

The Parliament of the Commonwealth of Australia

Joint Standing Committee on Foreign Affairs, Defence and Trade

**THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSIONER
AND THE COMMONWEALTH OMBUDSMAN:
REPORT ON PUBLIC SEMINARS
20 AND 25 SEPTEMBER 1996**

March 1997

LIST OF RECOMMENDATIONS

The Committee recommends that:

- 1 the Australian Government introduce legislation to incorporate the *Convention on the Rights of the Child* into domestic law; and
- 2 the Attorney-General investigate the feasibility of establishing a Children's Commissioner within the Human Rights and Equal Opportunity Commission. (Para 1.18)
- 3 the Government expedite the necessary changes to jurisdiction outlined in the 1995-96 Report:
 - (a) to ensure that the Ombudsman's office retains maximum jurisdiction covering the changed structures of public administration;
 - (b) to allow maximum parliamentary control and scrutiny over the work of the Ombudsman's Office; and
 - (c) to ensure that funding to the office reflects the demand of Australian citizens for the Ombudsman's services; and
- 4 a parliamentary review of the Office of the Commonwealth Ombudsman be conducted in order to examine the resources of the Ombudsman's Office, mechanisms for ensuring its independence from any specific portfolio, and the desirability of giving the Ombudsman the status of an independent officer of the Parliament. (Para 2.15)
- 5 the Australian Government fund an indigenous person's position within the Office of the Ombudsman to give special focus to the needs of indigenous Australians. (Para 3.6)

INTRODUCTION

The two offices, the Commissioner of the Human Rights and Equal Opportunity Commission and Commonwealth Ombudsman deal with international and domestic issues concerning human rights. The positions are held by Mr Chris Sidoti and Ms Philippa Smith respectively.

The Human Rights and Equal Opportunity Commission is a statutory body charged with the responsibility of ensuring Australia's implementation of and compliance with international human rights treaties. These international human rights treaties include: the *International Covenant on Civil and Political Rights*; the *International Convention on the Elimination of All Forms of Racial Discrimination*; the *Convention on the Elimination of All Forms of Discrimination Against Women*; the *International Labour Organisation Discrimination (Employment and Occupation) Convention ILO 111*; the *Convention on the Rights of the Child*; the *Declaration of the Rights of the Child*; the *Declaration of the Rights of Disabled People*; the *Declaration of the Rights of Mentally Retarded Persons*; and the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion of Belief* and the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

Some of these conventions have been enacted in law by the Australian Parliament. Specifically, the Commission, through the Human Rights Commissioner and a number of other Commissioners, namely, the Race Discrimination Commissioner, the Disability Discrimination Commissioner, the Sex Discrimination Commissioner, the Privacy Commissioner and the Aboriginal and Torres Strait Island Commissioner, is responsible for monitoring the following Acts of the Australian Parliament: the *Human Rights and Equal Opportunities Act (1986)*, the *Racial Discrimination Act (1975)*, the *Sex Discrimination Act (1984)*, the *Privacy Act (1988)*, the *Disability Discrimination Act (1992)* and the *Native Title Act (1994)*. It should be noted that no specific Act of Parliament has been passed to implement the *International Covenant on Civil and Political Rights* or the *International Convention on the Rights of the Child*.

The Commonwealth Ombudsman deals with issues that are not greatly different from those dealt with by the Human Rights and Equal Opportunity Commission, but which have a more domestic focus. The Commonwealth Ombudsman deals with the everyday human rights of citizens and their dealings with government agencies. The Commonwealth Ombudsman was established to provide a check on the responsibility, adaptability and sensitivity of Commonwealth departments to public needs. The Commonwealth Ombudsman makes recommendations directly to the Parliament and is established under the Department of the Prime Minister and Cabinet (PM&C). The person occupying the position of Commonwealth Ombudsman holds office for five years.

In January 1995 the Human Rights Sub-Committee met with the then new Human Rights Commissioner, Mr Chris Sidoti, to discuss with him the work of the Commission. The members of the Sub-Committee found the meeting a useful opportunity to monitor the work of the Commission and to discuss its progress and challenges and resolved in the new Parliament to continue the practice of an annual meeting with the Commissioner. The Sub-

Committee further resolved to include in this annual briefing a meeting with the Commonwealth Ombudsman.

The major issues will be separated into three sections. The first will examine issues specific to the Human Rights and Equal Opportunity Commission, the second will be the issues particular to the Commonwealth Ombudsman. The final section will look at the issues that arise jointly from both areas, that are feasible to be considered jointly.

SECTION 1

Issues Particular to the Human Rights and Equal Opportunity Commission

1.1 The first formal meeting between the Human Rights Commissioner and the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade took place in January 1996. At that time Mr Sidoti had only recently been appointed, and the meeting therefore was an opportunity to discuss with him the focus and direction he brought to the Commission. He discussed the international cooperation of the Commission, particularly in setting up national institutions in the region.

1.2 The domestic issues that were raised were Commission inquiries in relation to children's rights and the law and the separation of Aboriginal children, Commission submissions to the Senate inquiry into the *Migration Legislation Amendment Bill No. 2*, Commission inspection of and report on the detention conditions of asylum seekers in Australia at Port Hedland and Curtin in Western Australia, concern with the *Administrative Decisions (Effect of International Instruments) Bill, 1995*, and a commentary on the impact of the Brandy decision on the work of the Commission, on the costs and the timeliness of justice. Mr Sidoti was particularly concerned about the differential availability of the courts and the impact that that would have on the people for whom the Commission had responsibility.

The Development of Regional Human Rights Cooperation

1.3 Under the leadership of the previous Human Rights Commissioner, Mr Brian Burdekin, the Australian Human Rights Commission assisted a number of regional governments to establish national human rights institutions. These moves were greeted with some scepticism at the time, a scepticism which has lessened over time as these commissions have proved to be energetic, committed and more independent than had been expected by the critics. In its 1994 report, *A Review of Australia's Efforts to Promote and Protect Human Rights*, the Joint Standing Committee on Foreign Affairs, Defence and Trade recommended:

As an initiative to develop regional understanding on human rights matters, the Committee recommends that the Government explore with regional countries the possibility of establishing a regional dialogue on human rights through regular ministerial meetings of the foreign ministers, and other ministers as appropriate, of the APEC countries and through regular contacts between the Human Rights Commissions of regional countries.¹

1.4 There have been four regional meetings at an intergovernmental level organised by the United Nations to further the development of human rights mechanisms in the region.

1 Joint Standing Committee on Foreign, Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, AGPS, Canberra, November 1994, p. xxi.

The last meeting was in Nepal in February 1996. That meeting agreed that the best approach to the development of a regional mechanism was a step by step approach focusing in the first instance on the development of national institutions.²

1.5 The Australian Commissioner, Mr Chris Sidoti, has advanced the Joint Committee's 1994 recommendation and the outcome of the Nepal meeting by facilitating dialogue and cooperation amongst the commissions in Australia's immediate region. In Darwin in July 1996, the Australian and New Zealand Commissions jointly sponsored, with assistance from the United Nations Human Rights Commissioner, the Human Rights Centre in Geneva and the Australian aid agency AusAID, and hosted the *First Regional Workshop of Human Rights Commissions*. The workshop was attended by 12 countries from Australia's immediate region, including four of the five countries who have national institutions in place - Australia, New Zealand, Indonesia and India³ - and a number of countries contemplating or in the process of establishing national institutions - Fiji, Mongolia, Nepal, Pakistan, Papua New Guinea, the Solomon Islands, Sri Lanka and Thailand. A large number of observers attended, including Australian Government representatives, representatives of the United Nations, of NGOs, academics and members of the Joint Standing Committee on Foreign Affairs, Defence and Trade.

1.6 The workshop had two practical objectives: (1) to promote cooperation among, and the strengthening of, national human rights institutions in the Asia-Pacific region - by facilitating discussion and the development of joint activities; and (2) to encourage and assist those states that are in the process of establishing national human rights institutions through, inter alia, the provision of practical assistance and support.

1.7 During the hearing, Mr Sidoti addressed the differences in the role of commissions in each of the different countries. He pointed out that the issues faced by the commission in Pakistan were very different from those faced by the Australian commission. The probability of the Australian or New Zealand commissions having to deal with torture in police custody was low whereas these investigations were central to the work of the Pakistani commission.

1.8 Mr Sidoti outlined the success of establishing commissions in participant countries. In particular Papua New Guinea stands out with its commitment to set up an operational commission by early 1997. Other countries such as Vietnam, Hong Kong and Bangladesh received invitations to attend the meeting, but declined. They have nevertheless been listed for future consultations on the establishments of commissions. Issues particular to human rights are also becoming agenda items within regional groupings such as ASEAN. At the last meeting of the ASEAN Ministerial Council and Regional Forum, the heads of the Indonesian and Philippines human rights commissions met with the ASEAN foreign ministers to discuss the work of the commissions and to encourage them to develop commissions in the region.⁴ At this stage fully fledged participation across the region will be a long term dialogue issue.

2 Transcript, 20 September 1996, p. 17.

3 The Philippines delegate was unable to attend the Workshop.

4 Transcript, 20 September 1996, p. 15.

1.9 Mr Sidoti expressed concern that, despite two valuable human rights delegation visits to China in 1991 and 1992, China's commitment to human rights and willingness to participate in the regional human rights dialogue has declined. Invitations to reciprocate the visits by sending a delegation to Australia were extended to the Chinese on both occasions and were renewed by the Foreign Minister. This has not happened as yet. Mr Sidoti recommended to the Committee that it re-examine the issue of how to advance the dialogue on human rights with China.

1.10 The workshop adopted the *Larrakia Declaration* which committed the group to future cooperation and stressed the importance of the Paris Principles as the underpinning principles of national institutions. It also agreed to the establishment of an *Asia-Pacific Regional Forum of National Human Rights Institutions*, a forum open to all national human rights institutions established in conformity with the Paris Principles. This forum represents the first official structure to deal with human rights issues at the regional level. The Australian government offered to fund for the first three year a secretariat for the forum. It is not a full intergovernmental arrangement on human rights, but it does establish a very significant dialogue. The Indian Human Rights Commission agreed to host the next regional forum in 1997.

1.11 The Darwin workshop identified the question of child labour as a potential area for a joint project upon which the regional human rights commissions could cooperate. The Indian Commission had already completed a major study and the Pakistani Commission announced that they were about to embark on a similar inquiry and therefore expressed interest in the Indian Commission's experience. Representatives of the Philippines Commission, in conjunction with some judges, members of parliament and child welfare workers from the Philippines, were in the process of negotiating with AusAID for a joint project with the Australian Human Rights Commission and LawAsia in relation to children's welfare and services.

The Rights of the Child

1.12 The rights of the child emerged as a major concern in the discussions with HREOC. As a part of its responsibility for the implementation of the *Convention of the Rights of the Child*, the Human Rights and Equal Opportunity Commission set out what it believes are the principal concerns for children in Australia. The key areas⁵ identified by both Mr Sidoti and Sir Ronald Wilson (Human Rights and Equal Opportunity Commission President) were the welfare, care and protection system and children in the family law and juvenile justice system.⁶

1.13 A number of specific concerns were raised under this heading:

- political campaigns in many states and territories to 'get tough' with young people;

5 The Human Rights and Equal Opportunity Commission is running, in conjunction with the Australian Law Reform Commission, a national inquiry into children and the law. Many of these areas of concern have been identified in the course of that inquiry. Transcript, 20 September 1996, p. 18.

6 *ibid.*

- the increasingly hostile relationships between police forces and young people;⁷
- the ability of children to be represented or represent themselves in the courts;⁸
- the legal maltreatment of children who are victims of crime where systemic abuse compounds the initial criminal abuse of the child; and
- the decline of the principle of prison as a punishment of last resort.⁹

1.14 Sir Ronald Wilson and Mr Sidoti made two recommendations to address some of the problems associated with the welfare of children in Australia: a Commissioner to deal specifically with children and the enactment of the *Convention of the Rights of the Child* into law. A children's commissioner would fulfil a number of roles. He/she would:

- focus on the needs of children;
- have an investigative role in relation to the acts and practices of the Commonwealth touching the ICCPR;
- take responsibility for monitoring treaty obligations in relation to the Rights of the Child;
- advocate on behalf of children and families, to promote a climate in which family values are respected and children have a place in the family;¹⁰ and
- play an educative role.

1.15 The Joint Standing Committee on Foreign Affairs, Defence and Trade, in its November 1994 report, *A Review of Australia's Efforts to Promote and Protect Human Rights*, recommended to the government that 'the Attorney-General investigate the feasibility of establishing a Children's Ombudsman within the office of the Human Rights and Equal Opportunity Commission'.¹¹ The Government response to that recommendation was that it was under consideration. This Committee believes that a Children's Commissioner would satisfy the need identified in that report as well as an Ombudsman and supports the call of the President of the Human Rights and Equal Opportunity Commissioner for the creation of such an office.

1.16 The Joint Committee's report also recommended the enactment of the Convention into domestic law and the committee reiterates its support for that recommendation. Finally on these issues, both Mr Sidoti and Sir Ronald Wilson assured the Committee that neither the Convention nor a Children's Commissioner was or would be a threat to the rights of parents in bringing up their children.¹²

7 *ibid*, p. 19.

8 Public opinion appears to be satisfied when the punishment juveniles receive is in accordance with the crimes they have committed. However, the treatment these juveniles actually receive in the courts is not always within the guidelines provided by Human Rights Conventions, eg, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The court system treats children as adults and does not allow for their vulnerability. Not only does this have immediate effects on the mental health of the children, but it has a perpetuating effect by making the child uncooperative towards the justice system at a later stage in life. Transcript, 20 September 1996, p. 18.

9 *ibid*, p. 20.

10 *ibid*, p. 24.

11 Recommendation 40, Joint Standing Committee on Foreign Affairs, Defence and Trade, *op.cit.*, p. xxxiii.

12 Transcript, 20 September 1996, p. 24.

1.17 Australia's first periodic report under the *Convention on the Rights of the Child*, due in 1993, was deposited in January 1996. The UN Committee is likely to consider it in 1997. An alternative report has been issued by the Defence of Children International Australia, *Australia's Promises to Children - the Alternative Report*. This will be considered in conjunction with the official report. While the overall conclusion for the reports is that Australia's record in the treatment of its children is positive, the alternative report suggests that improvements can be made. It highlights areas which the Human Rights Commissioner highlighted to the Committee, namely, the treatment of juveniles in the justice system, particularly in the taking of evidence, police relationships with juveniles, indigenous children's rights and the need for a national approach to problems relating to children. This report too recommended the enactment of the Convention into law and the establishment of a Children's Commissioner.

1.18 The Committee recommends that:

- 1 **the Australian Government introduce legislation to incorporate the *Convention on the Rights of the Child* into domestic law; and**
- 2 **the Attorney-General investigate the feasibility of establishing a Children's Commissioner within the Human Rights and Equal Opportunity Commission.**

1.19 Sir Ronald Wilson also provided an assessment for the Committee of the work of the inquiry into the removal of Aboriginal children. Having listened to testimony from a large number of affected people over an extended period of time, he described a situation, the unravelling of which was essential to reconciliation between Aboriginal and white Australia. It was a policy that continued until very recent times. Not one Aboriginal family in Australia had been unaffected by the policy of separation, and, regardless of the motivation for the policy at the time it was instituted, it had left a legacy of deep sadness and suffering, dislocated families, an intergenerational absence of parenting skills and a myriad of social problems affecting Aboriginal people today.

1.20 He believed he had received excellent cooperation from all the states and that each of the states had been at pains to suggest some recommendations to the inquiry. At the time of the seminar, he had almost completed the inquiry, awaiting only the submission from the Commonwealth which he characterised as critical.¹³ The Commonwealth subsequently made a submission to the inquiry, and the report is expected to be released by the end of March 1997.

Other Particular Human Rights

1.21 The Human Rights Commissioner outlined several other topical areas of key interest to the Human Rights and Equal Opportunity Commission, and these areas are broad. Little focus was given to them in the hearing but they are relevant to the Committee. These issues included: the rights of refugees in detention, the rights of women in Australia and in the region, and the rights of transgender people.

13 *ibid*, p. 27.

1.22 The determination of refugee status does not fall directly under the Human Rights and Equal Opportunity Commission jurisdiction. However, Mr Sidoti is monitoring the policy of detention in relation to asylum seekers, mainly boat arrivals, who have been housed in the Port Hedland Detention Centre, the processing of their applications and the conditions under which they are detained.¹⁴ The Commissioner also outlined the conflict which developed in 1996 between himself and the Department of Immigration and Multicultural Affairs over his confidential letters to detainees at Port Hedland. The Department had declined to pass on letters from the Commissioner. He sought a ruling from the Federal Court which subsequently upheld the right of the Human Rights Commissioner to write confidentially to any person held in any detention facility in Australia. In response, the Government introduced legislation to remove that power from the Commissioner. Debate on the legislation has been adjourned and negotiations are taking place on a new protocol to govern the use of the power.

1.23 In relation to women's rights, Mr Sidoti mentioned an initiative taken by the Sex Discrimination Commissioner through the Asia Australia Institute. The Institute provides an annual allocation to bring to Australia a woman in a leadership position in the Asia Pacific with a view to the exchange with Australian women of ideas and methods in order to increase understanding of the issues affecting women in their respective countries¹⁵.

1.24 The rights of people with different sexual orientation from the majority are inconsistent between states, but this status is under review by the Senate Legal and Constitutional References Committee. That Committee is conducting an inquiry into Sexuality Discrimination which is due for release in early June. The Human Rights and Equal Opportunity Commission made a submission to this inquiry, and this appears to be the extent to which the Commission is currently dealing with that matter.

Concluding Remarks

1.25 While this is a brief summary of what was said by the Commissioner and President, it is necessary to point out that the workload of the Commission is intense. These issues are often only at the forefront and are likely to be only just ahead of other areas such as disability discrimination or the continuing problems of racism in Australian society. Sir Ronald Wilson expressed both a warning and a concern at the end of the proceedings:

My anxiety for the future is simply the intransigence of racism in the Australian community and its effects in relation to newer Australians, if I can use that term. ... [Y]ou could go to almost any level of Australian life and find there is still an endemic racism. So when I make public announcements of how Australia is basically a fair society and getting fairer ... I am conscious at the same time that there is a need to undergird those remarks, and I usually try to with the

14 *ibid*, pp. 32-33.

15 *ibid*, p. 42.

challenge of overcoming complacency. Of course, [attitudes to] the indigenous peoples are an example of continuing racism which, I believe, must really be brought home to the consciousness of all Australians.¹⁶

16 *ibid*, p. 43.

SECTION 2

Issues Particular to the Commonwealth Ombudsman

2.1 The Ombudsman's office deals with 'the everyday human rights of citizens in their dealings with Government agencies of various kinds. Our brief is to ensure the fairness and transparency in the way they are dealt with'.¹ The Ombudsman, Ms Philippa Smith, addressed the Committee on Wednesday 25 September 1996 with particular reference to the Annual Report for 1995-96. She raised a number of questions within the framework of the accessibility of the Ombudsman's services, the effectiveness of operation of the Office and the trends and issues discernible from the complaints.²

The Complaint Load

2.2 In the last year, the Office received 22,000 complaints and a further 21,000 inquiries. This was an overall increase of 28 per cent. These increases occurred in relation to the departments which had the greatest public contact. The departments attracting the most complaints included:

- Department of Social Security, up 56 per cent;
- Department of Education Training and Youth Affairs, up 68 per cent;
- Child Support Agency, up 2 per cent;
- Australian Taxation Office, up 40 per cent; and
- Australian Federal Police, up 24 per cent.³

Funding

2.3 Funding for the Ombudsman's Office has been reduced by 20 per cent over two years, a loss of \$1.7 million over the two years on an annual budget of \$9.3 million. The reduction has led to the closing of the office in Tasmania and its replacement with a toll free number to Melbourne, the loss of two community liaison officers, one for indigenous people and one for non-English speaking people and an increase in the use of the Ombudsman's discretion, ie, complaints that are received but declined any investigation. The discretion rate has gone up over the last year from 40 per cent to 50 per cent.⁴ This would leave 4,000 cases which would not be dealt with in a year.⁵

The Reasons for Complaints

2.4 When asked about the reasons for the increase in complaints to her Office, Ms Smith put forward a number of reasons:

1 Transcript, 25 September 1996, p. 2.
2 *ibid*, p. 2.
3 *ibid*, p. 3.
4 *ibid*, pp. 14-15.
5 *ibid*, pp. 17-18.

- the complexity of government administration and rules, particularly in terms of eligibility rules;
- gaps and overlaps between departments;
- the need for clear and more timely advice, common transparency.⁶

2.5 There were certain features of the current trends in administration which exacerbated the problems. Many of these features were related to budget cuts; others to 'modern' methods of administration. The major problems discussed were:

- (a) Under pressure of time, officials were less and less inclined to give people assistance and information basic to their requirements, unless people knew to invoke the **Freedom of Information Act**.
- (b) As part of the streamlining of services, there was an increasing tendency to give **oral advice**. It was quicker and more immediate. However it led to complaints where there was a lack of records about the advice given, possible denial that the advice was given, or incomplete, contradictory or ambiguous advice.
- (c) The increasingly widespread practice of the **contracting out of services** brought complaints from both contractors and customers about the use of selective tenders, the lack of clarity about service delivery standards and the lack of clarity about whose responsibility it is when things go wrong.
- (d) The tendency to use **self assessment** as a means of determining what services or entitlements people might be eligible for. This was combined with a 'three month rule'⁷ after which entitlements were forfeited. Unless people, often the more vulnerable, knew what questions to ask about complicated legislation, they would lose entitlements they did not know they had.⁸
- (e) The use of **teleservices**, a means by which the need for personnel was reduced, generated a large number of complaints from people who could not get through the system or could not access the kind of information they needed.

2.6 Given the rapidity of change, Ms Smith warned the Committee that:

Unless there are some 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.⁹

6 *ibid*, p. 4.

7 According to Ms Smith, the three month rule 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 back date, they forfeit their rights even if they would have been entitled. The forfeiting of rights occurs even if departmental advice was incorrect. Transcript, 25 September 1996, p. 5.

8 *ibid*, p. 4.

9 *ibid*, p. 17.

2.7 An example of some of the problems listed above can be found in the new CES arrangements. The structure of some Commonwealth departments is changing to accommodate budgetary pressures. One case that Ms Smith referred to was the Public Employment Placement Enterprise (PEPE). PEPE is a corporatised version of the old CES, which is competing against private sector agencies. In essence it is an employment finding service. The key issue for the Commonwealth Ombudsman is that the service is operating as if privately owned and therefore her scrutiny power is diluted. Ms Smith stated that 'it is going to be critically important that accountability mechanisms like the Ombudsman, the FOI 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 (sic) whether people get their entitlements or they do not'.¹⁰

Jurisdiction

2.8 The Ombudsman has put to Government a series of recommendations which she believes will address some of the matters raised at the hearing. On the matter of jurisdiction there were four propositions for possible legislative amendments:

- Introduction of a time limit within which an Ombudsman's report and outstanding recommendations would be considered by the Prime Minister and Parliament (a period of two months is recommended).
- A process by which a public report from the Ombudsman which raises issues of public importance (but does not require a decision on outstanding recommendations) can be tabled in Parliament. The model used in the NSW Parliament whereby Ombudsman's reports must be tabled on the next sitting day after receipt is recommended.
- Establishment of the Ombudsman's office as a Parliamentary office rather than as an outrider agency of the Prime Minister and Cabinet (PM&C) portfolio for budget purposes. The Ombudsman is a statutory officer reporting direct to Parliament, yet the current administrative arrangements mean that the budget is considered as part of the PM&C portfolio.
- The broadening of the jurisdiction to allow the investigation of complaints about core government services being provided indirectly by contractors.

2.9 Jurisdiction alone will not ensure the effective operation of the office. It is axiomatic that, as the case load rises, funding must in some way match the demand. At present it is in an obverse relation to the demand. In a climate of managerial theory which sees the importance of incentives to achieve best practice, a constant ratio which fixed funds to demand in the Ombudsman's office might be an incentive to government to improve its administrative practice. Given that the Ombudsman's Office reports to the Parliament, it is Parliament which needs to take responsibility for the discrete funding of the office from a specific parliamentary allocation in a way similar to the Office of National Assessments (ONA). Ms Smith saw the Parliament's need for information during a time of rapid change as a significant imperative for this recommendation:

10 *ibid*, p. 11.

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.¹¹

2.10 The Committee notes that the matter of the independence of the monitoring agencies in the Commonwealth has already been dealt with by the Joint Committee of Public Accounts (JCPA) in relation to the Australian National Audit Office (ANAO). In August 1996, the Minister for Finance, Hon John Fahey, MP, referred to the JCPA the matter of the independence of the ANAO in the following terms:

That the JCPA is requested to:

- suggest appropriate measures that could be incorporated into the Auditor-General's Bill, or other legislation, to support the functional independence of the Auditor-General, in keeping with the nature of that office; and
- conclude its examination of the issues and furnish a report not later than two months from the date of this reference.¹²

2.11 In October 1996, the JCPA reported to Parliament with the following general recommendations:

- First, the Committee recommends appointing the Auditor-General as an 'Independent Officer of the Parliament' and enshrining in legislation a guarantee of the Auditor-General's absolute independence in carrying out audit functions. This clear legislative statement is pivotal to supporting the independence of the Auditor-General.
- Second, the Committee recommends that the administrative relationship between the Auditor-General and the Executive be made transparent, as a guard against Executive influence over the operations of the Auditor-General. This could be achieved by giving the Audit Committee of Parliament effective oversight of the Auditor-General's operations.
- Third, the Committee recommends the enactment of specific provisions that extend to the Auditor-General explicit statutory rights and powers. Elements of the personal independence of the Auditor-General - such as tenure and remuneration; also the Auditor-General's audit mandate and operational powers, can be enshrined in legislation.¹³

11 *ibid.*, p. 17.

12 Joint Committee of Public Accounts, Report 346: *Guarding the Independence of the Auditor-General*, October 1996, p. vii.

13 *ibid.*, p. 59.

2.12 Further recommendations in the JCPA report address the specific aspects of structure, organisation and funding of the ANAO. Recommendation 7, in particular, suggests that the appropriation for the Australian National Audit Office should appear as a separate schedule in the Budget Papers. At the time of writing, the Auditor-General Bill 1996 was listed for debate in the House of Representatives.

2.13 The JCPA's recommendations are similar to those suggested by the Ombudsman for strengthening the independence of her office. In respect of these suggestions, a private member's bill, the *Ombudsman Amendment Bill*, was introduced into the House of Representatives in 1996. The bill seeks to establish a Joint Parliamentary Committee on the Ombudsman, which would monitor and review the performance of the Ombudsman and his/her functions, to examine the Ombudsman's annual report, to examine trends and changes in matters dealt with by the Ombudsman, and to examine and approve the proposed budget of the Ombudsman's office each year.

2.14 The Bill was subsequently introduced into the Senate and referred to the Finance and Public Administration Legislation Committee on 12 September 1996 for consideration. The Committee reported on 13 February 1997.¹⁴ The report concluded that issues with regard to the resources of the Ombudsman's Office, its independence from the PM&C portfolio and the desirability of giving it the status of an independent officer of the Parliament, would be better considered in a broader parliamentary review of the method of funding independent agencies such as the ANAO and the Commonwealth Ombudsman, rather than in the context of a private member's bill. The report recommended, inter alia, that wording similar to the text of section 53 of the Auditor General Bill 1996 be considered as a mechanism for enhancing the authority and independence of the Commonwealth Ombudsman. Under such a scenario, it would be possible for the Joint Standing Committee on Foreign Affairs, Defence and Trade or any other appropriate parliamentary committee to request the Ombudsman to submit annual draft estimates for consideration. This would give the Committee the opportunity to examine the resource levels and the independence mechanisms necessary to ensure the effective operation of the Ombudsman's office.

2.15 The Committee believes that there is merit in strengthening the office of the Ombudsman. Therefore the Committee recommends that:

3 the Government expedite the necessary changes to jurisdiction outlined in the 1995-96 Report:

- (a) to ensure that the Ombudsman's office retains maximum jurisdiction covering the changed structures of public administration;**
- (b) to allow maximum parliamentary control and scrutiny over the work of the Ombudsman's Office; and**
- (c) to ensure that funding to the office reflects the demand of Australian citizens for the Ombudsman's services; and**

14 Senate, Finance and Public Administration Legislation Committee, *Consideration of Legislation Referred to the Committee: Ombudsman Amendment Bill 1996*, February 1997.

- 4 a parliamentary review of the Office of the Commonwealth Ombudsman be conducted in order to examine the resources of the Ombudsman's Office, mechanisms for ensuring its independence from any specific portfolio, and the desirability of giving the Ombudsman the status of an independent officer of the Parliament.

SECTION 3

A Shared Concern: Racism and Indigenous Australians

3.1 Sir Ronald Wilson made a specific and eloquent plea on behalf of indigenous Australians. He was speaking specifically in relation to the expected Commonwealth submission to the inquiry he was conducting into the removal of Aboriginal children, but his comments had broader implications:

[The principle of self-determination] is at the heart of Aboriginal aspirations. What exactly does government see it as meaning? What does the opposition see it as meaning and, in the Australian context, it [is] fair to say that there is no suggestion from responsible Aboriginal leadership that self-determination extends to sovereignty and independence of that kind, that is political self-determination. But it does extend to achieving for Aboriginal people the same control over their lives that other Australians enjoy.¹

3.2 Both the Human Rights and Equal Opportunity Commission and the Ombudsman's Office have to confront racism as a significant issue. The Human Rights and Equal Opportunity Commission has a Race Discrimination Commissioner and an Aboriginal and Torres Strait Islander Commissioner. The Race Discrimination Commissioner is responsible for the implementation and monitoring of the *Racial Discrimination Act 1975*, which in turn implements the *International Convention on the Elimination of All Forms of Racial Discrimination*, ratified by Australia in 1975. The Aboriginal and Torres Strait Islander Commissioner was created in 1992 with an amendment to the *Racial Discrimination Act* in response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the Human Rights and Equal Opportunity Commission's National Report into Racist Violence.

3.3 Both Commissioners handle complaints, conduct major reviews and develop education and training programs in the area of their responsibilities. In the last year there have been studies and reports on the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, on indigenous health, on the operations of the *Native Title Act 1994*, the Alcohol Report, the Water Report, the Community Development Employment Program (CDEP) inquiry and the Filipino Women's Project and the major inquiry, conducted by the President of the Commission, into the removal of Aboriginal children from their families

3.4 The Commonwealth Ombudsman looks at the impact of the domestic departments' policies and practices on the equitable distribution of resources to indigenous peoples. Until this year's budget cuts there had been an indigenous and a non-English speakers liaison officer in the Ombudsman's Office. Specifically in response to a complaint from a community adviser that there were significant problems in relation to the Aboriginal

1 Transcript, 20 September 1996, p. 27.

camps at Alice Springs,² the Ombudsman's Office instituted an inquiry into service delivery to the Aboriginal community, especially in relation to the Department of Social Security (DSS). Preliminary problems identified in this survey include:

- lack of awareness and knowledge of DSS programs and services;
- communication failure leading to inability to meet compliance requirements;
- CDEP overlap issues (between DSS, DEETYA³ and ATSIC⁴) creating underpayments and overpayments;
- minimal access to bank accounts, postal services and the DSS itself, which creates difficulties for cheque cashing, and other money management problems.⁵

3.5 The Commonwealth Ombudsman provides significant information on government entitlements to indigenous Australians. The DSS, for example, requires that written correspondence be the primary form of communication between welfare recipients and the department. The problem, as identified by Ms Smith, is that '... illiterate people, ... do not understand what the letters [that are sent to them] are saying'.⁶ Ms Smith believed that indigenous Australians had special needs and faced limited access to social security because of current administrative procedures. The challenge for Commonwealth departments and for the Commonwealth Ombudsman was to simplify the complex requirements so that people from every background had equal access.

3.6 The Committee recommends that:

- 5 the Australian Government fund an indigenous person's position within the Office of the Ombudsman to give special focus to the needs of indigenous Australians.**

Conclusion

3.7 In general the two organisations have faced increasing workloads and decreasing funds to carry out their roles. The effect of this is the rationalisation of services to the people who utilise them and whose need, based on the statistics of complaints, is currently increasing; the role of each office is being undermined by budgetary pressures.

Ian Sinclair, MP
Chairman

2 It has been estimated that 40 per cent, as yet unverified, of the indigenous people who were eligible for payments did not receive them. Transcript, 25 September 1996, p. 7.

3 DEETYA - Department of Employment, Education, Training and Youth Affairs.

4 ATSIC - Aboriginal and Torres Strait Islander Commission.

5 Commonwealth Ombudsman: *Annual Report 1995-96*, p. 87.

6 Transcript, 25 September 1996, p. 8.