model is nowadays accepted in Australia as a central element of the government accountability framework.

10. These points were recognised and safeguarded when self government was conferred on the ACT in 1983. The major features of the Commonwealth administrative law system – the Ombudsman, administrative tribunals, judicial review, freedom of information – were applied to the new ACT system of government from the outset. The ACT Legislative Assembly had legislative authority to alter the legislation establishing an administrative law system, but that system was nevertheless part of the constitutional birthright of members of the ACT community.

11. In principle, therefore, it would seem appropriate that an Ombudsman function should apply to government administration in Norfolk Island. This would be consistent with the system of representative government established by the *Norfolk Island Act 1979*. It would also ensure that members of the Norfolk Island community had a similar right in relation to their government as all other Australians.

12. As a matter of principle, the only difficulty in implementing that ideal would seem to arise from the small size of the community and government system in Norfolk Island. It is unlikely that members of the community face the same level of difficulty as other Australians in contacting and being heard by a government administrator or a member of the Legislative Assembly. However, that is not a reason in itself for not establishing an Ombudsman function in Norfolk Island. The office of Ombudsman does not exist solely to create a point of access between people and government administrators. The main reason for the office is to enable independent scrutiny and investigation of complaints against government decision-making. Indeed, the smallness of a community, and the close social interaction between parliamentarians, administrators and members of the public, can create a special need for an independent office to be available to provide external scrutiny and resolution of grievances. This imperative is heightened when account is taken of the breadth of governmental functions discharged in Norfolk Island, which include finance, law and order, immigration, land planning and industrial and employment law, as well as “municipal” matters such as infrastructure and utilities. An Ombudsman ideally has power to investigate administrative actions even where there has not been a complaint, and these “own motion” investigations can help to improve the quality of public administration.

How could an Ombudsman function be established for Norfolk Island?

13. A range of options could be considered, but the following discussion is limited to three options that canvass most of the hybrid possibilities.

14. The first option would be to establish a separate office of Norfolk Island Ombudsman, and for a person who is a resident of Norfolk Island to be appointed to the position. A principal ground of objection to this option would probably be that the workload would not warrant the creation of a separate office.

For example, the number of complaints received by the Commonwealth Ombudsman against the ACT government administration has generally been about 500-600 per annum (plus complaints about the AFP in providing a local police service in the ACT). Given that Norfolk Island's population is less than 1% of that of the ACT, this may suggest a Norfolk Island ombudsman would attract fewer than 10 complaints a year. Furthermore, many of the ACT complainants (as high as 70% in some years) are advised to pursue avenues of complaint handling or internal review established by an ACT government agency before the Ombudsman will conduct an external investigation of the complaint.

15. A variant of the first option would be to appoint a person part-time to a position of Norfolk Island Ombudsman. A shortcoming of that option would be that the person may not be in a position to bring to the discharge of the Ombudsman function the independence that is an essential characteristic of the office.

16. A second option would be to establish an Ombudsman Committee, comprising members of the Legislative Assembly. Again, it would be questionable whether the members of the Committee (who may have played a key role in developing the law or policy that has given rise to a complaint) would have the degree of independence and objectivity required to discharge the Ombudsman function in a characteristic fashion. A further difficulty is that the Committee would not be as well-placed as an executive Ombudsman to develop the skills in administrative investigation that are required, and to give undivided attention when required to the investigation of a single complaint.

17. The third option would be to follow the model adopted by the Australian Capital Territory. The key features of this model are that the Norfolk Island Legislative Assembly would enact legislation establishing an office of Norfolk Island Ombudsman and the person appointed to that office would be an existing Australian Ombudsman (either the Commonwealth or a State Ombudsman). The geographical distance between the office holder and Norfolk Island should not by itself provide an insuperable obstacle to this option. Many Australian Ombudsman investigate complaints concerning government administrative actions that are undertaken in regional areas in which there is no direct Ombudsman presence. Many of the functions of the Ombudsman (such as document inspection, and interviews) could also be discharged locally, by members of the Norfolk Island Administrative Review Tribunal under delegation from the Ombudsman.

The Commonwealth Ombudsman – An Overview of the Office

18. The office of the Commonwealth Ombudsman is established under the *Ombudsman Act 1976* and the Ombudsman exercises powers and performs functions under that Act, the *Complaints (Australian Federal Police) Act 1981*, the *Telecommunications (Interception) Act 1979* and the *Crimes Act 1914*. The

Ombudsman is also the Ombudsman for the Australian Capital Territory and exercises powers and performs functions under the *Ombudsman Act 1989* and the *Public Interest Disclosure Act 1994* of the ACT.

19. The Ombudsman is currently assisted by a Deputy and has a total staff of about 80, working in offices in Canberra and all State capitals and Darwin. The Ombudsman receives about 20,000 complaints a year across all jurisdictions and investigates about a third of these. Where the Ombudsman does not investigate, it is usually because the complainant could take the matter up with the relevant agency – most larger agencies have good quality internal complaint management structures. As well, the Ombudsman deals with about 12,000 other inquiries. Nearly half of all complaints concern Centrelink, but the Child Support Agency, the Australian Taxation Office, the Department of Immigration, Multicultural and Indigenous Affairs, Australia Post, the Australian Federal Police and the Australian Defence Force/Department of Defence also feature prominently. As ACT Ombudsman, the Ombudsman receives complaints about all aspects of the ACT Government's performance of state and local government roles in the ACT.

20. The Ombudsman has a range of investigative powers to require information, documents and answers, but usually operates on a cooperative and less formal basis. The Ombudsman can issue a report and make recommendations where an investigation identifies defective administration by a government agency; in most cases, agencies are willing to accept responsibility and act on the Ombudsman's suggestions without the need for a report. The Ombudsman can report or disclose critical opinion only after he has given the person or agency criticised an opportunity to make submissions.

21. Most of the Ombudsman's investigations follow complaints made by any person, within or outside Australia, but some are conducted on an own motion basis, usually where a systemic issue is involved. Complaints can be made in writing, orally in person or by telephone or through the Ombudsman's website.

22. The Ombudsman has additional functions of inspecting and reporting on records relating to telecommunications interception and controlled operations conducted by Commonwealth law enforcement agencies.

23. The Commonwealth Ombudsman has seen his role as:
Assisting the Australian community by resolving complaints and improving public administration.