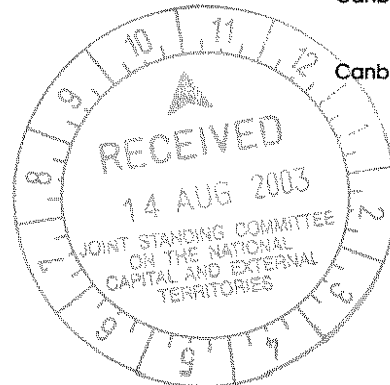


COMMONWEALTH OMBUDSMAN

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Submission No:.....	AA
Date Received:.....	14/8/03
Secretary:.....	<i>Q. Clements</i>



12 August 2003

Mr Quinton Clements
Inquiry Secretary
Joint Standing Committee on the
National Capital and External Territories
Parliament House
CANBERRA ACT 2600

Dear Mr Clements

Norfolk Island Governance

I undertook in my appearance before the Joint Standing Committee to provide further information on three issues. The attachment contains my response. Any further questions arising from my submission could, in the first instance, be addressed to my Director of Legal Policy, Mr Paul Bluck, on (02) 6276 0155.

I confirm that I do not require any amendments to the transcript of my evidence.

May I thank the Committee for the opportunity to give oral evidence to the inquiry.

Yours sincerely

Prof. John McMillan
Commonwealth Ombudsman

QUESTIONS RAISED ON NOTICE

1. Senator Hogg asked (at NCET 6) for the criteria for independence of an ombudsman that are internationally accepted.

At the international level there is a voluntary, non-government organisation, "The International Ombudsman Institute", to which many public sector ombudsmen (including the Commonwealth Ombudsman) belong. The criteria adopted by the Institute for an organisation to become an "institutional member" provide a good starting point for defining the criteria to be recognised as an Ombudsman.

"A public institution whether titled Ombudsman, Mediator, Parliamentary Commissioner, People's Defender, Human Rights Commission, Public Complaints Commission, Inspector General of Government, Public Protector or like designation, shall be eligible to become an Institutional member provided it exercises fully the following functions and meets the following criteria:

- i. it is created by enactment of a legislative body whether or not it is also provided for in a Constitution;*
- ii. its role is to protect any person or body of persons against maladministration, violation of rights, unfairness, abuse, corruption, or any injustice caused by a public authority;*
- iii. it does not receive any direction from any public authority which would compromise its independence and performs its functions independently of any public authority over which jurisdiction is held;*
- iv. it has the necessary powers to investigate complaints by any person or body of persons who considers that an act done or omitted, or any decision, advice or recommendation made by any public authority within its jurisdiction has resulted in actions of the kind specified in subparagraph ii) above;*
- v. it has the power to make recommendations in order to remedy or to prevent any of the conduct described in subparagraph ii), and, where appropriate, to propose administrative or legislative reforms for better governance;*
- vi. it is held accountable by reporting publicly to the Legislature or other appropriate authority;*
- vii. its jurisdiction is national, regional or local;*
- viii. its jurisdiction applies to public authorities generally or is limited to one or several public authorities, or to one or several public sectors; and*
- ix. its incumbent or incumbents are appointed or elected, according to the relevant legislative enactment, for a defined period and can only be dismissed, for cause, by the legitimate and competent authorities."*

A meeting of Australian Ombudsmen in 1997 also adopted a set of criteria (attached) designed to govern the use of the term "Ombudsman". There have been similar lists drawn up by other bodies.

2. At NCET 8, Professor McMillan, in responding to a question from Senator Crossin, said that he would check on complaints the Commonwealth Ombudsman has received from Christmas Island and the Cocos (Keeling) Islands.

Year	Christmas Island*	Cocos (Keeling) Islands*
1990-91	1	0
1991-92	0	0
1992-93	0	0
1993-94	0	0
1994-95	5	0
1995-96	2	0
1996-97	4	0
1997-98	5	0
1998-99	3	0
1999-00	8	1
2000-01	5	1
2001-02	4	0
2002-03 [#]	18	0
Total	55	2

* - figures subject to the reservation that some complaints may have been made by people on the mainland on behalf of islanders. Figures unable to be further disaggregated because of compromise to privacy in small communities. Agencies identified were mostly DIMIA (17), DOTARS (10) and their predecessors and the AFP (13)

[#] - increase substantially due to complaints relating to migration.

A special feature of the government of the Indian Ocean Territories is that the law of Western Australia has a partial application in the Territories, under the administration of officials of the Western Australian government. Accordingly, s 5(5) and (6) of the *Ombudsman Act 1976* (Cth) preclude the Commonwealth Ombudsman from investigating the actions of Western Australian officials performing functions under WA laws that are applied in the Indian Ocean Territories. The officials would be subject to the jurisdiction of the WA Ombudsman.

There would be no obstacle to the Commonwealth Ombudsman investigating, following a complaint or on his own motion, the actions of Commonwealth officials taken on or in relation to the Island or its population. Nor would the Ombudsman be precluded from investigating any action taken by a Commonwealth official exercising power under a WA law or another law affecting the territories.

3. At NCET 11, the Chairman asked about the role of the Ombudsman in relation to AFP members on Norfolk Island. The question indicated that the Island's police consisted of three members seconded from the AFP and three local special constables.

The jurisdiction of the Commonwealth Ombudsman to investigate complaints against members of the Australian Federal Police is conferred by the *Complaints (Australian Federal Police) Act 1981*, and would extend to actions taken by an AFP officer in Norfolk Island.

The Complaints Act is expressed to apply within and outside Australia and to every external territory (s 5A). The jurisdiction of the Commonwealth Ombudsman under the Act applies to any "action" taken by an "AFP appointee" (s 22). The term action is defined in s 4 to include any action taken by a person "(a) because of his or her being an AFP appointee; or (b) in the exercise of powers, or the performance of functions, given to him or her as an AFP appointee". This is underpinned by s 8 of the *Australian Federal Police Act 1979* (Cth), which includes among the functions of the AFP the provision of policing services by arrangement in an external territory.

On the face of the matter it would seem that the Ombudsman's jurisdiction would extend also to the actions of a special constable if that person has been appointed as a "special member" of the AFP. The term "AFP appointee" includes both AFP members and "special members" (s 3). The appointment of "special members" is governed by s 40E of the *Australian Federal Police Act 1979* (Cth), which confers power upon the Commissioner to appoint a person as a special member of the AFP to assist in the performance of its functions.

Criteria for the Use of the Term 'Ombudsman'

Following

1. the formation of the UK Ombudsman Association and the publication on 17 March 1993 of the Association's criteria for the use of the term 'Ombudsman' in the UK;
2. legislation in New Zealand outlawing the use of the name 'Ombudsman' without either legislative authority or consent of the Chief Ombudsman and the subsequent publication by the Chief Ombudsman on 2 April 1992, of the criteria for guidance in the granting of that consent;
3. an increase in the growth of the use of the position of Ombudsman in Australia in a variety of statutory and non-statutory contexts;
4. recommendation of the Access to Justice Advisory Committee in October 1993 as to the need to protect the term 'Ombudsman';
5. agreement between the Commonwealth Ombudsman and the Australian Banking Industry Ombudsman in April 1994;
6. consideration by the meeting of Australian Parliamentary Ombudsmen in July 1994 and by the 14th Australasian & Pacific Ombudsman Conference in New Zealand in October 1994,

it was agreed that in order to protect the credibility of the name 'Ombudsman' in the public interest, the following criteria should be adhered to when deciding whether or not a position should be filled by a person being called 'Ombudsman'.

These are regarded as minimum criteria to ensure the independence, accountability and effectiveness of the Ombudsman's office itself.

1. Independence

- The Ombudsman should be independent of those being investigated and the complainant.
- The Ombudsman should be appointed for a set term (such a term would be capable of being renewed), with removal only on the basis of incapacity/proven misconduct or bankruptcy.
- The majority of those selecting the person to be appointed as Industry Ombudsman must not be from the industry which it is proposed the Ombudsman will investigate.

- Any determination of whether a matter falls within the jurisdiction of the Ombudsman must be made by the Ombudsman or as set out in jurisdictional rules or criteria.
- The Ombudsman should be provided with sufficient funding to enable complaints/disputes to be properly investigated.

2. Jurisdictional Criteria

- While it may be a usual practice that a complainant should first exhaust any internal complaint procedures set in place by the body being investigated, the Ombudsman should have the right to investigate any complaint without the need for any prior consent of any person or body against whom the complaint is made.
- Comprehensive information setting out jurisdiction should be publicly available.
- There should be some independent procedure to review the extent of the jurisdiction from time to time and a public review of operations and effectiveness of the Ombudsman's operations.
- Desirably, the jurisdiction should give 100% industry coverage but at the very least, a majority of industry members should be subject to the Ombudsman's jurisdiction.
- In industry schemes, those investigated should be bound by the Ombudsman's decision, whereas the complainant should not be bound.
- In those cases where the Ombudsman's decisions or recommendations are not complied with, the Ombudsman should have the power to publicise, or require the publication of, such non-compliance at the expense of those investigated.

3. Powers

- The Ombudsman should be required to give decisions with reasons to the parties.
- The Ombudsman's procedures should accord with principles of natural justice.
- The criteria against which cases should be decided should include a reference to 'fairness in all the circumstances'.
- The Ombudsman should have the right to require all relevant information, documents and other materials from those who are being investigated or

from other parties capable of providing information relevant to an investigation.

Note: The Parliamentary Ombudsman has the statutory power to access information from a third party and the power to summons a witness on oath. The Parliamentary Ombudsman can also provide protection for privileged information so gained. The Industry Ombudsman does not have such powers or the capacity to provide such protection. As a consequence, there may be some limitations on the information capable of being obtained by the Industry Ombudsman.

4. Accountability

- Parliamentary Ombudsmen should be responsible to Parliament.
- Industry Ombudsmen should be responsible to a body made up of both industry and client groups, with an independent Chair, and with the proviso that the numbers of industry members of such a group do not predominate.
- The Ombudsman should publish an annual report to the public about the activities of the office and should have the right to name industry members or agencies and give anonymous case notes.
- The Ombudsman should have the ability to make statements in the public interest on matters within the jurisdiction of the Ombudsman.
- The Ombudsman and staff should either be protected from , or indemnified against any civil litigation which may arise as a result of the exercise of the Ombudsman's powers. Complaints should be protected from or indemnified against any civil actions which arise as a result of the content of a complaint.

5. Accessibility

- The office of the Ombudsman should be directly accessible to complainants.
- Parliamentary Ombudsmen provide their services free of charge.
- The Industry Ombudsmen should be free of costs to persons acting in a non-business capacity and to small businesses.
- The Ombudsmen should be enabled to ensure the Scheme is made known to potential users.