No. 72

1983

PARLIAMENT OF NEW SOUTH WALES

REPORT

OF THE

OMBUDSMAN OF NEW SOUTH WALES

FOR THE

YEAR ENDED 30 JUNE, 1983

Ordered to printed, 10 *November,* 1983

BY AUTHORITY
D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES–1983

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THE OMBUDSMAN OF NEW SOUTH WALES

EIGHTH ANNUAL REPORT

(1st July, 1982—30th June, 1983)

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(1st July, 1982 — 30th June, 1983)

Introduction

The Ombudsman of New South Wales submits an Annual Report to the Premier for presentation to Parliament. This is done in accordance with Section 30 of the Ombudsman Act, 1974, which requires him to report on the work and activities of his Office in the twelve months ending 30th June. The report is to be submitted as soon as practicable after that date. The Annual Report must also contain an account of functions under the Police Regulation (Allegations of Misconduct) Act, 1978 as required under Section 56 of that Act.

The present Ombudsman, G. G. Masterman Q.C. was appointed from 18th June, 1981. Accordingly this is his second Annual Report. The report covers the work of the Office to 30th June, 1983 and statistics are for that period. However, developments up to the date of writing this report (October 1983) have been included where particularly relevant.

This year the full Report is followed by a summary of the major issues dealt with during the year. The summary has been written for those members of the public who want an overall understanding of the Ombudsman's role, but are not concerned with details of administration or particular investigations.

The format of the Report is as follows:-
Part I
Introduction
Section A: Ombudsman Act: General Area
Section B: Ombudsman Act: Local Government
Section C: Ombudsman Act: Prisons

Part II
Police Regulation (Allegations of Misconduct) Act

Part III
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Part IV
Statistics

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Summary

Written Complaints by Major Categories

The number of complaints received during the year has increased by approximately 20% over the previous year (see table below).

	1981-82	1982-83
OMBUDSMAN ACT		
(a) Departments and Authorities (other than Corrective Services)	2291*	2761
(b) Local Councils	860	1058
(c) Department of Corrective Services	741*	845
POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT	1121	1349
	5013*	6013

* Corrected figures — excludes oral complaints

Oral Complaints and Inquiries

This Office has three full time interviewing officers who deal with members of the public on the telephone and in face-to-face interviews.

When a member of the public contacts this Office with a complaint the interviewing officer has to determine whether or not the matter falls within the Ombudsman's jurisdiction. If it does, the caller is advised to submit the complaint in writing and encouraged to attach any relevant documents for consideration.

The interviewing officer must sometimes, for various reasons, write out the complaint on the complainant's behalf. When this is done, he or she then reads the complaint to the complainant and obtains a signature.

There are, of course, many complainants whose problems fall outside jurisdiction. The interviewing officer is expected to provide a sympathetic response and accurately refer them to a more appropriate body.

Often callers have been wrongly directed to the Ombudsman by government or private agencies. In such cases an explanation of why this Office is unable to assist is given, so that complainants are not left with the feeling that they are just being referred from one department to another.

As much of the interviewing officers' job relates to the referral of complainants to other agencies, they are expected to have a wide knowledge of the functions of State Government Departments, Statutory Authorities, Local Councils and private organisations. For example, many callers to this Office have legal problems, which naturally, are of great concern to them. The interviewing officer has to explain that the function of this Office is not to provide legal advice and then refer the caller to a solicitor, Chamber Magistrate or the Public Solicitor's Office. Should their problems stem from the conduct of their Solicitor, the complainants are referred to the Law Society of New South Wales.

Statistically, this Office receives about thirty telephone enquiries and three to ten interviews per day. During the period 1/7/82-30/6/83 approximately 1,000 interviews were conducted and over 7,500 telephone calls were received. In addition, visits to prisons and juvenile institutions lead to many oral complaints or inquiries. These are often handled on the spot.

There is still some confusion in the community about the role of the Ombudsman. Even within the public service and community information networks, there is some uncertainty about the role of the Ombudsman and the services provided by this office. Public awareness campaigns over the next year will try to overcome this problem, and make members of the public more aware of their rights.

PART I

Section A: Ombudsman Act: General Area

1. The Role of the Ombudsman

The Ombudsman is appointed under the Ombudsman Act, 1974 to investigate citizens' complaints about N.S.W. Government Departments, Authorities and Local Councils, and to report any findings of wrong conduct. The Police Regulation (Allegations of Misconduct) Act, 1978 confers certain powers in relation to complaints about the conduct of members of the police force.

During the course of the year under review the Supreme Court of New South Wales had occasion to examine some aspects of the role of the Ombudsman under the above legislation. The specific cases before the courts involving the Ombudsman are discussed in paragraph 39 below. However, in one judgment in particular, Mr Justice Lee of the Supreme Court adverted to the Ombudsman's role as a "lamp of scrutiny". His Honour adopted as an accurate statement of the overall role of the Ombudsman under the Ombudsman Act the following passage from a judgment of a Canadian Judge (Milvane C. J.):-

> "These sections seem to make it clear that as an ultimate objective, the Ombudsman can bring to the legislature his observations on the misworking of administrative legislation. He can also focus the light of publicity on his concern as to injustices and needed change. It must, of course, be remembered that the Ombudsman is also a fallible human being and not necessarily right. However, he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good."

His Honour Mr Justice Lee then went on to say in relation to the New South Wales position that:-

> ". . . it can fairly be said that the 'lamp of scrutiny', to which he referred, when held by the Ombudsman in an investigation under the Ombudsman Act 1974 indeed burns brightly, but it is all too obvious that it only flickers uncertainly when the Ombudsman acts under the Police Regulation (Allegations of Misconduct) Act. If this state of affairs is not to obtain in the future, then Parliament, no doubt, will make appropriate amendment to the legislation or will devise some other methods of dealing with complaints against the Police."

2. Need for Independence from Bureaucracy

In the last Annual Report reference was made to the resolution of the International Bar Association defining the role of an Ombudsman. That resolution and indeed universal general literature on the subject acknowledges both the responsibility of an Ombudsman direct to Parliament and the corresponding need for independence from the bureaucracy.

In New South Wales, the provisions of the Public Service Act have the effect of subjecting the Office of the Ombudsman in a number of ways to the control of the Secretary of Premier's Department. Under current legislative and other arrangements the Secretary of Premier's Department is "the Departmental Head" of the Office of the Ombudsman. This is no matter of mere title; many areas of administration within the Office of the Ombudsman are subject to the Departmental Head's control. On the other hand, the Secretary of Premier's Department is a "public authority" in terms of the Ombudsman Act whose conduct may be (and from time to time is) subject to complaint to the Ombudsman by members of the public and consequent investigation by the former. The position of the Ombudsman in New South Wales of being subject in important administrative areas to one of the leading (if not the leading) members of the bureaucracy is anomolous and undesirable.

One somewhat bizarre consequence is that, in formal terms, the Ombudsman is said not to be entitled even to communicate with the Public Service Board or other Departments on staffing or administrative matters except through the agency of the Premier's Department. Recently, following direct contact between the Ombudsman and the Public Service Board on part time leave without pay and job sharing, the Secretary of Premier's Department referred to direct communication with the Board as being "inappropriate".

In the critical area of the staff provided to the Ombudsman the Secretary of Premier's Department is supreme. He may laterally transfer, at his sole discretion and without the consent and, indeed, against the wishes of the Ombudsman, staff from Premier's Department or its satellite organisations to the Ombudsman Office. He may likewise transfer or, importantly, refuse to transfer staff back to Premier's Department. Mobility of the Ombudsman staff, or the lack of it, is uniquely within his discretion. The Ombudsman while responsible to Parliament to ensure the vigorous, effective and independent investigation of complaints against the bureaucracy, is required to do so with staff determined ultimately by the Secretary of Premier's Department. This topic is taken up in more detail in paragraphs 46, 48 and 56.

Authorities such as the Auditor General and the Electoral Commissioner are separate administrative units not responsible to a "Departmental Head". There is a strong case for the Ombudsman's being put in the same position[1]; or, indeed, taken outside the scope of the Public Service Act altogether. The existing situation is causing the present Ombudsman concern and may need to be the subject of a detailed special Report to Parliament in the forthcoming year.

Footnote

[1]The former Ombudsman, Mr Smithers in 1976 sought the gazettal of the Ombudsman as a permanent head; this would have made the Ombudsman free from administrative control by the Secretary of Premier's Department. The proposal was agreed to by the Public Service Board but ultimately rejected by the Premier.

3. Ombudsman: Treasury and Budget

Some overseas Ombudsmen are in the position of relative freedom from a fixed line by line budget or, in a few cases, even from a one line budget. This gives them a flexibility to expand or contract their operations depending on the current pressure of public complaints and own motion investigations they believe necessary.

It is accepted here that, particularly in a time of economic stringency, Governments must have estimates of the extent of projected expenditure by Departments and Authorities. Although originally the product of an executive department, Treasury, budget allocations are ultimately approved or ratified by Parliament. Accordingly, the Ombudsman must, and does, accept the discipline of the budget.

Nevertheless it is the right and duty of an Ombudsman charged with investigating complaints against the bureaucracy to comment in the Annual Report to Parliament on the manner in which the budget may limit or impair the extent to which the functions of investigating public complaints may be carried out. Subsequently, therefore, as in the case of last year's Annual Report there appear topics which discuss the current budget. As a reading of these items will show in some cases, most notably in an upgraded telephone system, the budget requests of last year have been met; in others Treasury has considered that the financial exigency of the times preclude fulfilment. In general, by an increased budget provision the Treasury has enabled the Office of the Ombudsman to cope with its substantially increasing workload of public complaints. The opportunity given for full and frank discussion with Treasury officials in review of budget proposals and generally during the year has been appreciated.

4. Secrecy

The Ombudsman and his officers are bound to secrecy about their investigations on their findings. Section 34 of the Ombudsman Act imposes a fine of $1,000 for the disclosure of information to anyone other than the authority, the responsible Minister, the complainant, or a Royal Commissioner.

The secrecy provisions of the Ombudsman Act conflict with public interest when no statement can be made about the findings in a case which affects many people in the community. In his Annual Report for the year ended 30th June, 1982, the Ombudsman pointed out that in other countries, notably Sweden, the files of the Office of the Ombudsman are open to the public and the media. Other countries and some Australian States while not going as far as the Swedish model, give the Ombudsman the discretionary right to publish information in the public interest.

In the past year, the Office has again received many reasonable requests for copies of final reports which have been mentioned in the press. It has been a matter for concern and regret that the law forces us to refuse them.

The complainant in a particular case is not bound by the provisions of Section 34. He or she is free to take the final report to the media, and in matters of public interest this frequently happens. The result is that the particular newspaper or television station approached by the complainant has a 'scoop' or exclusive story. Journalists from rival organisations are tempted to see the Ombudsman's Office as acting in a partial or unfair manner. It is necessary to explain that the Ombudsman can exercise no discretion in the matter while bound by secrecy provisions. It would be far better public relations to make a press statement or a published report available to all interested members of the public and to media outlets.

Amendment of Section 34 to give the Ombudsman the right to publish at his discretion would:-

- Bring New South Wales into line with accepted practice in South Australia, Tasmania and the Commonwealth of Australia, as well as in Sweden, Denmark and other overseas countries.
- Conform with the spirit of proposed freedom of information legislation: the right of the public to know the basis on which decisions which affect citizens are made.
- Prevent the misunderstandings and resentments which now occur.

Three matters of public interest arose in the year under review which illustrate the constraints imposed by the secrecy provisions. The first concerned the maintenance of power stations, the second the operation of Police-Citizens' Boys Clubs, and the third the unrestricted operation of brothels in the Kings Cross/Darlinghurst area.

During 1981 power restrictions throughout parts of New South Wales created concern among consumers. One result was a high degree of public interest in the Ombudsman's report on his inquiry into alleged inadequate maintenance by the Electricity Commission of Liddell and other power stations. The final Report was given to the Minister and to the several complainants on 22nd December, 1982. The then Minister for Energy, the Hon. D. P. Landa, LL.B., made the report freely available and authorised this Office to make it available on his behalf. Some 70 copies of the Report were consequently issued from this Office in response to requests from engineers, the editors of technical journals, and other interested persons. However, when the Hon. T. W. Sheahan, B.A., LL.B., became Minister for Energy and Finance on 1st February, 1983, the decision to make the report available was reversed. At the risk of appearing inconsistent, this Office then had to refuse requests for copies. In fact, the responsible Ministers were able to exercise their discretion to publish, but the Ombudsman was not.

An investigation of administrative practices of the Glebe Police-Citizens' Boys Club, the Federation of N.S.W. Police-Citizens' Boys Clubs and other authorities attracted considerable publicity once the final report was issued. Those media outlets which did not have access to the complainant's copy of the report were anxious to obtain copies, as were a number of government authorities, including officers of the Corporate Affairs Commission and of the Premier's Department. In this case also, the Ombudsman's office had to refuse copies of the report even to persons with a close interest in the subject, and to refer enquiries to the responsible Minister/s. The Ombudsman's Office prides itself on being helpful and informative in its dealings with the public, and it goes against the grain to have to give people a bureaucratic brush-off in terms of Section 34.

A copy of the final report of the Ombudsman in respect of the Sydney City Council's failure to take reasonable steps to protect the amenity of persons in residential areas from the encroachment of a clear commercial use, brothels, apparently came into the hands of one of the leading Sydney dailies. An "exclusive" article duly appeared. In the belief of the Ombudsman this article (no doubt unwittingly) inaccurately summarised one important area of the Report. Yet, because of the secrecy provisions of the Act, the Ombudsman could not seek to correct the terms of the newspaper article by a public statement or even a letter to the Editor. This surely reduces the secrecy provision to an absurdity.

Even if the full openness of the Swedish Ombudsman system is not considered desirable in New South Wales, amendments to the secrecy provisions of the Ombudsman Act are clearly required in the public interest.

5. Resolved Matters

There is no specific provision in the Ombudsman Act for resolution of complaints to the Ombudsman by agreement between the complainant and the Department or other authority. However, resolution of a complaint by agreement is clearly desirable in the interest of all. Frequently, at an early stage a more senior officer of an authority from whom the Ombudsman has sought information on a complaint will review the issues and reach a decision favourable to the complainant, without the need for full investigation by the Ombudsman. At other times a joint inspection or other meeting during the course of an Ombudsman investigation will lead one or other of the parties to modify their views. In these circumstances it will often be appropriate to discontinue an investigation at this stage. (Modified statistics introduced during the year under review provide for classifying discontinued matters under three headings — resolved to the complainant's full or partial satisfaction, and discontinuance for other reasons.)

In some matters where resolution has taken place between the particular complainant and the authority it is not appropriate to discontinue the investigation. For example, the particular complaint may be merely one instance of an administrative problem which should be the subject of full investigation and recommendation. In other cases, the seriousness of the incident complained of might be such as to warrant a report to the responsible Minister, even though the complainant considers the matter to have been resolved. An important function of Ombudsman investigations is to provide Ministers with an independent source of information about their Departments.

6. Draft Wrong Conduct Reports

The practice adopted in this Office since about mid 1981 is that, where an Investigation Officer, following investigation, believes that the conduct of a public authority has been wrong in terms of the Ombudsman Act, he/she prepares a draft report outlining, inter alia, the relevent facts disclosed by the investigation and the conclusions to be drawn from those facts. The draft report invariably includes recommendations for action to remedy or mitigate the effects of the wrong conduct.

Before the Ombudsman finalises his own views on the draft report it is forwarded to the head of the relevant public authority and, where appropriate, to any public servant or other person in respect of whom adverse comment has been made in the draft report (Section 24). At the same time, in the normal course of events, a copy of the draft report is sent to the complainant.

In both cases, the purpose of distributing the draft report (which is clearly described as confidential and not to be disclosed except to legal or other professional advisers) is to obtain submissions and comments to be taken into account in preparing a final report. In this context, any submissions or comments the complainant might wish to make can be taken into account, as well as those made by the public authorities concerned.

Persons or authorities criticised in a draft report have a vital interest and a legal right to put forward their submissions and indeed in appropriate cases, to call further evidence. However, in normal circumstances complainants should also have the same opportunity to say that criticism in a draft report does not go far enough or that facts or submissions put forward by them have been misunderstood.

In certain circumstances where premature disclosure of the terms of a draft report may unduly prejudice an authority or public servant, or where it is thought the complainant cannot contribute significantly to the final report, the draft is not sent to the complainant. That situation is the exception rather than the rule.

In some cases a wider distribution of a draft report would be desirable, but this is often precluded by the secrecy provisions of the Act.

7. Consultation on Draft Reports

Section 25 provides that draft wrong conduct reports should be sent to the Minister responsible for the particular department or authority under investigation before they are made, and the Minister is given the opportunity of requiring a consultation with the Ombudsman on the terms of the draft report. A number of Ministers exercise this right, and helpful (and sometimes very vigorous) discussions have taken place.

These consultations provide an opportunity for the responsible Minister to express personally his views (whether by assent or dissent) on the draft report, and to make suggestions for change. The departmental head or other departmental officers sometimes are present at these discussions and this can be useful and constructive. However, the consultations are not to be seen as another opportunity for the department (as distinct from the Minister) to reiterate its views. By statute and practice the authority will previously have had full opportunity to put its views on the draft.

In some cases the Ombudsman may believe that, if a consultation with a Minister is to take place, the departmental head or other departmental staff (as distinct from the Minister's own aides) should not be present. The Crown Solicitor has supported the Ombudsman's right to take this stance, advising as follows:-

> ". . . The Act, in various provisions, such as s.26 (which is, of course, an important instance, because of the cross-reference to that section in s.25), s.28 and s.34(a), distinguishes between the responsible Minister and heads of authorities; and in s.25 only the Minister is mentioned. Moreover, the functions of the Ombudsman of investigating and, where he thinks it right to do so, reporting adversely on the conduct of public authorities, are such as to suggest to me that it was unlikely that the legislature intended that he should have to consult, or even to allow to be present during a consultation with the Minister, officers whose very conduct he may have investigated and be proposing to criticise. Those considerations seem to me to favour the view that the Ombudsman is entitled, if he thinks it appropriate to do so, to insist on dealing with the Minister alone; and I think they outweigh those earlier referred to."

8. Reports to Ministers

The Ombudsman Act requires a report to be made to Ministers where a finding of wrong conduct has been made about a department or authority. As explained in last year's Report, the object of scrutiny under the Ombudsman Act is the bureaucracy. Investigations are not concerned with the acts or decisions of Ministers.

During 1982-83, 87 wrong conduct reports have been made to Ministers under Section 26 of the Ombudsman Act. Some of these reports have been the result of complaints from several different people. In cases where there are multiple complainants about a similar issue, a single wrong conduct report is usually written.

The largest sub-group of wrong conduct reports concerned local Councils' denial of liability on small claim cases without giving reasons and on the mere say so of their insurers. Thirteen reports were written on cases of this kind. The topic is dealt with in more detail later. Major wrong conduct reports are discussed later either under the topic headings of this Annual Report or in the Case Notes.

9. Reports to Parliament

The Ombudsman has the power to make two types of report to Parliament, apart from the Annual Report. They are essentially special reports (Section 31) and non-compliance reports (Section 27).

Reports may be made under Section 31 of the Ombudsman Act on any issue relating to carrying out his functions that the Ombudsman regards as significant and in the public interest. Reports are not made under Section 27 unless the recommendations made in a report to a Minister have not been carried out.

The Police Regulation (Allegations of Misconduct) Act also gives the Ombudsman the right to report to Parliament under Section 30(2).

The previous Annual Report forecast a significant increase in the number of Section 27 reports tabled during 1982-83. The forecast has proved accurate. The following reports have been made during the past year.

Special Reports Under Section 31 of the Ombudsman Act

Report on the Deficiences and Limitations of the Current Legislation which Regulates the Handling of Citizens' Complaints against Police — Investigation of Alleged Police Involvement in Tow Truck Rackets.

Report on the Limitations of the Ombudsman's powers in respect of Investigations under the Ombudsman Act, 1974 of the Commissioner of Police and Non-observance of notification provisions of the Police Regulation (Allegations of Misconduct) Act — Inquiry into allegations of blank search warrants.

Non-compliance Reports Under Section 27 of the Ombudsman Act

Report concerning the Silverwater Bus Incident. (Department of Corrective Services)

Report concerning Cell Searches at Parramatta Gaol, January 1982. (Department of Corrective Services)

Report concerning Assault on Maria Jason at Mulawa Training and Detention Centre for Women. (Department of Corrective Services)

Report concerning inadequate offers of compensation for the acquisition of land in open space, corridor and similar zones. (Department of Environment and Planning)

Reports under the Police Regulation (Allegations of Misconduct) Act

Report concerning a complaint by Mr E. L. Nam — (wrong use of arrest procedure instead of summons).

Report concerning a complaint by Mr Allan James Matheson.

Report concerning a complaint by the Western Aboriginal Legal Service Limited.

Report concerning a complaint by Mr Neil Andrews, Solicitor, Aboriginal Legal Service.

Report concerning a complaint by C.A.M.P. Lobby Ltd.

10. Annual Report: Delay in Printing

The previous Annual Report of this Office was tabled in Parliament on the 11th day of November, 1982 and was ordered to be printed on the same day. It was eventually printed on 4th August, 1983 and copies were forwarded to this Office and made available to the public.

During the period 11th November, 1982 to 4th August, 1983 this Office was in touch with the Government Printing Office about the printing of the Report.

The delay in the printing of the Report was causing some concern when in May 1983 a formal complaint was received about the failure of the Government Printing Office to print the Annual Report of the Ombudsman for the period ending 30th June, 1982. The complainant said:-

> ". . . Since the creation of the Ombudsman in this State I have been sent a copy of his Annual Report and I have requested a copy of your report in the middle of last year. I understand that your report was tabled before the House in October of this year but to date I have not yet received a copy of your report. I understand the delay is in the Government Printing Office and I accordingly bring this to your attention as well."

On receipt of the complaint, this Office wrote to the Government Printing Office and asked for the comments of the Government Printer about the complaint. The Government Printer replied by saying:-

> ". . . there has been a delay in the production of the Ombudsman's Annual Report. However, Annual Reports are not normally allocated a high priority. There is provision for a department to advise this office of any case where a particular report is needed quickly and then we act accordingly. Such a request was not received in respect of the Ombudsman's Report.
>
> Annual Reports create a large amount of work which we receive at about the same time. The time taken to produce them has not been a point of major concern in the past. Earlier this year we reviewed procedures in relation to Annual Reports and expect to decrease their overall production time in the future."

It was true that this Office had not made a formal request for urgency concerning the Annual Report. On the other hand, this Office took the view that an Annual Report was, because of its very nature, needed quickly.

Preliminary enquiries were made about the publication of the Annual Reports of some other Government bodies (specifically, the Department of Consumer Affairs, the Anti-Discrimination Board, and the Department of Youth and Community Services) to assist in deciding whether there was any evidence suggesting a need to conduct a formal investigation about the delay in printing the Annual Reports. The following information was obtained:-

1. Department of Consumer Affairs

Annual Report 1979-80:
— Submitted to Minister 24/10/80
— Ordered to be printed 13/11/80
— Annual Report printed 21/1/81
— Report delivered on 26/1/81

Annual Report 1980-81:
— Submitted to Minister 24/11/81
— Ordered to be printed 3/12/81
— Annual Report printed 2/5/82
— Report delivered on 4/8/82

Annual Report 1981-82: — Tabled in February 1983. As at August 1983 the Report had not been printed.

2. Anti-Discrimination Board

Annual Report for year ended 30 June 1980:
— Ordered to be printed 27/11/80
— Annual Report printed 15/4/81
— Report delivered on 22/4/81

Annual Report for year ended 30 June 1981:
— Ordered to be printed 26/11/81
— Annual Report printed 10/3/82
— Report delivered on 13/4/82

Annual Report for year ended 30 June 1982:
— Ordered to be printed ?
— Annual Report printed 25/7/83
— Report delivered on 4/8/83

3. Department of Youth and Community Services

Annual Report 1979-80: — Submitted to Minister 2/12/81
— Ordered to be printed 3/12/81
— Annual Report printed 25/6/82
— Report delivered on 27/7/82

Annual Report 1980-81: — Submitted to Minister 29/3/83
— Ordered to be printed 30/3/83
— Not yet printed as at August 1983. (Although it would appear that this is not due to any fault on the part of the Government Printer.)

These very superficial enquiries showed delays in the publication of annual reports ranging from three to eight months. These delays on their own without further explanation were thought to justify further enquiry. A formal investigation was therefore commenced concerning the conduct of the Government Printer in the production of Annual Reports for Government Departments and Instrumentalities. At the time of writing this Report that investigation has not been completed.

11. "Own Motion" Investigations

Under Section 13 of the Ombudsman Act the Ombudsman has power to conduct investigations into alleged maladministration both where there has been a complaint and where there has not. The latter is known as the "own motion" power.

In many cases a complaint by a member of the public can lead to an investigation which is based partly on that complaint and partly on the own motion power. This can occur where the original complaint is inadequately expressed or where preliminary enquiry identifies a related area of conduct as requiring investigation. To permit such an "expanded" or "amended" investigation, the investigation officer acting under delegated power, should give to the authority a written notice complying with Section 16 of the Act clearly defining the "conduct the subject of investigation".

Some authorities misunderstand this use of the two partially overlapping powers. They sometimes complain "that the investigation has gone beyond the complaint", or suggest that a finding of wrong conduct cannot be made on an issue not raised in the original complaint. As already explained, this type of comment overlooks the scope of the "own motion" power. In substantive terms it is important that the Ombudsman's investigation can reach what is believed to be the relevant conduct rather than be confined to the original statetment of complaint by a member of the public who may have inadequate knowledge of the administrative processes involved.

"Own motion" investigations without any complaint whatsoever can be of considerable significance. A complaint to the Ombudsman presupposes a level of knowledge and/or self confidence that many in the community do not possess. The Ombudsman's Office must not become the exclusive preserve of the intelligent and articulate. The Ombudsman and his officers should be continually alert to dissatisfaction with administrative process in the community which because of such factors may not find its way into formal complaint. Despite heavy and increasing workloads, areas for "own motion" enquiry must be identified and pursued. Organisations in touch with less affluent or migrant communities can assist with identifying problems suitable for investigation by the Ombudsman.

During the course of this year the Office has been pursuing its investigation of the practice of Councils in denying liability on small claims without any statement of reasons, and often on the mere say-so of Councils' insurers. This investigation has proceeded on a State-wide basis. Where no complaint has been received the Office seeks full information of the last three claims for which liability has been declined. This provides a basis for an "own motion" investigation of the reasonableness and fairness of the procedures used by the particular council.

There have been other more limited "own motion" investigations during the year. This is an area, however, in which more can be done, and public comment is invited.

12. Royal Commission Power Enquiries

As indicated in last year's Annual Report, since mid 1981, the Ombudsman has decided to utilise Section 19 enquiries exercising Royal Commission powers in a number of investigations. Typical cases include those where there has been excessive delay on the part of the authority in replying to enquiries and where, because of conflicting accounts of events or otherwise, direct questioning by the Ombudsman is considered desirable. A further benefit of Section 19 enquiries is

that oral evidence is sometimes much franker than written responses to questions. One public servant described administrative practices in his section by saying:—

> "Look, if you saw some of the things that happen down at our place, Mr Masterman, nothing is extraordinary, to be quite honest. Strange things happen — this is a crook one!"

Few official letters are so direct in admitting to mistakes or faulty systems.

During the year ended 30th June, 1983, 15 Section 19 hearings were held. In the first category were three different complaints in which the Department of Youth and Community Services had failed to reply to preliminary enquiries from an investigation officer despite numerous promptings. Mr W. Langshaw, then Director-General of the Department, was required to attend and answer questions pursuant to Section 19. In the three matters in question the answers provided enabled a speedy conclusion of the investigation. Perhaps even more importantly, as a result of oral discussions at the enquiry the promptness of the Department's responses to Ombudsman investigation letters has significantly improved. Another serious delay case in which a Section 19 enquiry was held involved the State Rail Authority of New South Wales. A report of this case appears as Case 22 subsequently.

The second category of Section 19 enquiries included most notably the Electricity Commission maintenance investigation which was completed in the latter part of 1982 after hearing 52 witnesses. Other Section 19 enquiries included investigation of two complaints involving the Sydney City Council: one concerning a letter written by Alderman Hartup to the Registrar of Co-operative Societies and another urgent investigation into steps being taken by the Council and the Traffic Authority of N.S.W. in respect of the closure of York Street. In each of those latter matters it was held that on the evidence no wrong conduct was established.

13. Consumer Claims Tribunal

In last year's Annual Report the Ombudsman reported his view that under the terms of the Ombudsman Act the Ombudsman had no jurisdiction to entertain complaints concerning the Consumer Claims Tribunal. He noted that he had advised the Government of this view which differed to some extent from that of the former Ombudsman. The Ombudsman indicated that if the Government wished him to have jurisdiction, amending legislation was necessary.

A review of the administration and operation of the Consumer Claims Tribunals is being conducted by the Senior Referee, Mr D. A. Turley. The Ombudsman was invited to make submissions as part of the review process, and did so in the following terms:-

> "A meeting of interested persons was held in this Office on 13th April. The matters set out hereunder represent the views of certain of my officers in the light of their experience in this area. In this regard, some reference was made to a report prepared by Mr P. Wilmshurst, a copy of which had been made available to this Office."

"1. Transcript or Record of Hearing

(a) The desirability and practicality of making some form of transcript of a Tribunal hearing was discussed. It was noted that the possibility of a proper record of proceedings being kept had been canvassed on a previous occasion by the former Ombudsman and is documented in the Ombudsman's 1980/81 Annual Report. It is there recorded that after consultation between the former Ombudsman and the then Minister for Consumer Affairs, the Minister indicated that he had written to the Senior Referee directing that, in future, each Referee should make notes of such aspects of cases before them as might later become matters of contention. The impression gained from the Wilmshurst report is that not all Referees are adhering to the former Minister's direction.

(b) The majority view expressed at the recent meeting was, again, that a transcript was desirable. However, in view of the expense and other difficulties said to be involved, it was suggested instead that some form of record be made and, in particular, a statement of the Referee's *reasons* for his decision be documented in each case on the file, in respect of both a hearing culminating in an order and an application for a rehearing.

(c) A minority view was expressed that such a requirement may erode the original intention of keeping the Tribunals as 'a cheap, quick and informal means of resolving disputes'. For this reason, a number of persons opposed the requirement that reasons for decisions be given; however, the majority felt

otherwise. It was not decided whether reasons as well as being noted on the file should be recorded on the order form but, ideally, any such statement of reasons should form part of the record and be freely available to all parties.

2. Disadvantage to Consumers in Hearings

(a) Officers expressed the view that consumers seeking resolution of a financial dispute through the Consumer Claims Tribunals are, in the main, inexperienced in the art of advocacy. It was considered highly likely that companies against whom claims are frequently made, would have in their employ experienced, well trained advocates who if they satisfy Section 30(3) of the Act would not be excluded from hearings and who could therefore regularly attend the Tribunals and acquire a high degree of skill in representing their employer's interests. The use of such practised and expert company representatives does not require the consent of the consumer who, by the same token, is required by the Act to obtain consent before he/she can employ a legal representative. Such a possibly anomalous situation would, in the view of investigation officers, act against the interests of consumers and result in inequality of representation.

(b) If there is inequality of representation a heavy burden is placed on the Referees to carefully consider the consumer's point of view. The general view was that the provisions of the Act which deal with representation need to be carefully examined with a view to ensuring that any inequality of representation is redressed and the orders made in these situations are truly 'fair and equitable to all parties' as is envisaged by Section 23(2) of the Act.

3. Administrative Support for the Tribunals and Pre-hearing Settlement Procedures.

(a) An essential element of an efficient Registry is a process of ensuring that documentation issued is accurate. In most, if not all, Court Registries there is an established position of 'checking officer' whose function it is to ensure that the procedural requirements of the relevant legislation are being complied with.

I understand that such a position has already been created on a trial basis in the Registry of the Consumer Claims Tribunal. If so, such a move, in the view of officers, is to be welcomed and ought to be made permanent. The checking officer or officers ought to check all processes issued from the Registry. Additionally, and arguably more importantly, the checking officer ought to check all claim forms lodged commencing proceedings so that, to use Mr Wilmshurst's words on p.17 of the report referred to earlier, 'claimants set out all details that can serve to inform respondents in the way the Supreme Court thinks they should be'.

In addition, checking officers should be given authority to reject claims which do not disclose a cause of action or which seek to litigate a matter clearly outside the Tribunal's jurisdiction. Contentious matters or matters where the claimant insists on lodgement could be referred to the Registrar for final decision. A matter clearly outside jurisdiction ought not, in the view of officers, be accepted by the Registry.

(b) In August 1982 the District Court, Sydney introduced a system of pre-trial conference. Such a system would seem to be worthy of consideration for implementation by the Consumer Claims Tribunal as it appears to be working successfully in the District Court jurisdiction.

The prime objective of such a system is to obtain settlement of cases and obviate the need for a hearing. The number of cases going to contested hearing would be reduced and incidents of delays in having matters heard would be reduced.

The main advantage of the system is that only contentious matters are heard. The number of hearing dates allocated and lost through matters being settled after listing but before hearing would be reduced. It may well be that officers of the Department could act as conciliators and record written terms of settlement signed by each of the parties. If the terms of settlement were not complied with, the matter could be listed for hearing.

I note that some reference is made to such a procedure at page 48 of the report prepared by Mr Wilmshurst. He suggests a preliminary hearing might be conducted by clerks currently available after 'having been made more effective',

presumably by some form of special training. This suggestion would seem worthy of consideration.

4. Review of Tribunals by Ombudsman

(a) The Wilmshurst report suggests that the Ombudsman should have jurisdiction in respect of 'administrative action by Departmental staff once a claim is lodged' and 'the manner of hearing the claim and the following of procedures by the Referee'.

(b) It was considered that it would be impractical for this Office to attempt to review the manner of hearing and the following of procedures during the hearing by the Referee. Therefore, any amendment to either the Consumer Claims Tribunal Act or the Ombudsman Act to enable the Ombudsman to have limited jurisdiction over the Tribunals should be such as to restrict such jurisdiction to pre and post hearing administrative procedures.

(c) Any such amendment would not be sought by this Office."

The whole question of the operation of the Consumer Claims Tribunals is one of considerable difficulty. In the recent Court of Appeal decision *McClelland -v- Ancil Industries* all three judges were critical of the conduct of the tribunal on the facts before them. One of the judges, Mr Justice Hutley, said in his judgment:-

> "In my opinion the respondent company has been subjected to a gross injustice which is founded upon the conduct of the referee: but which is quite beyond this court to rectify." (page 6)

> "In my opinion what has been disclosed in this case required that urgent attention should be given to one or two matters, either the terms of the Act itself or for the conduct of a referee in relation to rehearings to be reviewed in higher courts." (page 7)

There is an essential tension between the need for speed, informality and finality on the one hand, and the possibility of substantial injustices taking place where there is no scrutiny or appeal. The recommendations flowing from the review at present being conducted and the Government's response are awaited with interest.

14. Public Trustee

In last year's Annual Report the Ombudsman recorded his provisional agreement with the views of Mr Downes of Counsel in an Opinion obtained by the Public Trustee which was to the effect that matters concerning the administration of private estates or trusts were not "matters of administration" as that expression was used in the Ombudsman Act.

During the course of the current year complainants to the Ombudsman about the conduct of the Public Trustee have been informed that the Ombudsman has no jurisdiction, but that the letter of complaint has been forwarded to the Public Trustee. The topic has had the consideration of the Attorney-General and, more recently, the Public Trustee has forwarded what appears to be an amended view which would give the Ombudsman jurisdiction in a limited range of cases. The criteria put forward by the Public Trustee are far from clear, and legislative amendment seems preferable to litigation between the Ombudsman and the Public Trustee in the courts on jurisdictional questions.

The Ombudsman recently expressed his views to the Secretary of Premier's Department in a letter dated 21st September, 1983 which was in the following terms:-

> "In that letter you set out what you state to be the views of the Public Trustee. As I understand the views now expressed they do not accord with the views of Mr Downes, his counsel, in his Opinion, which the Public Trustee forwarded to me.
>
> Counsel stated his conclusion at page 14:-
>
> 'It follows, in my opinion, that the Ombudsman has power to inquire into those activities of the Public Trustee which can be said to be acts of an executive nature. The question of whether he will or will not accept appointment as trustee of a particular trust might be such a matter. *The details of his day to day administration of the trust will not.* I do not think that any of the complaints to which I have referred above are properly capable of investigation by the Ombudsman.'
>
> (italics supplied)

The broad basis of the distinction drawn by counsel is developed on pages 10-14, and is, in brief, that the administrative activities of the Public Trustee in administering a trust are, as it were, "private" as distinct from the action of executive government. (Indeed, in contra distinction to the present views of the Public Trustee, as I understand them, counsel went on to state at page 15 that it is "highly likely" that the Public Trustee is protected from inquiry into his activities in the administration of trusts by the terms of Section 12 (3) (semble 12 (2)) of his own Act.)

I do not find it of assistance to attempt to reconcile the views which the Public Trustee apparently now puts forward as distinct from the views of his own counsel which were submitted to me by him. Mr Downes' Opinion would seem to me to clearly exclude matters which the Public Trustee apparently now puts forward as being within the areas of scrutiny of the Ombudsman, namely "failure to answer correspondence, to properly assess claims or to give adequate details to beneficiaries in, say, statements of account or reports" or even of systems in his Office related thereto. On the clear words and reasoning in counsel's advice such acts would not be acts of executive government and hence not subject to scrutiny under the Ombudsman Act.

The whole area is one of difficulty.

In his Opinion of the 14th December, 1982 the Crown Solicitor after citing a number of decisions relating to the question of what is the meaning of the vexed words "matter of administration" stated:-

> 'The diversity of opinion to which I have referred serves to illustrate the degree of uncertainty which exists in this area of the law.'

It is my view that the situation calls out for legislative amendment which can be drafted to ensure whatever ultimate position the Government wishes. The Crown Solicitor also appears to agree with this point of view. In the last sentence of his letter he says:-

> 'Of course, if it is desired that the question be put beyond doubt then the appropriate thing to do would be to enact appropriate legislation.'

To more precisely answer the request set out in the penultimate paragraph of your letter of the 13th September I do not, in view o the conflicting authorities, consider it possible to definitively define the "precise scope of the Ombudsman's powers to investigate the conduct of the Public Trustee". The Public Trustee's present views appear to differ from the rationale put forward by his own counsel, and this in turn differs from the views of successive Crown Solicitors. Indeed, when I referred Mr Darwen to the advice given by the State Crown Solicitor in 1978, he commented in a letter of the 27th January, 1983:-

> 'The two advisings of the Crown Solicitor make no reference to Section 12 (2) Public Trustee Act, 1913 as amended which in my view points out the distinction of functions of the Public Trustee and the extent of review of the function of administering deceased estates.'

What I am clear about, however, is that the expression "matter of administration" (which did not appear in the original Law Reform Commission Bill) does not coexist readily with the role of a body such as the Public Trustee. The exploration of the meaning of the expression in relation to the work of the Public Trustee would clearly need to be by court action (which I have sought to avoid) and the results would not, in my view, meet public expectations, at least as evinced in complaints to this Office. Accordingly, I repeat my request for legislative clarification. If the Government decides against such a course I would seem to have no alternative than to approach the matter on a case by case basis testing Public Trustee objections to jurisdiction in court so that the position will ultimately be clarified by court decision, which, as I say, is less preferable than legislative amendment."

For the time being, and until the Government makes a decision as to whether it will clarify the position by legislative amendment, complaints received from the public about the conduct of the Public Trustee in relation to the administration of estates will be forwarded to the Public Trustee for comment both on the facts and on the question of jurisdiction. In the absence of legislative clarification by the Government it may be necessary for the Ombudsman to institute test cases before the courts to determine the position under the present Act.

15. Metropolitan Water Sewerage and Drainage Board

(a) Complaints About Water Rates

As indicated in last year's Annual Report most complaints about "excessive" water rates for the reasons set out there were referred to the Board for review and advice direct to the complainant.

Consumers who contest Water Board records of their consumption can have their water meters tested for accuracy by a special section with the Board. Recently it has been ascertained from the Victorian Ombudsman that a draft standard for testing the meters is being drawn up by the Australian Standards Association. The aim of the revised standard will be to approximate the actual operating conditions of meters. This Office will continue to take an interest in this issue to ensure that a fair and reasonable standard is maintained.

(b) **Delays in Dealing With Customer Complaints**

In last year's Annual Report reference was made to a report made to the then Minister, Mr Landa on this topic (pages 13, 70 [Case 11]. In addition to more detailed recommendations, the report recommended that the Board carry out a complete review of its procedures, systems and controls for dealing with complaints from customers.

A copy of this Ombudsman report was made available to the Committee chaired by Dr R. McIver, set up by the Government to examine the structure and operation of the Board. The resultant Report of the Committee recommended the restructuring of the Board and, inter alia, recommended special attention to customer relations. As the recently announced Chairperson of the restructured Board, Dr McIver will be in a unique position to ensure that the recommendations of her committee will be implemented.

The Office of the Ombudsman has continued to keep under review allegations of delay by the Board in dealaing with customer complaints and, at the time of writing this Report, has commenced an "own motion" investigation in this matter.

(c) **After Hours Emergency Contact**

A complaint was made by a citizen who, in an emergency situation, had experienced difficulty one Saturday afternoon in contacting the Board's Service Enquiry Officers. The complainant said that he had tried to ring the Board when a sewer main ruptured, causing water to flow into his property. To use his words, "All I kept hearing over and over again was a recorded message that a reservoir was depleted somewhere south-west of the city, naming the suburbs affected. And the message said no more." The complainant eventually enlisted the aid of the Police to contact the Board's Office.

Investigation by this Office disclosed that it was standard Board procedure to utilise a recorded telephone message system when an unusual situation or problem arose and which could be expected to result in a flood of calls from consumers. This created a particular problem at weekends, after 4.00 p.m., when the Board's switchboard closed and all calls were dealt with by four Service Enquiry Officers. Similarly, it was standard procedure for the recorded message to conclude with advice to "hang on" if the caller's problem was not one associated with the subject of the recorded message. The complainant contended that this part of the message had been overlooked on the day he tried to phone the Board.

Without going into the detail of the technical operation of the Board's Service Enquiry Section, it was ascertained that drafting of each recorded message was left to a Service Enquiry Officer and it was up to the officer to remember to include appropriate advice to "hang on" in each message placed on line.

The Board agreed that this was a potential weakness in what otherwise impressed as an efficient and effective system; in very busy times, an officer might "forget". The Board, therefore, proposed the introduction of a recorded message pro-forma for use by the officers concerned; such pro-forma would *always* include appropriate advice for the caller to "hang on", and the officer would only have to compose the information relating to the special problem giving rise to the need for the recorded message.

The pro-forma introduced was in the following terms:-

> "This is the Sydney Water Board. Many service enquiry calls are being received at present and your call has been placed in a queue and will be answered personally in turn if you wait. If your call is in reference to . . .
>
> please note the Board's personnel are at present effecting repairs to restore service. We apologise for any inconvenience but advise that service will be restored as soon as possible.
>
> Please wait if your call is in reference to another matter. A queue system is in operation and your call will be answered in turn as soon as possible."

The Board's action was seen as a practical way of overcoming the problem identified by the complainant and our enquiries were discontinued.

16. The Inquiry into Alleged Inadequate Maintenance at Liddell and Other Electricity Commission Power Stations.

The Inquiry into allegations that the Electricity Commission of New South Wales had inadequately maintained its generators at the Liddell Power Station was mentioned in the Seventh Annual Report. At the time of writing that report, the investigation was not complete. On 22nd December, 1982 the final report on the investigation was forwarded to the Minister, the Electricity Commission and the complainants.

As indicated in the Seventh Annual Report, numerous complaints about the electricity restrictions imposed in New South Wales in December 1981 were received, particularly from small businesses. The restrictions had been imposed partly as a result of the failure of generators at Liddell Power Station. The issue received considerable media coverage because so many consumers were affected. Preliminary enquiries suggested an investigation by the Ombudsman was warranted.

Advice of Senior Counsel confirmed that an investigation into the maintenance procedures of the Commission was within the jurisdiction conferred under the Ombudsman Act. There was sustained public controversy and continuing complaints to the Ombudsman's Office. The Commission announcements indicated that there was a significant possibility of restrictions being imposed during the 1982 winter months, with consequent adverse effects on individuals. Electricity cost increases flowing from the Liddell failures were inevitable. There was no detailed rebuttal by the Commission of the allegations. No other independent inquiry was announced or in prospect.

In these circumstances, a decision was made to investigate, and this decision was communicated to the Electricity Commission by letter of 21st January, 1982. The form of the investigation was a Royal Commission-type investigation pursuant to the terms of Section 19 of the Ombudsman Act.

The terms of reference of the Inquiry were as follows:-

"(1) The general inspection and maintenance procedures adopted by the Commission in relation to power stations under its management and control since 1st July, 1975.

(2) In particular, without limiting the generality of (1), the inspection and maintenance procedures adopted with respect to the four 500 megawatt turbine generating sets at Liddell Power Station since 1st July, 1975.

(3) Whether the inspection and maintenance procedures utilised at the Liddell Power Station in respect of turbine generating sets since 1st July, 1975, complied with reasonable standards.

(4) The measures taken with the intention of preventing malfunctioning of turbine generator sets at Liddell Power Station including planning and/or implementation of a programme of routine maintenance.

(5) Measures adopted to ensure the completion of any such regular routine maintenance programme.

(6) The abandonment of any such programme once implemented.

(7) The failure to implement such a programme once planned."

The terms of reference primarily focused on the inspection and maintenance procedures adopted with respect to the generators at the Liddell Power Station. They were, however, wide enough to enable particular allegations of inadequate maintenance at Liddell or other stations to be investigated as part of a review of general procedures adopted by the Commission. The time period commencing 1st July, 1975 was selected so as to enable scrutiny of the allegation that there had been no removal of end covers and rotor or other proper inspection of the generators' end windings for a period of at least five years prior to the breakdown of three of the four Liddell generators. The first of these breakdowns had taken place in March 1981.

The investigation began on 4th February, 1982. Evidence was taken from 52 witnesses and 168 Exhibits were tendered in evidence. On 15th August, 1982, a draft report was sent to the Minister for Energy, Mr Landa, and to those persons entitled to notice under s.24 of the Ombudsman Act. Comment and submissions on the draft report were received and further evidence in reply taken, and on 22nd December, 1982 the final report was sent to complainants, the Electricity Commission and the Minister.

It was not part of the terms of reference of the inquiry to attempt to determine the causes of the Liddell generator failures. Any investigation by the Ombudsman is limited by the terms of the Ombudsman Act to "action or inaction relating to a matter of Administration". While therefore

there may have been some expectation in some quarters that the Ombudsman's inquiry would determine the cause of the failures and who was to blame, this question could not be within the terms of reference of the inquiry by virtue of the provisions of the Ombudsman Act.

The principal allegations and the finding made by the Ombudsman are summarised below.

(1) Manufacturer's Recommendations for Inspection and Maintenance of End Windings

Allegations were made by a former Commission Engineer, who preferred to remain anonymous, that in a number of respects the Commission tended to rely on breakdown maintenance, that is, waiting for a fault to develop before engaging in maintenance. He criticised the failure on any regular basis to take off the end covers from generators for a thorough inspection. The manufacturer, GEC Australia Ltd., also referred to the need for a regular programme for removal of the end covers and the rotor and a thorough inspection and cleaning of the end winding and support system, and indicated its belief that the Commission had not carried out such an inspection in the five years prior to the breakdown.

The evidence disclosed that in about 1973 the manufacturer, GEC, provided to the Electricity Commission a maintenance manual relating to the generators which had been supplied to Liddell. This manual set out the manufacturer's recommendations to the customer with regard to inspection and maintenance. It covered many parts on the units supplied.

The recommendation with respect to end windings appear in Volume 3 Part 3 of the Maintenance Manual which says that the recommended work be done "annually or at major outage". There is some ambiguity in this recommendation and it seems that what was intended was that the work be carried out either annually or during some planned major outage scheduled to take place at a period not greatly in excess of one year.

The GEC recommendations were not followed by the Electricity Commission. The prescribed procedures were in no case followed in respect of inspections and maintenance with the rotor removed. Visual crawl-through inspections took place, utilizing access through the manholes on a non-routine basis. There was never any tightening of the radial studs by employees of the Electricity Commission; on the other hand, there is no direct positive evidence that the radial studs in the generators at Liddell needed retightening.

The Electricity Commission did not discuss with GEC (or the Central Electricity Generating Board of the UK or any consultant) its decision not to follow the recommendations on inspection and maintenance of end windings, nor of the inspection and maintenance strategy to be followed instead.

The Ombudsman found that the decision of the Commission not to follow the recommendations of the manufacturer relating to annual or near annual inspection of the end windings with the rotor removed of the 500 megawatt generators at Liddell was correct. This recommendation was too rigorous.

The Ombudsman also found that the Commission, having decided to reject the manufacturer's recommendations with respect to inspection and maintenance of the end windings, should have had express discussions with the manufacturer on the subject and any independent experts it chose to engage, and, having made a final decision, should have specifically set out the inspection and maintenance strategies and procedures which were to be adopted in this area. The resulting documents should have specifically adverted, inter alia, to the need to examine the tightness of the radial studs and the circumstances in which rotor removed inspections would take place. The Ombudsman found that the failure of the Commission to take this course, and the absence during the relevant period of any such document constituted wrong conduct within the meaning of that term in the Ombudsman Act.

(2) Moisture Control Within Liddell Generators

Depending on the type of insulation used, the presence of moisture vapour within a generator may have injurious effects on the ability of the insulation to fulfil its function. The accepted method of monitoring moisture in the generator is by recording what is called the hydrogen dewpoint.

The dewpoint of hydrogen circulating within a generator is the temperature at which water vapour mixed with hydrogen begins to condense. The higher the temperature of dewpoint, the larger the amount of moisture in that hydrogen and in the generator.

From the commencement of the operation of the generators at Liddell until early 1979 the objective was to endeavour to ensure that the hydrogen dewpoint was never greater than 0°C. On 11th September, 1975 GEC wrote to the Electricity Commission confirming that it had eased its hydrogen dewpoint recommendations from 0°C to a formula variable figure which could reach 20°C. This recommendation was the subject of some examination by engineers at

Commission Head Office and acceptance of the revised limits was sent to Liddell in November 1975.

Liddell did not alter its operative practice of 0°C upon receipt of this notification from Head Office. It continued during 1975, 1976, 1977 and 1978 to adhere to its original practice of venting when the hydrogen dewpoint threatened to exceed 0°C. In early 1979, because of a dispute affecting supplies of hydrogen, a decision was taken at Liddell to allow the hydrogen dewpoints to go up to the revised limits recommended by GEC and accepted by the Head Office of the Commission in 1975. Following the resolution of the industrial dispute, the station, at least during 1980, kept the dewpoints of all generators generally below 0°C. In 1981, however, the dewpoints of units 2, 3 and 4 were allowed for substantial periods to be positive and in the case of units 2 and 3 were continually above 0°C in the month immediately preceding failure.

The Ombudsman did not consider that the Commission was in any way at fault in raising the hydrogen dewpoint limit above 0°C following the receipt of the altered recommendation of the manufacturer. Similarly, he was of the view that there was no fault on the part of the Superintendent at Liddell Power Station or of any station employees in permitting in early 1979 and again during 1981 the operating hydrogen dewpoint to exceed 0°C while generally being kept within the manufacturer's revised limits.

The ingress of seal oil containing some water into the generator is a potential source of moisture and the taking of samples of the water content of that oil can provide necessary information. The monitoring of liquid leakage detection will provide information on the extent of oil leakage into the generator. Apart from this the equipment concerned with either preventing or reducing the presence or build up of excessive moisture includes seal oil assemblies, hydrogen dryers, centrifuge oil purifiers and gland steam condenser exhaust fans.

The equipment associated with moisture control from the generators was out of service or operating defectively for long periods prior to the failures. The Ombudsman concluded that the cumulative effect of this equipment being out of service suggested a lack of priority was given to this area of plant maintenance.

In essence, the Commission did not dispute that a relatively low priority was given to the plant in question as compared with equipment whose non-availability would have immediately reduced the electrical output of the station. It was contended that this was a matter of operating judgment in a difficult industrial climate and that hydrogen venting (the replacement of moisture laden hydrogen by fresh hydrogen) was at all times an adequate substitute.

The Ombudsman, on balance and after hearing evidence in reply on the subject and subjecting it to scrutiny, reached the conclusion that there had not been wrong conduct in terms of the Ombudsman Act.

(3) Alleged Continuing Serious Vibration Problems at Liddell

Allegations had been received that all main sets at Liddell Power Station had serious vibration problems from time to time. It was alleged that Unit 3, in particular, had such a bad vibration problem at one stage that instruments designed to register vibration had to be reset downwards because the vibration level had gone off the scale.

There was no dispute that vibration existed but it was put that the vibration levels were tolerable and within limits set by Liddell engineers. The Ombudsman concluded that the decision as to those vibration limits are essentially engineering decisions and there was no evidence to suggest these were not realistic and proper in the circumstances. What the evidence did suggest was that while the unit was operating within those limits, the decision to balance rather than repair was dictated by system demand requirements to keep the unit in service. Normal operating procedures were not ignored but those procedures were not based primarily on the maintenance needs of the unit. In all the circumstances, however, the evidence did not support a finding of wrong conduct in terms of the Ombudsman Act.

(4) Alleged Continuing Shaft Current Problems at Liddell

Allegations had been received that Unit 2 at Liddell had current problems along the shaft, but because the unit's power was desperately needed, stronger fuses were installed rather than the unit being taken out of service to be fixed.

The investigation revealed that at the relevant time there were substantial reserves, and the Ombudsman concluded that it was probably an exaggeration to say that the unit's power was desperately needed at the time. The decision to replace blown fuses with larger fuses was based on the judgment of an experienced engineer, in circumstances where the origin of the fault was unknown, either to him, his station staff or Head Office staff.

Time and resource constraints precluded more than a brief examination of this allegation, but what evidence there was did not support a finding of wrong conduct in terms of the Ombudsman Act.

(5) Alleged Excessive and Unnecessary Boiler Tube Erosion

Allegations were received from a number of sources to the effect that boiler tube erosion and resultant boiler tube leaks were a basic problem affecting all Commission base load plant. The erosion, it was said, was caused primarily by the use of coal of a lower grade than allowed for boilers designed for North American and European coal. The coal being used, it was said, was poor quality, having an ash content of up to 35% and sometimes 40%, the better quality coal being reserved for export purposes.

The Ombudsman's investigation concluded that a large proportion of the Commission's total maintenance effort had been concentrated on boiler tube erosion problems. High coal ash content is the main cause of these problems, although that ash level on the evidence did not appear to have reached the alleged 40%.

The problems have been recognised and have been the subject of reports, in particular, internal reports in 1979, and a decision was taken on economic grounds to continue to cope with the repair problems without undertaking the very large capital expenditure on coal washeries and other means of reducing ash content. More recently, decisions have been made to embark on extensive capital expenditure on these items. These economic policy decisions are not the subject of scrutiny under the Ombudsman Act.

The Ombudsman, having come to these conclusions, made the following special recommendations:-

1. A programme of internal generator inspection at Liddell should be specifically developed. The Commission should consider and evaluate the draft Amended Maintenance Instructions recently received from GEC in respect of the rewound generators at Liddell. If approved by the Commission, the procedures will, as indicated by GEC, be printed in final form for integration into the Liddell Maintenance Manual. If the Commission, after full consideration (including advice from its consultants and discussion with GEC) does not approve these GEC recommendations in their present or other mutually agreed form, then the Commission in my opinion should itself set out a defined programme for inspection and maintenance of the end windings and associated support structure. This should be in written form and included in the Liddell Maintenance Manual.
2. The existing moisture control equipment at Liddell such as hydrogen dryers, centrifuge oil purifiers and the gland steam exhaust fans, should either be repaired or replaced by more effective equipment. During the course of evidence in reply it appeared that improvements proposed by the Commission at Liddell included:-
   (a) Seal improvement
   (b) Vacuum degassing plant
   (c) Hydrogen dryer upgrading
   (d) Off load hydrogen circulators
   (e) Continuous dewpoint monitors
3. The routine maintenance card system at Liddell should be critically reviewed.
4. An experienced industrial relations officer should be stationed at Liddell on a full-time basis. (This is now the case.)
5. The Annual Reports of the Electricity Commission should be more informative.
6. Specific steps should be taken within the Commission to encourage active critical discussion about, and greater participation in, maintenance decisions.
7. An increase in personal contact and exchange of information at a number of different levels between employees of the Commission and those of similarly placed overseas utilities would seem highly desirable.

On 22nd June, 1983 the Commission provided the following advice with respect to the specific recommendations:-

As to recommendation 1—

Based on a review of the recommendations in the GEC draft maintenance instruction and on information obtained from other utilities and manufacturers, a programme of internal

generator inspection has been developed and documented for the rewound generators at Liddell; this includes reference to the frequency with which top half end shields and rotor should be removed for winding inspections.

On 4th May, 1983 the Commission produced an instruction which set down the details to be followed for inspection upon which the station programmes are to be based. That instruction distinguished three levels of inspection:-

(i) manhole cover and/or hydrogen collar removed
(ii) end cover removed
(iii) rotor removed

Under the heading "Frequency" the instruction provides:-

3.1 For a few power stations, typically a 4 unit station, a complete inspection which will include removal of the rotor should be made on one unit during the maintenance warranty period. Providing this inspection does not reveal potential weaknesses in the generator, the remaining units need not be subject to rotor removal during their respective warranty period.

3.2 Unless the warranty inspections reveal actual or potential weakness which would dictate more frequent inspection, a program of generator inspections, geared to coincide with the two yearly major overhaul will be scheduled.

3.3 The inspection will be nominally scheduled over an eight year cycle — manhole access, end cover access, manhole access, rotor removed access.

3.4 Where particular requirements dictate otherwise, or when postponement of any inspection may become necessary, approval from the Chief Engineer/Generation is required.

As to recommendation 2 the Commission advised:-

(a) Seal Improvement-Seal Components — Redesigned for reducing the oil ingress to the winding space, are now being delivered and it is planned that these components will be installed in the Liddell generators starting at the 1983/1984 summer maintenance outages.

(b) Vacuum Degassing Plant — The Commission has sought and received an offer for the supply or vacuum degassing plant from GEC. The offer is currently being reviewed by Commission Engineers and a decision will be made in the near future.

(c) Hydrogen Dryer upgrading — New hydrogen dryers have been purchased for all Liddell units. The hydrogen dryers for Unit No. 1 have been fitted; the others are to be progressively installed.

(d) Off-load Hydrogen Circulators — Circulators have been purchased for all four Liddell generators; the first delivery is expected in October, 1983.

(e) Continuous Dewpoint Monitors — Fitting of continuous monitors to the Liddell generators is progressing with No. 2 generators complete and installation on Nos. 3 and 4 generators during the next summer maintenance programme.

As to recommendation 3 —

A preliminary review has been made by station staff and a more detailed review is now in hand which covers both the suitability and the frequency of inspection/work and the actual details of the type and extent of inspection work. By its very nature this will be an extended process since there is a need to assess the effect of any changes in these parameters over the long term in the light of analysis of plant performance.

As to recommendation 4 —

An experienced Industrial Relations Officer is stationed at Liddell on a full-time basis.

As to recommendation 5 —

The 1983 Report of the Commission was more informative than earlier reports and it is proposed to continue this practice.

As to recommendation 6 —

Currently, a committee of Generation Officers, assisted by an external management consultant, is reviewing the staff and organisation of power stations in relation to maintenance control. This committee is seeking and receiving an input from all grades of staff and it is intended that any organisational changes will ensure that adequate discussion and participation takes place at all levels.

As to recommendation 7 —

This is being done.

17. Press Comments on Liddell Report

The report on alleged inadequate maintenance at Liddell power station was favourably received by the press. An editorial in the *Financial Review* described it as "a model of how to conduct an effective, productive and relatively expeditious inquiry in the operation of a semi-government authority".

The editorial *(Financial Review,* 6th January, 1983) continued:-

> The result has been an extremely illuminating examination of a number of complex technical and managerial issues, conducted with a welcome absence of witch-hunting and concentrating on drawing out areas where remedial attention is needed.
>
> Although the Electricity Commission of NSW has been very prickly about criticisms of various alleged shortcomings from the media and elsewhere the Ombudsman's report should bring some benefits to the Commission, its various criticisms notwithstanding.
>
> It sets out many of the problems facing electricity engineers, including the deliberate jeopardising of the State's electricity system by union power groups using it as a vehicle for pursuing industrial claims, and underlines to the politicians the need to pay more attention to the difficulties which may face statutory instrumentalities.

The editor of the *Financial Review* went on to draw attention to the need for systematic outside review processes for statutory authorities:-

> The success of this inquiry emphasises the need for effective, independent review of the activities of statutory authorities in general, something to which the various Parliaments in Australia should be addressing themselves.

He pointed to the reference received by the Parliamentary Public Accounts Committee to report on the appropriateness of an Annual Report Act for New South Wales. Both Parliamentary inquiries and independent reviews, such as that conducted by the Ombudsman, had their merits, he said. An alternative would be to combine the two techniques.

The editorial concluded with these remarks about the limitations of Royal Commissions and of internal reveiws within the organisations themselves:-

> In the past inquiries have often been used as a method of taking the heat off a particular issue until, in the fullness of time, a very long Royal Commission report is delivered long after public interest has subsided. In more recent times it has been realised that an extensive reworking and modernisation of the often antiquated machinery of State Government is needed to improve the delivery of services and end some of the large scale wastage and misapplication of funds.
>
> In the case of the Liddell power failures the NSW Electricity Commission did conduct its own internal inquiry into the issues involved, which would have been helpful for the Commission management in assessing what modifications in management practice were needed.
>
> But an internal inquiry is still constrained by the hierarchical imperatives of large organisations, with inhibitions on the level of criticism individual employees may feel free to voice. An outside independent look from time to time is a useful extension of parliamentary powers of review.

18. Retrospective Electricity Charging

For quite some time various County Councils supplying electricity to domestic consumers had been adopting the practice of increasing their charges on a retrospective basis. The most recent example was in early July 1982, when in response to an increase in the cost of bulk electricity supply by the Energy Commission of NSW to County Councils, many County Councils including Sydney, Prospect and Shortland County Councils, decided to increase their charges to take effect within approximately one month. Because domestic consumers are billed every three months and because the increase would apply to all meters read after the date of the increase, this decision had the effect of retrospectively increasing the cost of electricity already consumed by customers whose meters

would be read after the date of the application of the increase. The amount of retrospectivity varied, of course, from customer to customer, depending upon dates on which meters were read.

The price increases were significant, varying between 13% and 29% depending upon the amount of power used and the Council area concerned. A very large number of people complained either directly to the Office or through a Radio Talk Back Show; in all, this Office received, in the form of letters and petitions, complaints from 2,283 people, the first of these complaints being received on 9th July, 1982.

These complaints caused this Office to launch an immediate investigation. Shortly before the investigation began, the then Minister for Energy, the Hon. D. P. Landa, announced that he proposed legislation to ban retrospective charging. The General Manager of Sydney County Council announced his agreement with the Minister's view that retrospective charging was totally unacceptable. The new legislation however was not to apply to the increase just announced, but only to those taking effect after 1st January, 1983.

In discussion with the Sydney County Council it emerged that one of the main reasons for the Council's decision to proceed with the price increases so quickly was that the Electricity Commission of NSW, in raising its charges for the bulk supply of electricity, had notified County Councils of this increase only on 28th July. The Sydney County Council believed that it had to pass on the higher costs to domestic consumers to avoid making major losses. As an additional difficulty, the County Councils had to face sharp increases in the quarterly energy rates also levied on them by the Electricity Commission. Therefore this Office decided to investigate whether the Electricity Commission had acted wrongly by failing to give adequate notice to the County Councils of its own price increases.

Breakdowns in the generating systems, together with rising interest rates and labour costs put pressure on the Electricty Commission's finances. The Commission passes on variations in the fuel and labour costs to the County Councils each quarter, and in the particular circumstances applying at the end of 1981 and the first half of 1982, these quarterly price increases were unusually high. The Electricty Commission did not provide any forecast of quarterly price movements to assist Councils in budgeting and tariff fixing. Indeed, an examination of the Minutes of the Electricity Commission revealed that while the Commission did not retrospectively charge Councils for increased fuel and labour costs, it had resolved, for example, on 21st April, 1982, that the price of coal delivered from all Commission owned collieries be increased by amounts ranging between $2.00 and $3.00 per tonne as from 1st October, 1981. Permitting its own collieries to charge the Commission retrospectively increased the price of coal delivered to its generators; the Commission made the debt recoverable from County Councils through the quarterly adjustments in the energy rate.

The quarterly adjustments made by the Electricity Commission are based on a formula and take effect from a date which the Councils know in advance, but the precise quantities of any variation are not. The Councils therefore received electricity during the first 5 or 6 weeks of a quarter without knowing what the price would be. Here, a distinction needs to be drawn between what was happening to Councils and what was happening to consumers. Councils knew in advance the dates of quarterly adjustments, but not the precise amounts involved. Consumers had no such knowledge and believed that they were using electricity at the price advertised at the time they had consumed it.

By 21st April, 1982, the Electricity Commission received a report concerning its financial position which clearly showed that the Commission was losing money, partly through a fall in demand and partly through increased costs. This report was referred to the Minister for his consideration. Ministerial press releases at about this time revealed that there would be an increase in electricity charges to the County Councils. However, between 21st April and 29th June, Cabinet did not reach a final decision in the matter. Therefore, because the Government had decided to take the decision on price increases out of the Electricity Commission's hand, this Office concluded that the Commission itself could not be blamed for giving insufficient notice to the County Councils of the new charges. The new rates finally announced by the Commission, following Cabinet's approval, applied from 1st July, 1982, thus giving Councils only two days' warning.

There was little room to doubt that one of the major administrative problems faced by Councils in budgeting, and hence in giving notice to consumers of any increases, was the notice of price movements they received from their supplier, the Electricity Commission. Over the preceding months Councils did seek changes to the existing system in order to plan their budgets better and thus be able to warn their consumers of price increases. However, their efforts were not successful.

Notwithstanding the role of the Electricity Commission, this Office considered that retrospective price increases did contradict a fundamental principle that at any time citizens ought to be able to discover their rights and obligations and enjoy and abide by them. Where the price of a commodity increases after it has already been used, there is no way in which citizens can take action

to reduce their consumption of the commodity even though they may have taken such action had they known of the price increase in good time. To explore the legal position in this respect, the Office had its solicitors brief Counsel on whether it was lawful for the various County Councils to impose their tariff increases retrospectively. Counsel's advice was that if the retrospective increase was outside the powers conferred on County Councils by legislation or proclamation, then any contract which the Councils may have with consumers purporting to give them such a power could not be enforced. Counsel also concluded that, although the matter was a difficult one of statutory interpretation, it seemed to him that the statutory powers of Councils should not be construed so as to enable them to increase retrospectively charges for electricity which had already been supplied at the time the resolution to increase the charges was made. After considering this advice, the Ombudsman also reached the conclusion that the Council's conduct appeared to be contrary to law.

Although the financial pressures operating on the Council were considerable, the Office concluded that their administrative and financial problems should not have been passed on to consumers in a way that was inherently unjust. Given that the Councils' decision was, at best, of doubtful legal validity, the Ombudsman also concluded that the use of such a legally doubtful charge constituted wrong conduct in terms of the Ombudsman Act. The conduct of the Electricity Commission in relation to the extent and timing of its price increases appeared to be covered by the decision of the Minister and Cabinet, and therefore to be outside the jurisdiction of this Office.

On 4th August, 1982, four weeks after the first complaint on this matter was received, this Office released its final report. The report recommended that Councils should forthwith take such steps as they could to most fairly rectify the situation caused by the wrong conduct. The report also pointed out that consumers had available to them the option of refusing to pay the amount of any account estimated to represent retrospective charging, or of paying such an account "under protest". Shortly after the release of this report and the considerable media attention it attracted, the Government decided to freeze the bulk supply tariff charged by the Electricity Commission to County Councils at its then existing level for the remainder of 1982. This freeze meant that Councils were able to defer the proposed increases for a sufficient time to give adequate notice to all consumers. The practice of retrospective charging has been abandoned.

19. Results of Report on Planning, Management and Control of Sydney Harbour and Foreshores.

In the previous Annual Report, the Ombudsman referred to a complaint which had drawn the attention of this Office to the plethora of authorities concerned with the planning, management and control of Sydney Harbour and its foreshores. The actual complaint itself related to the Maritime Services Board's approval of a plan to install a "trot" mooring system in Sailor's Bay, without any environmental impact statement being called for or the proposal being referred to the Foreshores Building Committee of Advice for comment.

In the report which arose out of this investigation, broadly speaking it was recommended that:

1. The Minister for Ports (after consultation with the Minister for Planning and Environment) give consideration to the carrying out of a comprehensive inter-Departmental review of the existing legislative and administrative framework relating to the planning, management and control of Sydney Harbour and its foreshores;
2. As an interim measure, prior to the eventual overhaul of the existing system, the Minister for Ports formally instruct the Maritime Services Board to expand the role of the Foreshores Building Committee of Advice to enable the consideration of all building and development proposals (both private and public land, and water based) which would have environmental impact; and
3. The Maritime Services Board implement the environmental impact assessment provisions of the legislation and regulations on a broader and more consistent basis.

In response to the Ombudsman's Report in this matter, while the question of a comprehensive review of the existing legislative and administrative framework is still under review, the recommendations concerning the role and powers of the Sydney Harbour Foreshores Building Committee of Advice have been accepted and implemented. In this regard the Charter of the Sydney Foreshores Building Committee of Advice was reviewed, in the light of the various recommendations made by this office, and a new constitution prepared.

This constitution significantly upgraded the role of the Committee and, to a large extent, the Maritime Services Board is bound by any unanimous recommendations of the Committee. Where any recommendation made by the Committee on a proposal is not unanimous, the Board is now

required to submit the proposal to the Minister for Ports for his decision (to be made after consultation with the Minister for Planning and Environment).

In relation to the last recommendation referred to above, the Board has advised that it "unreservedly accepts" the recommendation that it "implement the environmental impact assessemnt provisions of the relevant Act and Regulation within the true spirit of the legislation".

20. Juvenile Institutions and Residential Care Units

Juvenile Institutions

During the year, the programme of visits to juvenile institutions administered by the Department of Youth and Community Services has been maintained and, where possible, extended. A programme of regular visits to the major institutions has been put into effect, and certain Investigation Officers have been given responsibility for visiting particular institutions, and for dealing with complaints received from their residents as follows:-

Mt. Penang Training School Gosford	—	Mr A. Hartigan
Minda Remand Centre Lidcombe	—	Dr M. G. L. Dunn Ms H. Mueller
Daruk Training School Windsor	—	Mr G. Andrews
Reiby Training School Campbelltown	—	Mr R. Orton

Following the opening of the new Remand Centre at Glebe, ("Bidura"), Ms C. Doemling and Ms J. Fleming have made regular visits, with the responsibility for dealing with complaints from residents at Bidura.

Additionally, during the year the Principal Investigation Officer, Mr G. Smith, visited Endeavour House at Tamworth, a juvenile institution for older boys. This was a "one-off" visit and was carried out in conjunction with an "outreach" campaign visit to the New England area. The Deputy Ombudsman, Dr Brian Jinks and Ms H. Hurwitz, Investigation Officer, recently visited Ormond Training School, Thornleigh, and spoke to the residents and the staff.

Investigation Officers, during visits to institutions, receive oral complaints from all who wish to make them. The majority of such complaints can be dealt with quickly and on the spot, by discussion with the Superintendent and/or his officers, without embarking on a formal investigation. Where it is considered appropriate oral complaints are reduced to writing and are taken up with the Director-General and the appropriate Regional Office. Irrespective of the manner in which a complaint is dealt with, the resident concerned is always informed of the outcome of his or her complaint (either verbally during the visit or later by letter from this Office).

In addition, my officers have commenced investigations in respect of a number of matters under Section 13 of the Ombudsman Act (i.e. by "own motion") where this course has been seen to be appropriate.

A number of investigations are current in this area:-

- the apparent continuing use of isolated detention cells at one training school, contrary to Ministerial directions
- lack of air conditioning on one level at the new Bidura Remand Centre
- lack of sufficient activities for residents at Bidura

Residential Care Units

This year, for the first time, there has been a programme of visits to residential care units in which wards of the State are housed. The programme is still in its infancy, and questions relating to the most effective deployment of the limited resources of this Office have yet to be determined. Nevertheless, the new programme is regarded as most important and it will be continued; hopefully, it will be extended at a future stage.

Sensitive to the fact that the new programme of visitation represented an intrusion by this office into an area in which the Minister for Youth and Community Services has direct responsibilities and which had hitherto been the preserve of the Department, the programme was

developed and implemented in close consultation with the Director-General and his senior officers. The Department subsequently published in the Departmental Bulletin a notice in the following terms:-

> **"Visits by the Ombudsman to residential care units for wards**
>
> For some time now, staff from the Ombudsman's Office have been visiting a number of Departmental institutions for juvenile offenders on a regular basis. The purpose of these visits is to provide an "outreach" service to those who are not readily able to have access to the Ombudsman's Office.
>
> Generally, visits to a particular institution are made one (sic) every six to eight weeks and involve, in the main, meeting with individual inmates who wish to raise a particular matter with the Ombudsman.
>
> Inmates usually complain about a wide range of matters which by no means always relate to the particular institution of the Department of Youth and Community Services, but to a variety of other government departments also. Where complaints do concern the particular institution, in the vast majority of cases they are referred to the local staff and satisfactorily resolved at that point.
>
> The Ombudsman has recently decided that the service of his office to children in care should be extended to the Department's ward establishments in the form of regular visits to some of the larger establishments. As with visits to institutions, it is envisaged that visits to ward establishments will provide an "outreach" service to residents, and will be conducted along similar lines as visits to institutions.
>
> Discussions have been held with the Ombudsman's officers and I have agreed that they should commence visits to the Department's residential care units for wards in addition to the training schools which they have been visiting for some time.
>
> It is hoped that visiting can begin in mid June and continued at around two monthly intervals. The Ombudsman's Office has made it clear that, should Departmental staff at any of the above establishments so desire, arrangements can be made for the role and function of the Ombudsman to be explained in a group setting. The Officers-in-Charge of each unit will be contacted prior to each visit and the Ombudsman's officers have been encouraged to maintain contact with Regional Directors as well.
>
> Any queries about these visits can be directed to Helen Mueller at the Ombudsman's Office."

Because of limited resources, it was decided, as a matter of policy, that visits would initially be restricted to two or three residential care units where (in terms of age and number of residents) our services might be most effective. Similarly, a decision was made to test the effectiveness of visits to establishments catering for intellectually handicapped persons.

Again, particular officers have been given responsibility for individual units, namely:-

Brush Farm	Mr G. Smith
Eastwood	Ms H. Mueller
(60 girls from age 8 years, 20 primary school age boys — intellectually handicapped wards)	
Renwick	Ms H. Mueller
Mittagong	Ms C. Doemling
(160 boys and girls of primary and secondary school age)	
Clairvaux	Mr G. Smith
Katoomba	Mr D. Brogan
(96 boys and girls from 5-15 years — intellectually handicapped wards)	
Werrington Park	Mr G. Smith
St Marys	Mr D. Brogan
(90 boys from age 10 years — intellectually handicapped wards)	

Visits have so far been made to Brush Farm, Renwick and Clairvaux and further visits are planned. A considerable number of oral complaints have been dealt with and, where requested, my officers have met with the staff to explain the role of this Office.

Investigations currently being conducted and arising out of the residential care unit visits include the alleged use of a room for isolated detention within a school conducted by Department of Education, and alleged excessive use of physical punishment by a physical education teacher.

Complaint Details

(i) Statistical details of oral complaints dealt with and arising out of visits to Juvenile Institutions during the year ended 30th June, 1983 are shown in the Table following.

(ii) Visits to Residential Care Units did not commence until just prior to 30th June, 1983. No oral complaints arose out of those visits made before that date.

ORAL COMPLAINTS RECEIVED AND DEALT WITH VISITS TO JUVENILE INSTITUTIONS
1st July, 1982 to 30th June, 1983

Nature of Complaint	Institution							Public Authority Involved
	Endeavour House, Tamworth	Daruk Training School, Windsor	Minda Remand Centre, Lidcombe	Mt Penang Training School, Gosford	Bidura Remand Centre, Glebe	Reiby Training School, Campbelltown	Total	
Unfair Punishment and/or application of rules		10	2	1			13	Department of Youth and Community Services
Alleged assaults		4	1				5	
Day/Weekend Leave — refusal of or other problems		3		7	1		11	
Discharge — delay in or other problems		2		5		1	8	
Medical treatment	1	4	1	1			7	
Transfer — problems re		6		5	1	3	15	
Detention		3					3	
Food		11	8	5	1		25	
Refusal of requests		5					5	
Failure of officers to act		5					5	
Sports & Leisure activities — lack of or other problems re		2	3	1	1	1	8	
Failure to inform		1					1	
Facilities generally		1					1	
Information wrongly recorded		1					1	
Cleanliness and/or laundry problems			2	1			3	
Clothing		2	2	6	1		11	
Failure of District Officer to contact or act		2	1	1			4	
Camps/Outings — cancellations of or other problems re		1		2	1		4	
Officers — conduct of		1	1				2	
Accomodation problems			1	5			6	
Smoking — rules re and other problems			9		1		10	
Personal Property			2		1		3	
Bail			1				1	
Mail — censorship of and other problems			5			2	7	
Demerit system — operation of						1	1	
Visits and/or visitors	1		1			2	4	
Conditions generally (including complaints re furnishings)		1	4	1			6	
Supervision — level of		2					2	
Privacy — lack of		1					1	
Searches			1				1	
Defective equipment or material		3	1				4	
Unfair accusations			1				1	
Legal Aid — problems re			1				1	
Totals	2	71	48	41	8	10	180	
Unfair Punishment		3					3	Department of Education
Disclosure of information		1					1	
Refusal of request		2					2	
Level of School work			4				4	
Totals		6	4				10	
Queries re Court hearings			2	1			3	Courts (No jurisdiction)
Totals			2	1			3	
TOTAL COMPLAINTS DEALT WITH	2	77	54	42	8	10	193	

21. Isolated Detention Cells

During the course of the past year, officers of the Ombudsman made regular visits to a number of Remand Centres and Training Schools operated by the Department of Youth and Community Services for the detention of young offenders. During these visits this Office became concerned at the use of certain cells set aside for the solitary confinement of inmates guilty of misconduct within the institution. As a result of this concern, an investigation, on this Office's own motion, was launched into the conditions and use of such cells.

The Child Welfare Act, which presently regulates the use of cells, provides that they shall be employed only in exceptional cases and that, among other things, they shall be light and airy, that some form of useful occupation shall be provided, and that some means of communication with the members of staff shall be available.

An examination of such cells at a number of institutions revealed the following facts. At Minda Remand Centre, Lidcombe, for example the cells are provided for both male and female inmates. They were approximately 3 metres by 2.5 metres (i.e. 10' x 8') with concrete floors and cement rendered walls. Along one wall was a bed constructed entirely of bricks with a cement rendered slab on top. Near the bed was a brick table or desk also having a cement rendered top. There was no chair. At the time of the first inspection, mattresses were removed from the cell by day even if an inmate was confined there. Following inquiries from this Office (and at the direction of the Director-General of the Department) mattresses were placed in the cells whenever they were occupied. These mattresses were foam rubber with fabric covering, approximately 8 to 10 cm thick. The cells were ventilated by means of a high window covered with heavy duty stainless steel wire. A small area of the wall was normally painted with blackboard paint although this had been temporarily covered over during a repainting of the cells. The cell was observed through a small peephole in a heavy door. Adjoining the cells was a shower and toilet. Inmates were checked regularly, day and night, but if they wished to attract the attention of the officers on duty, they had to shout, as the cells, at least in the male section, were in the furthest corner of the Minda complex. The cells were cold and austere.

During an inspection of Reiby School at Campbelltown for girls and boys aged between twelve and sixteen years, similar cells to those at Minda were observed. Each had a blackboard, a fixed wooden table and bench but no bed. In the past, mattresses were left out of the cells by day. In the cells inspected, light came in through a high skylight rather than a window. The absence of furnishings made the cells seem as cold as those at Minda, although it was a warm day at the time of inspection. The peepholes in the doors did not permit a complete view of the cells.

Daruk Training School at Windsor still has three isolated detention cells each about 3 metres by 2 metres (10' x 7') in a separate block. They have a small blackboard on the wall where the detainees write lines or ponder on other problems that are assigned to them while in the cells. There is a small wooden desk and stool that are bolted to the floor, which is covered with vinyl tiles. The window, which is high up, is made of opaque glass bricks. At 6 o'clock on the night of the inspection the cells were very cold, however, in summer the cells would be stuffy. If inmates are put in there overnight, which many are, they sleep on an ordinary mattress and are provided only with some blankets. Inmates were forced to change into special "boob" clothes. These consisted of a pair of sandshoes without laces, a pair of jeans and a shirt with the buttons removed on the grounds that inmates use them to gouge the walls, the blackboard and themselves. There was also a jumper available.

A survey of the frequency with which the cells were used also showed that isolated detention at Daruk appeared to have become part of a normal routine for punishment rather than being used only in special circumstances as contemplated by the Child Welfare Act.

This over-use of isolated detention cells and their condition, which this Office considered did not meet modern community standards, was the subject of a finding of wrong conduct and report under the Ombudsman Act. On 5th May, 1983, in consultation with the Ombudsman, the Minister for Youth and Community Services, the Hon. F. J. Walker, Q.C., M.P., said he viewed as extremely serious the problems highlighted in this report. He therefore issued instructions to the effect that:-

Punishment shall be imposed only subject to compliance with the following provisions:-

(a) the person subject to the punishment shall be provided with some means of usefully occupying himself;

(b) the physical environment, including furnishings, of the place where the person subject to the punishment if confined shall, as far as practicable, be no less favourable than the physical environment of other places occupied by persons ordered or required to be detained in the training centre or remand centre; and

(c) where the person subject to the punishment is a child, he shall be so confined that at all times he can be seen by and may see and speak to an officer.

A punishment may not be imposed . . . on a person subject to control or on remand so as to interfere with visits to that person by any of his relatives.

The action taken by the Minister, in my view, satisfied the recommendations this Office made in its report. This Office will monitor the Department's progress in relation to bringing the facilities up to the standards laid down under the new Community Welfare Act which will soon regulate the Department's institutions.

22. Department of Environment and Planning: Resumption of Land

As indicated elsewhere, a report was made to Parliament in relation to a complaint made by Mr Dennis which related to the approach adopted by the Department in formulating offers to landowners in corridor and open space zones. The short effect of the report was that the Ombudsman was of the view that offers of compensation made by the Department as exemplified in Mr Dennis' case were inadequate and constituted wrong conduct under the Ombudsman Act. Following the completion of the report to Parliament on resumption by the Department and consequent valuation by the Valuer-General, the Department increased its offer to Mr Dennis by over $17,000. The new amount offered by the Department was considered inadequate by Mr Dennis and his solicitors, the Public Solicitor, who have retained Queens Counsel to appear on behalf of Mr Dennis and have initiated proceedings to determine the amount of compensation. The matter will be heard by a judge of the Land and Environment Court and should assist in clarifying the law in this area. It is unfortunate that Mr Dennis, an elderly man and in ill health, has to undergo the anxiety and stress of court proceedings, but he has no alternative.

Another aspect of the resumption procedures of the Department has been the subject of complaint and investigation by the Ombudsman. This complaint, which has not yet been determined, relates to alleged delays in making advance part payments of compensation and the making of inadequate part payments. One reason why these matters are of considerable importance is that those landowners who have their land resumed are entitled under the present statutory provisions to interest at the rate of 4% per annum, in respect of the first period of 12 months following resumption on the amount of compensation ultimately agreed upon. In the course of this investigation it has been noted that the Inter-departmental Committee on Land Acquisition Procedures by Government and Government Authorities recommended as long ago as 1978 that:-

"Compensation should bear interest from the date of payament at a rate of interest that is fair and reasonable in the contemporary circumstances."

It is clear beyond any possibility of doubt that an interest rate of 4% p.a. is not fair and reasonable in current circumstances. In order to avoid a situation which is grossly unfair to citizens whose land is resumed, the Government should urgently adopt and implement this recommendation.

23. The Department of Environment and Planning — Discussions with Developers

An investigation into the conduct of the Department of Environment and Planning has raised a number of issues considered to be of importance, including access to information by resident groups, the objectivity of the Department in dealing with formal rezoning applications after giving preliminary advice and assistance to developers, and, in particular, the apparently accepted practice within the Department of not recording discussions and consultations with major developers unless, in general, a commitment has been made, further action is required, or the matter is regarded as contentious.

The investigation was concerned with the Department's role in advising a developer of potential sites for a major new shopping complex in the Marrickville area and the Department's subsequent role in advising the Minister in relation to a formal application for development on one of the sites identified. The events surrounding the inquiry occurred during the time of the transition from the old to the new planning legislation, so that any specific findings of the investigation will not be of general utility.

The question of recording of preliminary discussions with developers is, however, considered to be significant. Mr Smyth, the Director of the Department, in the course of the investigation, explained that to keep detailed records of all discussions with developers would impose an unbearable administrative burden on the Department; and further, that he himself did not do so because of the confidential nature of the matters dealt with and the danger of information being leaked.

A record of discussions of this nature would seem to be essential, both to enable the Director properly to perform his duty of advising the Minister, and to protect the Department's officers against allegations of bias and improper motive. Whether a failure to keep such a record constitutes "wrong conduct" under the Ombudsman Act has not yet been determined, and may depend upon the particular circumstances of any matter under investigation.

24. Heritage Council: Rural Bank Building

The Heritage Council of NSW resolved in April 1981, that it would oppose the demolition of the Rural Bank (later known as the State Bank) building at 52-56 Martin Place. It said the building was a good example of art deco style; and a contribution to the identity and quality of Martin Place; and that its exterior salmon colour and granite finish harmonised with nearby buildings.

However, in July 1981, the Heritage Council rescinded that resolution in favour of one expressing concern over the future of buildings in Martin Place and urging a precinct plan. In September the Heritage Council rescinded the July resolution, and passed a resolution which asserted, *inter alia*:

(ii) that the Rural Bank, Martin Place, is of heritage significance.

(iii) that in view of the factors surrounding the retention of the building, the Heritage Council does not oppose its replacement by an appropriately designed building which maintains the existing scale and character of Martin Place.

The Ombudsman received complaints about this apparent reversal by the Heritage Council, and decided to investigate, not the merits of demolition or preservation, but such issues as whether the resolutions in question were within the Heritage Council's powers; whether members of their alternates were swayed by irrelevant grounds or considerations; whether the procedures followed at the meetings in question included adequate notice of motion; and whether those present at the meetings had the opportunity to obtain full and impartial information concerning the Rural Bank Building. The investigation was a long and complicated one, involving interviews with fifteen Heritage Council members and alternates. A sixteenth preferred to answer questions in writing.

In December 1982 a final report was issued, finding the Heritage Council's conduct wrong in that it

(i) Failed to ensure that sufficient notice was given to all members that a rescission motion was to be proposed at the July 1981 meeting of the Council reversing the previous Council resolution in favour of retention of the Rural Bank Building and that representatives of the Rural Bank would be making submissions in support of the rescission motion and failed to ensure that all members were provided with sufficient relevant information prior to that meeting to enable them to have sufficiently detailed knowledge of the issues to be discussed.

(ii) Did not make adequate enquiries regarding the validity or otherwise of the estimates of cost of retention of the Rural Bank Building presented at the July 1981 meeting.

(iii) Failed, in the interest of having as much information before it as possible on the question of whether the Rural Bank Building should be retained, to afford, for example to representatives of the National Trust or of the Royal Australian Institute of Architects, an opportunity to make counter submissions to those of the Rural Bank.

The report disclosed that between the April and July meetings, representatives of the Department of Planning and Environment, the State Bank, the project architects, Peddle Thorp and Walter and Professor Peter Webber, head of the School of Architecture, Sydney University, met on various occasions. A representative of the Premier's Department attended three of those meetings.

These meetings agreed that the architects should prepare three alternative schemes for the Martin Place bank site.

On the morning of 2nd July these proposals were presented to Sydney City Council.

On the afternoon of the same day a presentation relating to the redevelopment was given to the Heritage Council.

The Ombudsman said the only official notification that the issue of the Rural Bank was to be discussed at the July meeting was a notice on the meeting agenda that a presentation on the bank would be made by Professor Webber and a verbal report by Mr Nigel Ashton, the Department's representative on the Major Development Liaison Committee. No mention was made of other speakers. No report was provided by the Heritage and Conservation Branch of the Department, and no progress reports were made on the negotiations between the Department and the bank in the agenda papers.

The Ombudsman found that the Council Minutes recorded the costs for redeveloping the bank site given to the July meeting ranged from $40 million to $52 million. Cost problems associated with retaining the existing building would involve an extra $12 million, the meeting was told. However, the cost figure given later to the City Council was $28.5 million.

The Ombudsman understood changed circumstances would account for some of the reduction, but if the building estimate varied by so many millions, it was possible that the costs of retaining the existing building were inaccurate.

It was highly likely that the cost factor, in the minds of some members at least led to a decision not to oppose demolition.

In spite of alleged assurances to the meeting that the costs had been checked, the investigator said she had been advised that no such check was made by the Environment and Planning Department.

Heritage Council members were interviewed in the course of the investigation about alleged pressures. One said:-

> "You should realise that most members are not free of some suggestions on what they might do. So the suggestion as to how a member might vote has not been restricted to government members, or government matters. I have been lobbied. However, I don't think it ever affected my judgment on any issue. Nobody came up and said — you have to support the rural Bank issue because the Government wants it.
>
> The way it does happen though, is that it becomes known through the Public Service that say, the State Bank wants to do this thing and it has government support . . . when it is general knowledge that the Government is supporting the project it does cause problems."

Another member, when asked "Were you ever told not to block government projects?" answered: "Never is so many words. Something like, 'I hope us government guys will stick together' would be closer." Yet another member reported receiving 'informative' telephone calls from Mr G. Gleeson, Secretary of the Premier's Department, about two days before the July meeting. Mr Gleeson had inquired whether there were any problems in relation to the development of the rural Bank site. Mr Gleeson apparently advised that the Government was keen to see it proceed. The member stated: "I'm not saying that such a call wouldn't influence my thinking, but I don't bow to such pressure."

The Ombudsman recommended that as the Heritage Council relied on the Heritage and Conservation Branch of the Department for information and advice, controls be introduced to ensure that the branch was kept informed of Departmental negotiations with parties, whose properties were under consideration by the Heritage Council.

25. Sydney City Council: Darlinghurst/Kings Cross Brothels

In late 1982, the Ombudsman received a series of complaints concerning the alleged failure of the Sydney City Council to take sufficient action to prevent the proliferation of brothels in the Darlinghurst/Kings Cross area and the associated problems of noise and public nuisance.

An extensive investigation was carried out involving correspondence between the Office and the Council, interviews with a number of Council officers specifically involved in the inspection and monitoring of premises suspected as operating as brothels, and a detailed inspection of 100 Council files. The Council files revealed that there had been 103 premises reported to Council as suspected brothels operating contrary to the planning provisions at the time. The Council had gained injunctions against at least 8 premises, and injunction proceedings were pending in two other cases.

Council has attempted to curb street soliciting by means of the erection of special street lighting and had occasionally sought court injunctions, but the investigation revealed that Council's response to the problem was principally confined to reliance on the N.S.W. police to obtain evidence for use in injunction proceedings, and a reliance on the State Government to provide a solution to the continuing predicament.

At the conclusion of the investigation, the Ombudsman found that the Council had acted wrongly in that it:-

(a) failed to establish an appropriate administrative system or task force to investigate the magnitude of unauthorised or non-consented use in these areas; explore and evaluate the means by which Council might effectively deal with the problem; co-ordinate and monitor actions by Council; and prepare submissions for Council addressed to appropriate authorities to enlist support or request law changes or other action where Council powers were found to be inadequate;

(b) delayed recognising its statutory responsibilities and powers to take action to restrain unauthorised and non-consented users in the area;

(c) failed to develop a draft local environmental plan to control the location of premises used for prostitution activities in the area;

(d) failed to always take action to gather evidence for use in injunction proceedings in relation to those premises which were notified to Police but for which no Police affidavit evidence was forthcoming;

(e) failed to provide adequate resources to meet the day to day demands of investigation of resident complaints and the necessary support of efforts by the City Solicitor to effectively pursue injunction proceedings.

It was recommended to the Council that:-

(i) it develop a draft local environmental plan containing provisions prohibiting the use of premises for the purposes of prostitution or soliciting for prostitution in residential areas where the related activities result in unreasonable disturbance to the amenity of the neighbourhood and making such other provision for control and regulation of such premises in other areas as to the Council seem fit;

(ii) it immediately create a task force among its staff to oversee the preparation of such a plan, and evaluate current and alternative options within the power of Council, and to co-ordinate all future action taken by the Council in respect to brothels in the East Sydney — Darlinghurst — Kings Cross area;

(iii) it liaise with the Department of the Attorney-General and Justice during the preparation of the draft local environmental plan and seek its assistance in investigating any complementary legislative provisions that may be necessary to support such a proposal;

(iv) it make a submission to the Select Committee of the Legislative Assembly inquiring into prostitution and these and any other measures that it believes may be necessary to support its planning provisions to control brothels.

Council has declined to carry out the central recommendation that the Council's town planning powers be used to protect the amenity of residents in residential areas from the undoubted traffic and noise of the clearly commercial activity of prostitution. In the circumstances consideration is being given to preparing a report for Parliament on this issue.

26. Sydney City Council Mistakes Complainant's House as Brothel

As mentioned in the previous paragraph of the report, the Ombudsman investigated a complaint that the Sydney City Council had failed to exercise available powers and take sufficient steps to prevent the unauthorised use of premises in the Darlinghurst/Kings Cross area operating as brothels. During the investigation, it was noted that Council officers had carried out surveillance activities of suspected brothels in December 1982 and those premises had been entered into Council's records.

One of the curious features of this list of suspected brothels was that it contained the address of one of the residents of Darlinghurst who was one of the complainants to the Ombudsman concerning the Council's alleged failure to take action against the brothels.

After the list of suspected brothels appeared in the Ombudsman's draft report on the investigation, the residents concerned complained to the Council and following an investigation that confirmed in fact that the mistake had happened, were assured by the Lord Mayor and the Town Clerk that the Council records had been suitably notated to indicate that theirs was a bona fide residential premises.

Several months later, as one of its moves to deal with the brothels, the Council decided to issue amended rate notices to the suspected brothels on the basis that the premises were being used for commercial or business purposes. Our complainants, much to their displeasure, received one of these amended rate notices, increasing their rates by over 100%.

When inquiries were made of the Council, the Town Clerk informed the Ombudsman that his notation on the Council records had unfortunately been overlooked and the property included among those to be re-rated. When the error was brought to his notice, the Town Clerk forwarded a letter of apology to the complainants, and subsequently the Council resolved to remove from all Council records any reference to the premises being commercial premises of any description; that the Lord Mayor on behalf of Council issue a written apology for the hurt and embarrassment the complainants had been caused; that the revised rate notice be withdrawn and an assurance given that their premises are and will continue to be rated as residential premises; and that the Ombudsman be advised of action taken and requested to alter the records kept in his Office.

27. The Federation of New South Wales Police-Citizens' Boys Clubs

In the past year considerable public attention has been focused upon this Office's investigations relating to Police-Citizens' Boys Clubs. The Ombudsman Act sets out various definitions of what constitutes a "public authority" whose conduct may be made the subject of investigation. One of these definitions deals with persons, in relation to whose accounts the Auditor-General has a power under any law, or in relation to whose accounts the Auditor-General may exercise a power where requested to do so by a Minister of the Crown. The Federation and its member Clubs are all separately registered as charities under the Charitable Collections Act; this Act provides that the Auditor-General may exercise the functions of an inspector under the Act and may therefore examine the books and accounts of such clubs. Therefore this Office clearly has jurisdiction to investigate complaints relating to matters of administration connected with individual clubs or with the Federation itself.

In one case, the then Treasurer of the Glebe Club came to this Office in June 1982, to make a series of complaints concerning various authorities who had been involved in the conduct of the Club. The complaint centred on a situation where Club funds had been misappropriated as a result of lack of correct administrative procedures within the Club. According to the complainant, there had been no action to ensure that such misappropriation would not occur again. She also believed that the true extent of the misappropriation had been concealed. A detailed and lengthy investigation was undertaken of this complaint, during the course of which a Senior Inspector of the Charities Branch of the Department of Finance conducted an examination of the Club's affairs finding many inadequacies in the Club's methods of keeping books of accounts and of ensuring that its assets were not lost or misappropriated. This Office also interviewed the President of the Federation and examined the Federation's own procedures for monitoring the conduct of its Clubs. It emerged that the Federation had indeed failed to take effective action to improve administrative procedures of the particular club concerned. Moreover, the Federation's inspections of member clubs, conducted on its behalf by police attached to local Police Stations were in disarray. For example, the Glebe Club had not been inspected properly by anybody for 18 months despite a police instruction that the Club should be inspected each quarter. The Federation kept no check on whether reports of such inspections were submitted at the proper time, and it did not undertake action to follow up any failure to conduct an inspection. The police officers attached to the Federation to conduct internal inspections did not have the necessary experience and expertise to carry out the task of checking up on the financial affairs of individual clubs.

In the final report on this complaint, the Ombudsman also drew attention to the peculiar constitution of the Federation and its member clubs, which reserves the principal executive positions within the Boys' Club movement for serving police officers. Community involvement takes place only in a consultative form. In the particular circumstances of this complaint, the citizen Treasurer's views were not taken seriously by the then Secretary/Supervisor of the Club, who went so far as to complain of her activities to the Police Special Branch. Findings of wrong conduct were made against the Club, the Club's then President, the Federation and the Federation's President. Recommendations were made concerning immediate steps that might be taken to ensure the adoption of sound administrative and financial procedures. At about the time that the final report was being completed, the Government set up an Interdepartmental Committee to review the role of police in the Boys' Club movement, and this Office referred its report to the Committee, together with a recommendation that it should examine whether any police involvement at all in Club affairs was desirable.

28. Western Lands Commission

A lessee of the Western Lands Commission, which manages and controls two fifths of the area of N.S.W. in the Western Division, complained to this Office of a lengthy delay by the Commissioner in approving a change in the purpose of the lease from grazing to agriculture.

The complainant had spoken to the Commissioner in January 1979 about a proposal to irrigate part of the land he leased. The proposal was accepted and approval for a change in purpose promised as soon as the irrigation works were completed. In October 1979 the complainant informed the Commission that work was completed and sought his change of lease. The Commission failed to reply to this letter, and also to another letter a year later in October, 1980. In January, 1981, the complainant again interviewed the Commissioner who, for the first time, explained that he was not keen on including large areas of dryland grazing area within special leases for agriculture. Because it would take the land out of the price control provisions of the Western Lands Act and because it would not give the Crown the benefit of the increased value of the land, the Commissioner deferred the matter for further consideration. The complainant's solicitors wrote to the Commission in May and June 1981 seeking a decision, but the Commissioner also failed to reply to these letters. In January, 1982, the complainant called again at the Commission, pointing out that he hoped to sell his property as his children did not wish to take it over. The change in his lease would help him receive a better price. By 1 March he still had not heard anything and so he rang the Secretary to the Commission. Finally, he was told that his matter was the subject of a Government policy review and that it could be another twelve to twenty months before a new policy would emerge. The complainant then turned to this Office for assistance.

Because of other commitments, the Commissioner failed to respond to a written request for information from this Office. Therefore a formal inquiry requiring his personal attendance was held. At the inquiry, the Commissioner conceded that he had given the complainant "a virtual undertaking" that his proposal would be approved. As a result of that promise the complainant had carried out irrigation works at a cost of approximately $20,000. Having suggested a certain procedure for the complainant to follow — which he did — the Commissioner became concerned at the possible policy implications of adhering to that procedure. No effort was made to inform the complainant of any possible objections until 30 January, 1981, two years after the initial undertaking was given. But for the intervention of this Office, the delay in finalising the matter could have been up to five years.

After taking into account all the facts this Office found the conduct of the Commissioner wrong in inordinately delaying a decision he himself had undertaken to make in favour of the complainant, and in failing even to acknowledge the complainant's correspondence.

The Commissioner agreed to make a decision promptly in the matter, and did so on 7 June, 1982, to the complete satisfaction of the complainant.

In the light of this delay and the Commissioner's own statements that other delays in consents to transfer also existed, the Ombudsman recommended an urgent survey of all outstanding matters at the Commission. The Under-Secretary of the Department of Lands, under whose general administration the Commission falls, agreed to begin a management consultancy study forthwith. As a result of this study, numerous procedures are now being changed to improve productivity and efficiency within the Commission.

29. Registration of Water Slide Amusement Devices

The Ombudsman's Office received a complaint that a Council was unreasonable in requiring certain works to be carried out prior to approving the operation of a water slide device. The case raised the general issue of the safety of water slide amusement devices, as well as an overlap of responsible authorities.

In late 1981 the complainant and the Council entered into an agreement concerning the erection of a water slide on Council property and the sharing of revenue derived from its operation.

On the basis of this agreement the complainant commenced the erection of the water slide device in November, 1981 without building approval being obtained beforehand as required under the provisions of Section 306 and 311 of the Local Government Act 1919.

Although a building application for the foundations was lodged with Council during December 1981, by that stage the foundations had already been constructed and the steel work was being erected. At about the time when the above building application was lodged, the complainant also lodged with Council an engineering plan for the structure. However, it was considered to be quite inadequate in detail.

Before construction started, the complainant had approached a branch of the Department of Industrial Relations where he was advised that the water slide device was not classified as an "amusement device" under the provisions of the Construction Safety Act 1912. In this regard the Department advised this Office that the complainant was told that a water slide was in fact an "amusement device" within the definition of the Construction Safety Act. However, he was further informed that:-

- there was no requirement for such a device to be registered under the Act as it was not power operated;
- plans were not required to be submitted to the Department for approval;
- the plans for the device should be certified by a qualified Structural Engineer; and,
- that he should contact the Council.

On the basis of numerous inspections by Council Officers, and further to a letter from the complainant's Consulting Engineers confirming that all aspects of the structural support system of the water slide were satisfactory, the water slide was eventually opened to the public in March 1982.

The water slide was inspected by an Officer of the Department of Industrial Relations in April, 1982 (after the opening of the slide to the public) following which the Inspector issued directions (dated May, 1982) to improve the safety of the slide.

The Department advised this Office that although formal registration of the device was not necessary, the Department considered that it still had a duty to ensure that it was safe for use. In this regard it should be noted that under Sections 13 and 15 of the Construction Safety Act 1912 Inspectors of the Department have the power to inspect and examine amusement devices and to give such directions in writing as they think necessary in order to prevent accidents or to ensure compliance with the regulations. A person receiving such a direction is required to comply with it forthwith, unless a Notice of Appeal is given as provided for in the Act.

It appears that the complainant was not told that he could appeal to the Minister against the Department's directions. The Department advised that in accordance with standard procedure, the Departmental Inspectors explained to the slide supervisor and a Council Officer the reasons for requiring the alterations, and as they appeared to accept the need for the additional safety precautions, no reference was made to the right of appeal.

When comparing the Council and Departmental requirements to improve the safety of the device, it is interesting to note the Catch-22 situation which arose when the Department required the complainant to provide:-

"A flexible non-metallic pool divider between the discharge points of the slide . . ."

The Council had earlier required the complainant to *remove* a pool divider which had originally been installed between the discharge points of the slide. Although it is difficult to determine where the responsibility lies for this situation developing, in no way can it be seen as acceptable or appropriate for Council and Departmental requirements to be totally inconsistent.

Council advised this Office that:-

> "Although requests were made to the Department of Industrial Relations for guidance in the construction of the slide, this was not forthcoming as the Department denied all responsibilities therefor and advised the responsibility rested entirely on Council for the construction and safety of the structure. It was not until after completion of the slide that the Department then decided to carry out an inspection of slide and notified Mr . . . of directions to be complied with."

Although it was reasonable to consider the safety of the water slide, the most appropriate time for safety to have been considered was before it had been built.

It is also reasonable to expect the Department to advise a person issued with directions under Section 15 of the Construction Safety Act that a right of appeal to the Minister is provided under that Act.

In response to the Final Report in this matter (prepared under the provisions of Section 26 of the Ombudsman Act 1974) the Under Secretary of the Department has advised the Ombudsman that:-

(1) "The rights of persons to appeal against directions given to them under the Construction Safety Act by Departmental Officers is now explained to the persons concerned at the time of issue of the directions."

"The form used in connection with the issue of directions is being reprinted to include a notation advising of the right of appeal."

(2) "Improved liaison between this Department, Local Councils, owners and operators of new water slide amusement devices is the subject of an instruction being prepared for circulation throughout the industry and to other Departments concerned."

(3) "The proposal to register water slide amusement devices has been submitted by the Chief Inspector of Construction Safety. An Order to this effect can be anticipated for gazettal after legal review has been completed."

"When registration of these devices becomes law as proposed . . ., this Department will have the same degree of control over water slides, as now exists in respect of all other registered amusement devices."

30. Department of Motor Transport — Role of Taxi Co-operatives in the allocation of taxi-plates.

The allocation of taxi-plates is an important aspect of the regulation of the metropolitan taxi industry, which in turn is an important function of the Department of Motor Transport in the discharge of its wider responsibilities in regard to non-government motor transport.

Another aspect of the Department's conduct in the allocation of taxi-plates is dealt with separately in this report (see Case No 17). In this instance the complaint discusses the relationship of the Department with the private taxi co-operatives which dominate the industry.

The complaint attracted a degree of imprecise media attention but it was generally recognised that the investigation concerned condition No 4 of the official application form, which required that the applicant should be accepted for membership of a recognised taxi-cab two-way radio organisation. The equation was quite straightforward: no evidence of acceptance for membership meant no taxi-cab licence.

In other words, the taxi co-operatives, by refusing to accept a person as a member, could exclude that person from the industry. Further, they were under no obligation to state the reasons for refusal of membership, it was this point which occasioned the complaint.

The complainant, who had criticized the relationship of a particular taxi co-operative with a petroleum supplier before a Trade Practices Commission hearing, claimed that this power to refuse membership without stated reason could be, and was, exercised for improperly discriminatory purposes. He was indeed convinced that this had been done in his case.

The Department, when approached, explained that it had been its policy to require taxi-cabs in the metropolitan transport district to be equipped with two-way radios and to be operated as units of recognised taxi radio co-operatives since 1957. As a result, it is said that about 98% of the taxi-cabs licensed for operation in the Metropolitan Transport District are fitted with two-way radios. The Department had no doubt that its policy was in the best interests of the industry and the general public, and was unaware of any prospective taxi-cab purchaser, other than the complainant in this instance, having any difficulty in joining a taxi co-operative. The Department pointed out that some 3,000 taxi owners found the conditions of membership of the co-operatives acceptable, and that the complainant, although refused membership of a number of co-operatives, had not pursued all of the opportunities open to him.

Although it may be that the Department's policy has achieved its proper objectives over the period since 1957, the reply given was not regarded as a convincing answer to the problem raised. Three thousand taxi owners may well find the conditions of membership of the co-operatives acceptable, when non-membership means exclusion from the industry.

The taxi co-operatives are outside of the jurisdiction prescribed by the Ombudsman Act and may, in any event, have very good reason for refusing membership in any instance from their own point of view. In the case of private organisations properly concerned with and responsible only for their private affairs this may be quite in order, but in this case it remained clear that the decisions taken by the private co-operatives had a determinant role in the discharge by the Department of a public responsibility.

It was put to the Department that it had an obligation to satisfy itself that the role of the co-operatives is at all times exercised in a manner consistent with the public interest and the purposes of the State Transport (Co-ordination) Act, and that membership and taxi-cab licences are refused or withdrawn only on appropriate grounds; and further, that those grounds should be clearly and fully set out in written notification to the person concerned.

Following subsequent discussion and further consideration of the matter, the Commissioner for Motor Transport decided that the points raised concerning the role of co-operatives under existing Departmental policy would be included in a comprehensive review of the structure of the taxi-cab industry in which individuals and organisations within the industry, and the general public, will participate.

Pending the outcome of that review, the Commissioner took steps to ensure that before the issue or transfer of a taxi-cab licence is declined because of the applicant's inability to obtain membership of one of the nominated co-operatives, the Department will seek details from the organisation(s) about the grounds for refusal. If it is found that the decision was based on unreasonable or nebulous grounds, the organisation will be informed that, unless membership is granted, the applicant will be given freedom to join the co-operative of his choice. If the applicant cannot join any co-operative and such a course seems reasonable, consideration will be given to allowing the taxi-cab to be operated without a radio.

The reasons to be accepted by the Department as legitimate grounds for refusing an application for membership of a co-operative will be those which the Department in the discharge of its own responsibilities will itself regard as legitimate. When this occurs, the Department will give a written statement of those reasons to the affected party, who will then have a right of appeal to the Transport Appeal Court under an amendment of Section 24 of the Transport (Co-ordination) Act which came into effect from the 1st November, 1982.

In the circumstances the issues under investigation were seen to be satisfactorily resolved by the Commissioner and the investigation was discontinued.

31. Complaints about Pastures Protection Boards

A number of complaints have been received in this Office by dissatisfied "occupiers" and ratepayers in respect of ratings by their Pastures Protection Board. It is apparent that confusion exists, particularly among persons who have recently been charged the minimum rate on the basis of an "assessed carrying capacity" of "5 large stock", as to what Pastures Protection Boards do, why and how rates are levied, and what options of appeal are available.

The complaint received from Mr B exemplifies the problems being experienced by some "occupiers". Mr B contended that the Moss Vale Pastures Protection Board had incorrectly assessed his land's carrying capacity, as on the basis of his actual useable land and the number of stock carried he was exempted from rates.

Mr B complained to the former Ombudsman in April 1980. It was decided, after some correspondence with Mr B and the Board, to take no action, as an avenue of appeal existed for Mr B to the Local Land Board and the Board undertook to "include an appropriate notification on its next issue of rate notices concerning the right of appeal mentioned".

Mr B claimed that, of the 35 acres he owns, only a very small portion is useable (approximately 5 acres), as the property is located in a slip area and is timbered and very steep. The property, which has no marked boundaries, was assessed by an officer of the board in the owner's absence. Accordingly, he disputed the Board's decision that his land had an assessed carrying capacity of five large stock and was therefore ratable land.

He wrote to the Board, but was advised that objections had to be lodged within one month of the date of service of the notice, that this time had now expired and that nothing could be done about the assessment. The Board, after a request for comments, advised this Office of Mr B's right of appeal under Section 33 of the Pastures Protection Act. This information was conveyed to Mr B, who commented:-

> "I am pleased to note that I have a right of appeal to the Local Land Board which is what I have sought from the start, a judgment by a body independent of the Pastures Protection Board and myself . . . I was annoyed that I was not advised of my right of appeal at the time when the assessment was made and perhaps it might not be too much to ask for the M.V.P.P.B. to mention it in their pamphlets."

In view of the existence of an avenue of appeal, the investigation was discontinued. However, although Mr B was now aware that he had a right of appeal to his Local Land Board, he experienced great difficulty in locating it. It was not in the telephone book, nor did the M.V.P.P.B. know its address. On 24th November, 1981 he again wrote to this Office and advised that he had

received a summons from the Camden Court of Petty Sessions claiming $19.34 rates levied by the Board, but was still unable to find out where to lodge his appeal. Mr B commented as follows:

> "Surely this is an anomaly (of law) when the people administering an Act cannot tell me where to lodge my appeal. You don't know, the local Court of Petty Sessions don't know, the Local Land Department don't know and yet I am to be prosecuted because I have not exercised my right of appeal."

In March 1982, Mr B wrote advising that he had finally located his Local Land Board, but was unfortunately out of time to lodge an appeal. In a further letter dated 31st March, 1982 he advised that he had just received his 1982 rate notice and that:

> "You will be pleased to note that after 3 years I have reached a stage where I have found out I can lodge an appeal (which I have done) and where I lodge it."

Section 33 of the Pastures Protection Act provides for an appeal by the occupier of any land who is dissatisfied with the determination of a Pastures Protection Board as to the carrying capacity of his land. The appeal must be lodged, within thirty (30) days after service of the rate notice, with the Local Land Board. However, Mr B was not advised of this right of appeal when he received his 1979 rate notice. There was no mention made on the rate notice or in the accompanying pamphlet that a dissatisfied "occupier" had a right of appeal, nor of how he might exercise it.

The 1982 rate notice stated:

> "In accordance with Section 33 of the Act any appeal against the assessed carrying capacity must be lodged in writing one month of date of posting notice."

It is possible to debate the meaning of "appropriate notification". The Ombudsman commented:

> "I take the view that, whether or not there is a stated statutory responsibility to inform of an avenue of appeal, there is certainly a moral responsibility to advise affected persons of their right of appeal and in sufficient detail to enable them to realistically exercise such right. The statement on the Board's 1982 Rate Notice may constitute "notice", but it is not, in my opinion, adequate notice particularly in view of the trouble Mr B experienced, once he had discovered that he had a right of appeal, in ascertaining where he had to lodge such appeal and so comply with Section 33."

The Board's conduct was found to be wrong in terms of the Ombudsman Act for its failure to advise Mr B of his right of appeal against its assessment of his property as ratable land. It was recommended that in order to save other "occupiers of land" the frustration Mr B experienced, the Board's pamphlets and rate notices be amended to give adequate details of that right of appeal in a form of notice stating:

(i) that such right exists;

(ii) details of where and with whom an appeal should be lodged; and

(iii) advice of the time within which an appeal must be lodged.

Mr B lodged an appeal with the Local Land Board. As a result, his property was inspected by a Land Board Officer, and it was held that his land could not carry the 5 large head of stock necessary for the land to be deemed ratable. His neighbour, a widow, had her land inspected, and it was decided that her land would only support 2 large stock. In both instances it was shown that the minimum rate had been unfairly levied.

As a result of such reports by the Ombudsman, the Department of Agriculture and the Pastures Protection Board Association have recommended to all Pastures Protection Boards that notice of ratepayers' right of appeal should be included on future rate notices.

In addition to the issue of appeal rights, a number of other issues relating to Pastures Protection Boards have been the subject of complaints to the Ombudsman. The following are a number of questions which are currently under consideration:

(a) Assessment of Carrying Capacity

In two cases, complaints were received in circumstances where a Board had assessed carrying capacity of a property and the landowner contended that the physical features of the land would make it impossible to depasture any stock at all on the land. In one of these cases, the Board re-inspected the property and found that it had been in error as to the actual boundaries of the property. Consequently, the Board agreed that the property could not hold stock and withdrew the assessed rate.

(b) Objection to Validity of Rates

Section 36 of the Pastures Protection Act provides as follows:

"36. In any proceedings for the recovery of any rate, objection to the validity of the rate shall not be allowed nor avail to prevent the recovery of the rate.

Any occupier desiring to object to the validity of the rate may subject to section 26 object to such validity in such court and in such manner and upon such conditions and subject to such fees as may be prescribed . . ."

Certain complaints have raised issues which may amount to objections to the validity of a rate. However, despite the provisions of Section 36, no "court" or "manner" to object to the validity of a rate have been prescribed. This is considered most unsatisfactory, and it has been recommended that this anomaly be remedied by regulation.

(c) Interpretation of Section 30(3)

Rates levied under section 30(1) are based upon actual stock numbers shown in the landholder's return. It was found in one case that an amount assessed in respect of agricultural land under section 30(3) was added as a matter of course to the actual stock numbers when the rate was fixed under section 30(1). The advice of counsel retained by the Ombudsman is that this is incorrect.

(d) Inspection of Properties

It is not normal practice for properties to be inspected prior to a rate being fixed. This is understandable owing to the limited resources available to Boards, coupled with the fact that Board members generally have considerable local knowledge of the land being rated. However, in the case of one complaint, the Board did not carry out an inspection of the property, even though a bona fide dispute had arisen over the assessment of carrying capacity. The Secretary of the Board declined to arrange for an inspection when requested to do so by an Investigation Officer for the Ombudsman, but stated that the matter would be considered by the Board if the request were put in writing. There are obviously occasions on which an inspection is essential, and this issue is being given consideration.

32. Chiropractors Registration Board

Details of complaints received about the Board were set out in the Case Notes section of the last Annual Report (Case No. 1). A report issued in August, 1982, recommended:-

(i) That:-

(a) the Board take immediate action, as soon as possible and no later than 1983, to ensure the provision of a bridging course of appropriate content and duration to afford those Osteopathic graduates concerned a reasonable opportunity to attain the knowledge they require and to otherwise equip them to attempt the Boards examination for registration; and

(b) pending the availability of such bridging course, the Board ensures that those Osteopathic graduates who have not yet gained registration but who have been and are presently engaged in the practice of Osteopathy be given all practicable and positive assistance possible to otherwise enable them to attempt the present registration examination.

(ii) That the new Board, when constituted, contain appropriate representation from the ranks of the "pure Osteopathic profession".

(iii) That the Board take immediate action to regularise and remove the uncertainty which surrounded its practice of charging examination fees by arranging for an appropriate regulation or for appropriate regulations, as the case may be, to be made.

The Chairman of the Board subsequently reported that:-

(i) The Board established a bridging course to assist graduates of osteopathic colleges in N.S.W. who were ineligible to register under the "grandfather" provisions of the Chiropractic Act, including 1982 and 1983 final year osteophathic students. The bridging course, which was part time and lasted for six months.

(ii) A registered osteopath was appointed to the Board as the "person nominated by the Minister" under Section 5(2) (e) of the Chiropractic Act. The Board was re-appointed for a period of 12 months only and the Chairman indicated that the Minister was giving consideration to more formal and more extensive osteopathic representation on the Board.

(iii) A regulation prescribing the fees to be paid in connection with examinations was gazetted on 17th December, 1982.

As the Board had taken action considered by this Office to be appropriate in terms of the recommendations made, the investigation was concluded.

33. Refusal to Issue Public Vehicle Licences: "Booze Buses"

During the year under review the Government introduced random breath testing as a measure to reduce drunken driving and consequently the road accidents which might arise as a result. The hotel and club industry was faced with a possible decline in patronage and various ideas were adopted to overcome this. One such idea was that of 'booze buses' or 'pubmobiles'. A complaint was received from a publican in Kempsey that the Department of Motor Transport (D.M.T.) had refused to licence a small bus which he had acquired for that purpose, on the grounds that the needs of the community were being adequately served by the existing passenger services available.

The D.M.T. took a view, based upon Section 17(3)(b) of the State Transport (Co-ordination) Act which requires that regard be had to:

> "the extent, if any, to which the needs of the proposed areas or districts, or any of them, are already adequately served."

and the regional office was instructed that:

> "Any appalication by a PUB is to be dealt with on an individual basis, but if there are adequate taxi cabs or other public vehicle facilities available applications will be refused."

There were 13 taxi cab licensees in Kempsey and they represented their alarm at the introduction of the 'pubmobile', and its effect upon their trade. On the ground that these taxis "by tradition rely heavily on patronage from hotels and the like" it was concluded that an adequate service existed.

This decision was overtaken by the Government's decision in February 1983 to allow hotels to provide free bus services to patrons.

The Ombudsman proceeded nonetheless to report on the matter as the original decision was, in his view, wrong, in particular as to the application of Section 17(3) of the State Transport (Co-ordination) Act. That sub-section requires the Commissioner (or his delegate) in deciding whether or not to grant a licence for a public motor vehicle to consider a number of factors.

These include consideration of the public interest and the extent to which the needs of the area are already adequately served. The section does not give pre-eminence to any of the seven factors listed, and does not dictate an approach which regards existing licensed operators as having some type of monopoly rights which are not to be interfered with by new competition. The instructions issued by the D.M.T. were therefore based on an erroneous view of the operation of the section. The position of existing taxi operators was only one factor in the situation, yet it was regarded as determinative. There were obvious public interest factors in the situation which required consideration.

34. Forestry Commission: Upper Hastings Forest: Environmental Impact Statement Required

In last year's Annual Report reference was made to a finding of wrong conduct made in relation to a submission by the Commission to its Minister proposing the immediate construction or extension of Tigra Road in the Upper Hastings Forest (see Case No. 4, pages 65-66). The lengthy report dealt in detail with the Commission's activities in the forest and the changing plans for various roads in the area. The report annexed internal departmental minutes. The conclusion reached in the report was that there had been no "final decision" to extend the road prior to the enactment of the Environmental Planning and Assessment Act, and accordingly all the procedures provided for in that Act, including the completion of a report on the required environmental impact statement by the Director of the Department of Environment and Planning, had to be completed before a final decision could be made.

As recorded more fully in Case No. 4 to last year's Annual Report, the Commission on receipt of the draft wrong conduct report argued to the contrary, and indeed furnished the Ombudsman with a copy of an Opinion obtained from Mr David Officer of counsel which concluded that the 1978 Ministerial approval of North Plateau Road Stage 1 constituted a "final decision" which also encompassed the construction of Tigra Road and so placed it outside the operation of the Environmental Planning and Assessment Act. In the Final Report the Ombudsman disagreed with this opinion. In addition to finding the Commission's conduct wrong, he adverted to the fact that it was open to the complainant to commence proceedings in the Land and Environment Court for an injunction against the construction of Tigra Road.

Proceedings were commenced by Mr Prineas, the Secretary of the National Parks Association of NSW in December 1981. The initial affidavit in support annexed the Ombudsman's report including the annexures to it. An interlocutory injunction was granted and the substantial legal arguments were not heard until later in 1982. Curiously perhaps when the matter came on for argument the Forestry Commission did not submit, as it did to the Ombudsman, that the relevant "final decision" had already been made. In a decision on a number of substantial issues in the case given on the 12th November, 1982 *(Prineas-v-The Forestry Commission of New South Wales & Ors,* 12th November 1982). His Honour Mr Justice Cripps also accepted that it was clear that no "final decision" had been made, and, accordingly, the procedures set out in Part V of the Act with relation to consideration of the environmental impact statement had to be undertaken.

In the event, the New South Wales Government decided that logging of rain forests in the area would not continue. It may be that the Ombudsman's enquiry and the subsequent injunction proceedings provided a breathing space and held the Commission back from a possible breach of the law while giving the Government the full opportunity to decide the matter on high policy grounds.

35. Hermitage Reserve: Addition to Sydney Harbour National Park

This Office has been involved for some years in following the progress of the acquisition of the Hermitage Foreshore Reserve by the National Parks and Wildlife Service, to form an extension of the Sydney Harbour National Park from Nielsen Park to Rose Bay.

A complaint was first received in September 1980 from Mr Peter Beggs, who at the time lived in Darlinghurst (see Paragraph 35 "Persistent Complainants") and who had discovered the existence of the Reserve while walking in the area. During his rambles through the area, he had run into some trouble with the property owners. His initial complaint was about the failure of Woollahra Council to maintain the Reserve as a park.

Enquiries at the time established that the foreshore land he had discovered was in fact resumed by the Lands Department in 1912 and consisted of the narrow strip of land of approximately 3.2 hectares extending in a South Easterly direction from Nielsen Park to Bayview Hill Road, varying in width from 30 metres to 12 metres. Also that there were four access points to the Reserve from Nielsen Park, Tingara Avenue, Queens Avenue, and Bayview Hill Road, and included the popular Milk Beach (situated in front of Strickland Hospital) as well as a couple of other small stretches of sand.

At the time of his complaint Woollahra Municipal Council had the care, control and management of the Reserve but had not taken any action towards establishing the Reserve as a public park, largely because of the difficult nature of the terrain. It was extensively overgrown and with the exception of a couple of private gardens which had been established adjoining and some within the Reserve, was nearly impenetrable. Several of the gardens were elaborate and included terraced gardens and walls, and in one case a full laid out Japanese Garden and fountain. In addition, at that same property a boat slip and private jetty existed, all of which encroached on the Reserve. Mr Beggs as a part of his campaign to have the Reserve recognised and opened to the public, blazed a trail through it and on several occasions had run into trouble with the adjoining owners. It was also established that as from 30th September, 1965, all permissive occupancies were to end, but that none of the encroachments, improvements, structures and the like were required to be removed. In addition there were some Maritime Services Board leases which still abutted the foreshores.

Initially, the National Parks and Wildlife Service were not interested in acquiring the Reserve to form a continuation of the Harbour National Park because in its opinion from a nature conservation point of view, the area was neither substantially natural nor was it of value for wildlife management.

In March 1981, following a considerable volume of publicity resulting from the Ombudsman's enquiry, a Cabinet decision was taken to incorporate the controversial Hermitage Foreshore Reserve into the Sydney Harbour National Park. This decision meant that the encroachments into the area would need to be removed by the adjoining property owners. Because of the original complaint, the Ombudsman followed the progress towards gazettal of the area as part of the Harbour National Park.

In the ensuing couple of years considerable action took place between the Lands Department, Maritime Services Board, and the National Park and Wildlife Service, regarding the surveying of the area and the removal of a number of structures on the foreshores such as boat sheds, rock pools, and jetties. Signposting of the various access ways to the Reserve was carried out by Woollahra Council. During this period several adjoining owners made representations to the Ministers involved, seeking to reach agreement on the retention of some of the encroachments. Indeed in some instances because of the difficulty removing them, it was agreed to allow the encroachments to remain, but under leasing arrangements with the Government. One such outstanding structure, known as the "Rooklyn Wharf", was originally proposed to be cut back to only one arm (or half its size) to allow both the public and the National Parks and Wildlife Service to use it. However, after representations were made, agreement was reached between the Minister and Mr Rooklyn for the whole of the jetty to be retained and for him to have the use of the dolphins near it for mooring his yacht and also the use of the eastern half of the jetty on weekends between 6 pm and 6 am.

Two senior officers of the National Parks and Wildlife Service involved in the direct management of the proposed park, expressed considerable concern to the Director at the proposal to allow the jetty to remain and about the mixed public use of it. In writing to the Director the Ombudsman also expressed his concern at the prospect of likely conflict or at least confusion arising from the proposed joint public and private use of the jetty and suggested that rather than issue a 3-year licence an annual one only be considered. The Ombudsman also commended the officers of the Department who had expressed their dissent from the original proposal for their preparedness to speak out in the public interest.

The Ombudsman is continuing to keep this longstanding matter under review to ensure full resolution of the complaint. Formal gazettal of the Reserve as part of the Sydney Harbour National Park should be imminent.

(i) Newly-signposted Hermitage Reserve, Vaucluse. (see paragraph 35)

(ii) Rooklyn Wharf

(iii) Japanese garden encroaching on reserve

(iv) Mr E. Azzopardi (see paragraph 36)

36. Persistent complainants and Public Interest

Some complainants are unusually persistent in their pursuit of the public interest. When their complaints are vindicated, they deserve the community's gratitude for their untiring persistence in pursuing matters of principle.

A recent trend in the United States has been to celebrate such "whistle-blowers" as a vital part of the consumers' rights movement. In Australia, persistent complainants operate in a less enthusiastic climate. The popular epithets "whingers" and "stirrers" are not complimentary.

Taking a complaint to many government agencies and different media outlets requires energy, determination and a strong sense of justice. Of the persistent complainants to our Office during the past year, two may be singled out for particular mention, Mr Peter Beggs and Mr Eddy Azzopardi.

Mr Beggs became incensed at private encroachment on the Hermitage Reserve, a narrow band of public land on the foreshores of Vaucluse between Rose Bay Convent and Nielsen Park. (The case is described in more detail in paragraph 35 above.) The property-owners whose gardens, fences, toolsheds, boatsheds, rockeries and hedges impeded pedestrians included the Health Department and several well-to-do and influential citizens. Mr Beggs complained in the first instance to Woollahra Council. When it became clear that the authorities concerned ranged beyond the Council and included the National Parks and Wildlife Service and the Maritime Services Board, Mr Beggs did not lose heart. His complaint to the Ombudsman which he made public led to media interest and a decision by the Government to incorporate the area as part of Sydney Harbour National Park. The accompanying photographs show what progress has been made in the reclamation of the reserve as accessible public land.

Mr Beggs' zeal did not stop in making a complaint. He personally cleared patches of overgrown bushes, in one place cutting a pathway through thick bamboo. He took television crews and local reporters to inspect the site. Even after moving interstate he requested regular follow-up reports. He visits the reserve each time he comes to Sydney.

Another persistent complainant, Mr Eddy Azzopardi, continued to make allegations relating to the administration of the Parramatta Police-Citizens' Boys Club over a lengthy period. There were several police enquiries which involved Internal Affairs Branch because one of the officers mentioned in Mr Azzopardi's allegations was a police sergeant. Reports by Internal Affairs Branch denied that there was anything untoward at all. For example, Internal Affairs Branch reports said:-

> "Since 1979 all the matters referred to have been investigated by senior members of the Police Internal Affairs Branch and reports on those enquiries submitted to the Minister.

There has been no occasion when any of the allegations inherent in and inferred by the questions or representations have been substantiated."

"My enquiries have indicated nothing sinister or underhand in any of the matters dealt with in this report."

Mr Azzopardi had also made complaints to officers of the Charities Branch, then a part of the former Department of Services. No investigation had been carried out by the Charities Branch of Mr Azzopardi's allegation with regard to the conduct of art unions. He then on 9th December 1981, complained to the Ombudsman about the lack of action on the part of the Charities Branch. The Ombudsman conducted an enquiry and made the following findings:-

"That the Charities Branch which has been transferred from the former Department of Services to the Treasury acted wrongly in failing to investigate the allegations and complaints made by Mr Azzopardi."

These findings were embodied in a report to the Treasurer Mr Booth to whose department Charities Branch had been transferred. In consultation with the Ombudsman Mr Booth said that independently he had ordered a review of the operations of the Charities Branch and that the recommendations contained in this report would be considered in the course of that review.

Subsequently Mr Azzopardi approached the Office of the Ombudsman with further allegations relating to the Parramatta Boys Club's conduct of art unions. It was suggested that the proper course for him now was to refer these matters to the Treasurer, who promptly referred the matter to the Auditor-General Mr O'Donnell.

In his Annual Report to Parliament Mr O'Donnell the Auditor-General has reported as follows:-

"Special Audit

On the 5th January, 1983, the Treasurer, acting under Section 12 of the Lotteries and Art Unions Act, 1902, sought a special audit of art unions conducted by the Parramatta Police and Citizens Boys' Clubs.

Early in the audit signs of irregularities were apparent and there was found to be an intermeshing of art union transactions with those of the Club itself. It thereupon became necessary to exercise the functions of an inspector through Section 11 of the Charitable Collections Act, 1934, to extend the review to activities of the Club as a registered charity. It was found also that a Police investigation was in progress into other matters affecting the Club.

An interim report was delivered to the Minister on 1st July, 1983, referring to extensive known and suspected irregularities in the conduct of art unions and in the financial affairs generally of the Club. The report included recommendations for further action pending the completion of audit and inspection.

Simultaneously, in acknowledgement of a common law duty, information on suspected indictable offences was referred directly to the Commissioner of Police. On 6th September, 1983, a former Police Sergeant was charged with an offence arising from the conduct of an art union. Additional charges were preferred on 19th September, 1983.

In a further report to the Minister I expressed the view that action by the Federation of N.S.W. Police-Citizens' Boys Clubs to control the operations of the Club had been in my opinion, ineffective. I have notified the company, known as the Federation, that I propose to exercise the functions of an inspector under the Charitable Collections Act in relation to the company's operations as a registered charity. Some aspects of art union and Club operation are still under investigation and it is not appropriate yet to report further details."

As indicated in the above report charges against the former Police Sergeant are pending. The Ombudsman for his part is awaiting explanations from Deputy Commissioner Perrin in relation to the original Internal Affairs Branch reports referred to above.

37. Complaints about Universities

Under the Ombudsman Act, the definition of a "public authority" whose conduct may be made the subject of investigation includes persons Incorporated or unincorporated in relation to whose accounts the Auditor-General is empowered to exercise powers under any law.

Universities and other tertiary institutions set up by Act of Parliament contain audit provisions which require their accounts to be audited by the Auditor-General, and so these bodies

come within the definition of a "public authority". The reasons for the Ombudsman's power to investigate the conduct of these bodies seems to be that universities are now largely funded by Government and should share with other Government departments and agencies the accountability that the Ombudsman Act provides for. Decisions universities make can sometimes be "wrong" and such decisions do adversely affect individuals.

The conduct which this Office may investigate is restricted firstly by the specific exclusions listed in Schedule 1 of the Ombudsman Act; for example, the conduct of a public authority relating to the appointment of a person as an officer or employee may not be made the subject of investigation. Additionally, the Act defines "conduct" as meaning any action or inaction "relating to matters of administration". This addional qualification or restriction therefore requires early and careful consideration of each complaint about universities and colleges to determine whether the complaint relates to "conduct" as defined in the Act. In one recent case, a complainant wrote to this Office alleging that the supervisor of his thesis had not given him sufficient guidance and criticism in the preparation of his work and, as a result, he had failed. He had re-submitted the work, attempting to take account of the examiner's criticisms, but despite these efforts failed again as a result, he alleged, of fresh problems discovered by the same examiner. In my view, although the allegation may or may not be correct, the conduct of the supervisor and examiner did not relate to a matter of administration. Both those persons were making judgments on either the standard of supervision required or on the academic merit of a piece of research. The administrative procedures of the university or college only go into operation following the exercise of these judgments, and I believe that it is unlikely that such judgments come within this Office's jurisdiction. In any event, there are sound policy reasons why a lay person, such as the Ombudsman, should not seek to involve himself in scrutinising decisions where special or professional expertise is the essential ingredient in reaching that decision.

On the other hand, this Office has investigated the conduct of a university in the case of a student who complained that correct procedures had not been observed in determining a grade where two examiners of a research project had widely divergent views of the project. The supervisor was supposed to make a recommendation to a committee on the most appropriate course of action, with the possibility that a third examiner already appointed would submit a report. In fact the supervisor reported direct to the meeting of the school in favour of recourse to the third examiner but the school adopted the committee's recommendation to rely instead upon the report of one of the two examiners. When the supervisor lodged a recission motion in relation to this decision, the committee had one of its own members examine, in effect, the paper and report on it. As this committee member was not the already appointed third examiner, this Office believed that there was a *prima facie* case that a wrong administrative procedure had been followed. Similarly this Office has been prepared to investigate the procedures followed by an examiner in reaching a determination, that is, whether all the evidence making up the material required to be assessed has been examined, whether marks have been correctly calculated and whether the assessment has been made in accordance with criteria previously announced to students. Legal advice obtained by this Office from Senior Counsel confirmed that such matters are "matters of administration" within the meaning of the Ombudsman Act.

Subject to the restrictions mentioned above, this Office can investigate a diverse range of administrative decisions or procedures within universities and colleges. This capacity to bring outside scrutiny to bear on these matters has raised some important questions amongst academics and senior administrative staff within tertiary institutions to the effect that the Ombudsman is interfering with academic freedom, that this Office imposes a further unnecessary review process when there are already adequate appeals procedures *within* academic institutions, and that some institutions also provide for outside review by means of a visitor. To some extent, these questions have already been canvassed in earlier debates on whether an Ombudsman was necessary at all. Evidently, Parliament believed that existing procedures could occasionally fail; a Visitor might not be a real or adequate remedy; and an institution governed largely by academics might on rare occasions be overly reluctant to criticise or rectify some error or unfairness on the part of a colleague. At the same time, Parliament also gave the Ombudsman a wide discretion to decline to take up a complaint or to discontinue an investigation once it became clear that, for example, existing appeal procedures appeared satisfactory or that the complaint could be best resolved within the institution itself. These discretions are used frequently, with the result that a reasonable balance is struck between the legitimate concern of academics and administrators and the right to an independent investigation of complaints where it appears that internal safeguards may have failed.

38. Complaints about Privacy

Complaints about privacy are excluded from matters which may be investigated by the Ombudsman. Schedule 1 paragraph 7 of the Ombudsman Act excludes from investigation "conduct of a public authority relating to alleged violations of the privacy of persons". The basis of this exclusion is that such complaints should be dealt with by the New South Wales Privacy Committee.

Investigation officers are aware of this provision, and refer all complainants to the Privacy Committee. When borderline cases arise, it is the practice of this Office to discuss them with the Executive Member of the Privacy Committee or her staff. During the year these consultations have proved effective.

39. Court Proceedings Involving the Ombudsman

During the course of the year the Ombudsman was involved in three court proceedings. These were:-

(a) Moroneys Case

This case concerned the right of the Ombudsman to say that he was unable to determine a complaint of police misconduct under the Police Regulation (Allegations of Misconduct) Act, 1978. The basis of the Ombudsman's approach in these cases was that the investigation under the Act was carried out by the Commissioner of Police, and all that the Ombudsman received were statements taken by the investigating police. Where these statements conflicted, as they did in the complaint against Sergeant Moroney, it was often impossible for the Ombudsman to affirmatively satisfy himself either that the complaint was not sustained or was sustained as required by Sections 27 and 28 of the Act.

Sergeant Moroney commenced proceedings in the Supreme Court to compel the Ombudsman to find the complaint not sustained. The matter was heard at the first instance by Mr Justice Lee of the Supreme Court, who decided in favour of the plaintiff Sergeant Moroney. The Ombudsman appealed, and the Court of Appeal by a majority of 2 to 1 (the majority including the Chief Justice Sir Laurence Street and the President of the Court of Appeal Mr Justice Moffitt) decided the appeal in favour of the Ombudsman. The court ordered that Sergeant Moroney pay the Ombudsman's costs of the legal proceedings both before Mr Justice Lee and the Court of Appeal. No further appeal was undertaken by Sergeant Moroney and judgement of the majority of the Court of Appeal provides authoritative description of the operation of the Act. This decision is further referred to in Part III of this report.

(b) Boyds Case

This case concerned the right of the Ombudsman to reopen an investigation after reporting that a complaint had not been sustained. The former Ombudsman, Mr Smithers, had found a complaint against Constable Boyd not sustained, but on the submission of further evidence had sought to require the Commissioner of Police to undertake further enquiries. Constable Boyd took proceedings to restrain the Ombudsman from reopening the investigation. The matter was initially heard by Mr Justice Rogers of the New South Wales Supreme Court, who found in favour of the Ombudsman. Constable Boyd then appealed to the Court of Appeal. The Court of Appeal by a majority (including the Chief Justice and the President of the Court of Appeal) decided in favour of the Ombudsman and dismissed the appeal. Constable Boyd was ordered to pay the costs of the Ombudsman of both the proceedings before Mr Justice Rogers and before the Court of Appeal. No further appeal was brought by Constable Boyd and the judgments of the majority of the Court of Appeal accordingly, authoritatively state the law.

(c) The University of New South Wales -v- The Ombudsman

Following an investigation and draft report the University of New South Wales instituted proceedings in the Supreme Court. Initially the proceedings raised questions relating to jurisdiction and the meaning of the expression in the Ombudsman Act "conduct relating to a matter of administration". Following discussions between the parties and their counsel the matter was settled.

The complainants were advised of the terms of settlement in an agreed letter, but otherwise the terms of settlement preclude a full report on the matter.

In the above three legal proceedings the Ombudsman was represented by and had the advice of Mr A. M. Gleeson Q.C. and Mr J. C. Campbell of Counsel and Messrs Ebsworth & Ebsworth, Solicitors. The Ombudsman appreciates the high level of professional service provided by these eminent lawyers.

40. To whom can dissatisfied complainants complain after the Ombudsman?

It has been said that the Ombudsman is a complaint investigation body of last resort. Certainly it is traditional in all countries which have the institution, and normal practice in New South Wales, for the Ombudsman, before entertaining a complaint, to require the complainant to exhaust all other avenues. The complainant must therefore make reasonable efforts to press his complaint with the authority concerned. If the complainant has a reasonably available legal remedy he ought to take that course. Accordingly, when investigating a complaint the Ombudsman is in some senses correctly described as the last resort.

Inevitably, following the completion of an investigation where the conclusion is no wrong conduct on the part of the department or authority, there are occasions where the complainant remains dissatisfied; and in some cases, dissatisfaction fixes on the conduct of the investigation by the Ombudsman or his officers. This is to be expected, given that some complainants to the Ombudsman are very persistent, and that judgments about what is "wrong" can differ.

It is this context that questions arise as to whether a further "right of appeal" should be given from the decisions of the Ombudsman. Sometimes the argument is put in terms of "Quis custodes?" or, "Who guards the guardians?" Ultimately this type of question is for the legislature. One important factor, however, is that in any event the decisions of an Ombudsman are persuasive only and can be ignored by the authority. There would seem to be little point in giving an appeal from a body which cannot enforce compliance to another body, presumably similarly placed.

In the circumstances all that an Ombudsman can do is to carry out full and fair investigations and take care and patience to explain the basis of the facts and his conclusions in clear language. Ultimately, the answer to the question posed in this heading is no-one. However, the decisions of an Ombudsman do not preclude a complainant, and his Member of Parliament, continuing to assert the correctness or validity of a complaint found "not sustained". And from time to time the dissatisfied complainant will be right in that assertion.

For as was said by a Canadian Judge (Milvane C. J.) in a 1970 case:-

> "It must, of course, be remembered that the Ombudsman is also a fallible human being and not necessarily right."

41. Satisfied Complainants

Having in the last paragraph referred to dissatisfied complainants it should be said that the Office receives many letters of gratitude and satisfaction from members of the public. A brief sample is as follows:-

> "I believe that without your enquiries I would still be waiting to hear from Council, let alone actually seeing the land cleared."

> "It is reassuring to know that citizens can obtain such help if they suffer at the hands of the bureaucracy."

> "May I conclude by saying how impressed I have been with the efficiency and thoroughness of your Office? I found the speed with which the matter was taken up and the care taken in the preparation of Dr Dunn's report to be most impressive."

> "My sincere thanks for your efforts in the matter without which I am sure, the situation would not have been rectified."

42. Ex-gratia Payments: Need for Legislative Amendments

Both overseas and in the states and territories of Australia, Ombudsmen in their recommendations following a finding of some wrong conduct on the part of a department or authority, commonly recommend the making by the department or authority to the complainant of an ex-gratia payment. In the vast majority of such cases the citizen will have no legal entitlement to such payment; if he did he would in all probability have had an alternative legal remedy and have been required to exercise that right.

It has become apparent in similar situations in New South Wales that some departments and authorities claim that they are not legally entitled to make an ex-gratia payment. In some cases their arguments proceed on the basis that the complainant has no legal entitlement, which, as has been indicated, is beside the point. Under some legislation constituting a department or authority an appropiate construction of the powers of the authority would enable it to make an ex-gratia payment if it chose. For example, Section 5(2) of the Health Administration Act provides:-

> "(2) The Minister may:
> (a) provide, conduct, operate and maintain and, where necessary, improve and extend any health service or any ancillary or incidental service and arrange for the construction of any buildings or work necessary for or in connection with any such service;
>
> (b) enter into any agreement or arrangement for any other person to provide, conduct, operate and maintain any health service; and
>
> (c) do such supplemental, incidental or consequential acts as may be necessary or expedient for the exercise of the functions under the foregoing provisions of this subsection."

Counsel has advised the Ombudsman that the above section enables the making of an ex-gratia payment by the Department of Health to a patient in the circumstances outlined in Case No. 6. Accordingly, the Department having refused to make an ex-gratia payment, a report has been forwarded to the Premier for presentation to Parliament.

It is also clear that Ministers have a right to make ex-gratia payments up to $500, and on the advice of Counsel a Minister may at any stage approach the Treasurer in respect of ex-gratia payments in excess of $500. Another situation in which it is believed by the Ombudsman that ex-gratia payments can be made is in the case of local councils. The position is analysed in that section of this report dealing with Local Government.

Notwithstanding the particular circumstances discussed above, the relative uncertainty of the position and possible absence of power in some cases would suggest the need for specific amendment to the Ombudsman Act empowering public authorities to make ex-gratia payments where these have been recommended by the Ombudsman in a report. Such a provision would be an empowering position and would not oblige the authority to make any payment recommended by the Ombudsman. The traditional position would remain that the Ombudsman's recommendation was purely persuasive. The authority, however, could no longer plead lack of legislative power.

The suggestion of amending legislation was put to the Premier by letter dated 20th May, 1983. A positive response to this request is still awaited.

43. Staff

The current office bearers are:-

Ombudsman:	G. G. Masterman Q.C.
Deputy Ombudsman:	Dr Brian Jinks
Assistant Ombudsman:	Susan Armstrong

At the 30th June, 1983 the Ombudsman, Deputy Ombudsman and Assistant Ombudsman were assisted by a staff of 36, making a total Office complement of 39. This represented an increase of 1 clerk's position during the year. The staff at that date comprised a Principal Investigation Officer, one substantive Senior Investigation Officer (police), 16 Investigation Officers (of whom 5 held Grade 9 positions and the title of Senior Investigation Officer), 3 Interviewing Officers and an administrative staff of 15, including the Executive Assistant, records staff, secretaries and typists.

During the year a new Deputy Ombudsman and three Interviewing Officers were appointed after, in the first case, the expiry of the term of the Deputy Ombudsman and in the remainder upon promotions or transfers elsewhere in the Public Service.

The three year term of the Deputy Ombudsman, Daryl Gunter, came to an end in December, 1982. In particular he made a significant contribution to the Office, up to June 1981 in the recruitment and selection of able investigating officers both from within and outside the public service. In the latter stages of his term he carried out some difficult and onerous investigations, including particularly Case No. 6 in the Case Notes.

One matter of concern in the staff field is that the position of Assistant Ombudsman has not been regularised by statutory amendment. A Bill amending the Ombudsman Act, which included provisions for the appointment of an Assistant Ombudsman was prepared in 1981 but has not yet been introduced. The Government is urged as a matter of necessity and propriety to introduce legislation validating the position of the Assistant Ombudsman as soon as possible.

Gordon Smith, the Principal Investigation Officer has continued to bring his considerable practical experience to bear not only in training new Investigation Officers but for the benefit of the whole Office. He cheerfully carries an onerous workload.

During the year under review, the office dealt with 6013 complaints, compared with 5013 in the previous year. That an increase of nearly 20 per cent was handled with no additional staff is clear evidence of increased productivity. Despite the rising workload, no increase in staff numbers has been sought apart from the creation of one administrative position of clerk, grade 1/2.

It is clear that the Office can only continue to operate effectively with such an increased workload if all positions remain occupied and any vacancies are filled as a matter of urgency. The Ombudsman has expanded delegations to officers, as one means of increasing efficiency. However, it is simply not possible to cope with the volume of complaints and enquiries if positions are required to be left vacant to achieve "savings" provided for by Treasury.

During the year temporary assistance was obtained by the appointment of two temporary investigating officers for short term periods. Ian McLeod and Robyn Walmsley brought different types of experience to their tasks and made very valuable contributions to the work of the Office.

During the year under review all investigating officers, and indeed all staff, have had high workloads. Some of the draft reports written by investigating officers have been outstanding. The staff as a whole have the Ombudsman's thanks.

44. New Deputy Ombudsman

Dr Brian Jinks took up his appointment as Deputy Ombudsman for a period of 5 years on 7 March 1983 following the expiry of the term of Daryl Gunter. Dr Jinks brings to his task extensive practical experience of administration in Papua New Guinea, high academic qualifications and eight years experience as a lecturer at Macquarie University, including three years in the Management Studies Centre of the University. During the latter period Dr Jinks provided consultancy advice to Government departments and authorities, and at the invitation of the Public Service Board, among others, gave lectures on public administration to public service staff.

The Office of the Ombudsman has had a need for high level speedy investigations of complaints considered to have special priority. Apart from assisting the Ombudsman generally, Dr Jinks has very effectively taken on this special role. Matters he has investigated, or is currently investigating, include complaints concerning Dover Heights High School, a complaint by the Local Government Association against the Chairman of the Boundaries Commission, pollution of the Yass river and allegations against the Department of Main Roads about tendering for road building equipment.

45. Staff Recruitment: Short Term Secondments and Appointments

In last year's Annual Report reference was made to the newly introduced policy of recruiting investigation officers for periods of 3 years, either on secondment from departments or authorities of the Public Service or appointment from outside the Public Service. This practice was introduced with the support and approval of the Secretary of Premier's Department and the Public Service Board.

The U.K. Parliamentary Commissioner (equivalent of the Ombudsman in New South Wales) has described the advantages of short term 3 year secondments in the following terms:-

> "Taking staff on secondment from government departments affords a vast area of choice among young men and women anxious to acquire valuable experience and the broader view of Whitehall which service in this office can give them. The very fact that the posts are not permanent means that those attracted to apply are more likely to be looking for a stepping stone for their future careers rather than a comfortable niche into which to settle and are therefore anxious to do well."

The experience of the present New South Wales Ombudsman supports the above view.

It is appreciated that the N.S.W. Public Service Association believes that the N.S.W. Public Service should be a career public service. It is no part of the present Ombudsman's purpose to disagree with that viewpoint in respect of the public service as a whole. However, a belief in the desirability of career public service does not necessarily involve the view that a person transferred to a particular position in a public authority should have the right to remain there for life, short of committing some disciplinary offence. A career public service does not mean a guaranteed lifetime career in one small part of the Public Service. When a vacancy occurs, advertisements appear both in the Public Service Notices and the Sydney Morning Herald, making clear the 3 year term proposed. These advertisements over the last year have led to applications for positions in the Office of persons of high calibre. Those public servants who apply appear to have a particular bent of independence and see 3 years in the Ombudsman's Office as varied experience and a stepping stone in their careers. The 3 year secondment ensures that they do not become marooned in the Office. The quality of those from outside the Public Service who have applied for the 3 year positions has also been extremely high; the selection process becomes an extremely difficult choice between very able applicants. The Office is very grateful to those who applied but missed out for selection.

Of the 17 investigation officers in the Office, 4 have now been appointed under the new system of short term appointments and they are among the best investigating officers in the Office.

46. Long Serving Investigation Officers: Need for Rotation or Mobility

In last year's Annual Report the Ombudsman referred to the subject of Investigation Officers appointed under the former system who have been at the Office of the Ombudsman for more than 5 years, but who in that time have not attained any of the few supervisory positions in the Office. It was indicated for the reasons there set out that attempts would be made to seek rotation or re-location of investigation officers in this category to other parts of the Public Service.

During the course of the year under review discussions and correspondence have taken place with the Public Service Board, the Secretary of Premier's Department and heads of certain Departments and Authorities. Regrettably no progress whatsoever has been made and none of the four long serving investigation officers has been found another suitable position anywhere else in the public service.

In a recent speech to the conference of Australasian and Pacific Ombudsmen in Darwin, Mr Eric Freeman the Western Australian Parliamentary Commissioner for Administrative Investigations (Ombudsman), a former very senior officer in the Western Australian Public Service, said:-

> "This much is clear. Whatever the role of the Ombudsman, his Office needs to be an efficient organisation with discreet staff of a high calibre with analytical and communication skills.
>
> To this end, the co-operation of Governments and Public Service Boards are essential in assisting where required with the secondment and mobility of staff."

The New South Wales Ombudsman fully agrees with these views. Regrettably in New South Wales, neither the Secretary of Premier's Department, who has control of staffing in the Ombudsman's Office, nor the other Government Departments approached, nor the Public Service Board have in any way whatsoever been able to provide for mobility or rotation of long serving investigation officers who were assigned to the Ombudsman's Office more than 5 years ago. Rotation and mobility in the New South Wales Public Service seem to be myths written about in learned reports, but so far in the experience of the Ombudsman's Office having no reality whatsoever.

In the present Ombudsman's view, as a result of his experience in the Office, those investigating officers more recently recruited to the Office following selection procedures bring to bear a freshness, receptiveness and vigour that is not generally possible after performing the particular task for a number of years. Accordingly, it being the Ombudsman's belief that the public interest demands it, endeavours will continue to be made to achieve rotation and mobility of long serving officers. If no progress is made a special detailed report to Parliament may be required.

47. Job-sharing

Job-sharing — that is, two people holding down one permanent job by working part-time — is not a new concept. It is not yet, however, an option available throughout the Public Service of N.S.W.

Under the provisions for maternity leave, an officer may work part-time on her return to work, and a second part-time officer may be engaged to work the remaining hours. Such an arrangement was made in this Office for two investigation officers. Normally the arrangement would have expired when the permanent officer exhausted her maternity leave. Because the job-sharing arrangement suited both the Office and the two officers involved, an application was made to extend it for six months. A number of administrative obstacles had to be overcome before this request was granted. Although part-time work (and hence part-time leave) is an established practice as part of the maternity leave provisions, firm guidelines on part-time leave without pay in other circumstances have yet to be finalised. The Public Service Board approved the continuation of job-sharing by the two investigation officers as a special case pending the introduction of public service-wide guidelines.

48. Industrial Relations

The principal issue of industrial relations in the Office has concerned the Ombudsman's attempts to obtain re-location of those Investigation Officers not holding supervisory positions who have been in the Office for more than 5 years. A second, but related issue, concerns the policy of short term appointments. The reasons for the Ombudsman's policy concerning relocation were set out in last year's Annual Report which was tabled in Parliament on the 11th November, 1982, and which was available for perusal in the Office of the Ombudsman. No adverse comment was received on the policy or on its statements in the Annual Report until, following discussions with the Public Service Board and a Senior Officer of Premier's Department, letters were written to the heads of various departments and authorities seeking exploratory discussions on the possibilities of re-location or exchange of officers.

On the 24th March, 1983, the Ombudsman received a letter from Mr B. S. Jardine, the Acting Secretary of the Public Service Association of New South Wales which referred to the issue in the following terms:-

> "I consider it essential at the outset to advise you of the Association's views in regard to possible "burn out" of officers employed in your Office for a period of more than 5 years.
>
> The Association does not agree that the efficiency of any officer, generally speaking, would reduce as a result of carrying out duties which are confined to any particular area. In fact, the Association takes the opposite view, that an officer's efficiency would increase as time passed. The career structure in the N.S.W. Public Service is based on the premise that officer's efficiency increase in time in a position. This is borne out by the current structure of incremental advance and broad banded gradings within the service.
>
> The Association is extremely concerned at any suggestion that a reduction in the level of efficiency of any members employed in your office in excess of five years has taken place, particularly, as the Association understands that the officers concerned have received no adverse reports to date, but rather have had excellent reports written in respect of the duties they perform.
>
> Accordingly, the Association seeks a total retraction of the contents of your letter to other Departments or Authorities in respect of any suggestion that any of the four officers come within the ambit of the views expressed in pages 32 and 33 of your Annual Report for the year ended 30th June, 1982.
>
> Additionally, the Association seeks your co-operation in having the letter already forwarded to Departments or Authorities (and referred to in your letter of 3rd March, 1983, to the Association) withdrawn from those Departments or Authorities.
>
> The Association would appreciate a further conference with you pursuant to the requests you made of the various Departments or Authorities, to discuss your further intentions in the matter."

The Ombudsman's views were set out in a letter of reply which included the following:-

> "Your letter of 24 March, 1983, concerns me deeply and requires a detailed examination of recent events in order to clarify an obvious misapprehension on behalf of the Association and some of its members.
>
> Firstly, I am surprised that you did not receive my initial letter dated 15 February, 1982, particularly as that letter was discussed in some detail with executive members of the Premier's Branch of the Association. It is also curious that the Association seems to regard this matter as a recent development. In February, 1982, I raised the whole question with the Secretary of Premier's Department in almost identical terms to the letter to your Association and discussions took place with the Public Service Board. At all

times I have been at pains to have frank discussions with all concerned parties. On various occasions in the last twelve months I have discussed the matter with not only Association Branch representatives but with the officers themselves. My views in relation to the effect on Investigation Officers of working for periods in excess of five years in this Office have been set out in my report to Parliament. I believe it as being in the public interest that I should report those views.

Your letter indicates that the Association views my attempts to change the employment arrangements within the Office and to promote the transfer of long serving officers as some kind of attack upon the abilities of public servants, and in particular, as constituting a reflection on four senior officers. However, you should be aware that in the last eighteen months three officers have retired early, at least partly I believe, because of stress related to the duties required of employees of the Ombudsman's Office. Having succeeded in having fixed terms of employment introduced in the Office, I have more recently moved to protect the future welfare and promotional opportunities of those who have served in excess of five years. This aspect affects immediately four senior officers but will also have long term ramifications. Given this background I should also make it abundantly clear that I am primarily concerned for the efficiency of the Office of the Ombudsman. It is precisely because I recognise the problems of stress and lack of promotional opportunities that I have taken the actions outlined above. Those actions are designed to benefit the officers and to benefit the operation of the Office.

I would expect your Association to be acutely interested in both these problems and in attempts to overcome them. Having pointed out the context in which I have pursued this matter, I believe it is inconceivable that others would regard my actions as reflecting on the officers concerned. This is especially applicable to my attempts to arrange short term exchanges with other Departments. The inclusion of the relevant extract from the Annual Report in my letter to various Departments and Authorities was designed only to indicate my general policy and to extend that general policy to encompass inter-Departmental transfers and relocations.

With respect to the sixth and seventh paragraphs of your letter, I do not see the necessity to retract any part of the letters concerned. Those authorities that have replied, for varying reasons, are not interested in or able to assist in the relocation of officers. I expect that to be the general position. However, if any Department or Authority does express an interest in pursuing the topic I would not take the matter further without discussing it with the officers concerned, and they, of course, if they wish may consult the Association. I will continue to encourage all investigation officers who do not achieve promotion to the very few supervisory positions in this Office to make long term career development plans which could involve relocation to other parts of the Public Service whether by lateral transfer or promotion after they have served three years in the Office and are approaching five years . . ."

More recently the Public Service Association formally advised the Ombudsman of its attitude towards employment of Investigating Officers on a short term basis in the following terms:-

"The policy of this Association has always been one aimed at the permanent appointment of officers to the N.S.W. Public Service, and the Association would vigorously advocate the adoption of this policy in appointing Investigating Officers to the Ombudsman's Office.

The Association opposes the appointment of temporary employees for extended periods of time and is committed to a policy of permanent appointment of temporary employees who have been so employed for a continuous period of twelve months.

The Assocition is totally opposed to the concept of contract employment."

A conference was held in October, 1983, between the Public Service Board and the Public Service Association which was attended by the Ombudsman. The Board's representative indicated that the Board had already given approval for future vacancies of Investigating Officers in the Office of the Ombudsman to be filled by short term appointments under Sections 75, 76 or Section 80 of the Public Service Act. This approval had been given to overcome the very problems raised by the Ombudsman and the operation of short term recruitment appeared to be successful. The Association's representatives raised no issue of substance that would warrant any change in the current practice.

One aspect of this matter which is of concern arises out of the very special position of the Office of the Ombudsman. The very object of the Office of the Ombudsman as laid down by its statute is to investigate allegations of "wrong conduct" by members of the public against "public authorities", and the definition in the Ombudsman Act of "public authority" is:-

"(c) any officer of the public service"

HAVING TROUBLES WITH GOVERNMENT DEPARTMENTS?

Maybe the Ombudsman can sort them out

TELEPHONE: 233-5122 for advice or write to.

The N.S.W. Ombudsman
14th Floor, 175 Pitt Street,
Sydney. N.S.W 2000

Bus poster (see paragraph 49). In October 1983 the telephone number changed to 235-4000.

In other words, the very raison d'etre of the Ombudsman's Office is to investigate public servants. A union of public servants very properly, on the other hand, has a duty to represent and protect public servants. There is thus the possibility of a serious conflict of interest in a union of public servants putting forward views as to the staffing of the Ombudsman's Office which may lead, and in the present Ombudsman's views do lead, to a dimunition in the vigour with which complaints against the public service are investigated. Ultimately, the whole issue may raise the question of whether investigating officers in the Ombudsman's Office should remain public servants during their period with the Office. In some other States and overseas countries persons taking up positions in the Office of the Ombudsman who come from the public service cease to be public servants during the period of their secondment while retaining pension and other rights.

49. Publicity

During the year a poster was developed for display in Government buses in Sydney and Newcastle. Public transport is an appropriate media outlet for an organisation trying to reach a wide spectrum of the population. Television, with its mass audience, would also be an excellent medium, but the Ombudsman's Office has not had a big enough budget to use it.

There has been considerable media interest during the year. The Ombudsman is precluded by the secrecy provisions of the Ombudsman Act from commenting publicly on current matters under investigation even if press reporting is inaccurate or based on a confidential draft report only.

Press releases were issued following the tabling of the 1981-2 Annual Report. Each of the reports tabled in Parliament generated some publicity. The Ombudsman also took part in radio interviews on several stations. Media coverage of issues related to this Office has been balanced and well researched in most cases.

50. Community Information Program

During 1982-3 officers of the Ombudsman have visited many country areas. Country visits became necessary during the investigation of complaints from prisoners in non-metropolitan gaols, and in certain other investigations requiring on-the-spot investigations.

In last year's annual report it was pointed out that the allocation for travel during 1982-3 would restrict country travel primarily to visits to prisons in country areas. The intention of the Office to run a pilot public awareness campaign was also mentioned.

During the year, visits have been made to the Hunter Valley (Newcastle, Maitland, Cessnock) and to the New England area (Tamworth, Gunnedah, Armidale).

On each of these visits a similar strategy was used. We made contact with the co-ordinators of local information centres or community cottages, arranged times dates and venues to interview members of the public, and then arranged suitably-timed publicity. Paid advertisements were used for both radio and the local press. Press releases led to a generous amount of coverage in local papers and on radio programs. Talk-back radio proved a particularly useful forum for discussing how the Ombudsman's Office deals with typical complaints. The media response was excellent on both these visits.

Each of the visits involved a five-day trip for two officers. In addition, the Principal Investigation Officer travelled to Tamworth to inspect Endeavour House, an institution run by the Department of Youth and Community Services.

In choosing community centres as venues for interviewing the public, we were motivated by a desire to remain independent from government organisations whose activities might be the subject of complaints. Thanks to Mr Steve Robertson of the Local Community Services Association, and an excellent network of regional contacts, we were put in touch with helpful community workers in all areas visited.

In this way we had the benefit of local knowledge when choosing how to publicise our activities, or where to send people whose complaints could not be dealt with by this Office. Several of the community centres, for example, had a tenants' advisory service.

In the course of these two visits, we held interviews with approximately two hundred people, and through the media reminded many more of the Ombudsman's functions. Public awareness campaigns of this type are essential for people outside metropolitan Sydney to be able to exercise their rights.

A two-day awareness campaign was held at Penrith Neighbourhood Centre in June, 1983. Despite press and radio advertisements and contact with information centres from surrounding districts, the public response was slight compared with that experienced on country visits. In view of the Office's limited resources, advertising costs are hardly justified if only a handful of people seek interviews. It would appear to be more worthwhile to include people from the outer metropolitan area in advertising campaigns aimed at increasing overall awareness of the Ombudsman's Office.

Despite this failure of the pilot campaign at Penrith the very considerable success of the country programmes makes their continuance essential.

51. Country Investigations

During 1982-83 priority for country travel was given to the investigation of complaints from prisoners. There were visits to gaols at Cessnock, Cooma, Grafton, Bathurst, Maitland and Broken Hill, as well as those in the metropolitan area.

In 1983-4 an allocation of $15,000, an increase of $3,000 over last year, should enable on-the-spot investigations into significant complaints from country areas.

Of the complaints received during 1982-83, 520 came from areas outside great Sydney, Newcastle and Wollongong. Of these, 215 were from prisoners, and 2 from Wards of the State.

52. Need for Word Processor

Last year's Annual Report commented on the need for a micro-computer with word-processing capabilities. A submission on this need was annexed to our budget estimates for 1983-84, but was not accepted because of the stringent economies currently required of all government bodies.

The work of the Ombudsman's Office could be made much more efficient by the use of word-processing. Every time a wrong conduct report is written, it goes through at least two drafts, more commonly three or four, and sometimes even more. It is obviously uneconomic to retype page after page because comparatively small amounts of information have to be inserted or changed. A word processor would enable efficient editing and cut out needless duplication of work. In addition, standard letters and paragraphs could be stored for use as required. The addresses of heads of authorities could be reproduced automatically. In the estimates for next year, a strong case will again be made out for the purchase of a word processor.

53. Need to Computerise Records in the Ombudsman's Office

As mentioned in the previous item, funds were not made available for computerising the records system of our Office. Unlike some of its counterparts, including even the Northern Territory, our Office must record by hand all statistics on complaints received and their outcomes.

The current manual system of record keeping means that there is increasing pressure on the small staff of the records area. File creation, indexing, storage, retrieval and recording of outcomes are all done by hand. Despite several attempts to streamline the processes and keep them to a minimum, the tasks remain time-consuming. A computer would not remove the need for a file system, but it would enable automatic retrieval and comparison of key pieces of information including the way similar complaints have been handled in the past. A submission on this subject will be put forward again when the 1984-5 Budget is under consideration.

54. New Telephone System

The need to update the telephone system of our Office was explained in last year's Annual Report. In mid-1983, sufficient funds were granted for a new PABX to be bought. This has overcome the problems of shared extensions, insufficient lines in and out, and loss of many incoming calls. The new switchboard has in-dialling, so that investigation officers can be called direct. The new system is expected to contribute significantly to the efficiency of the Office.

55. Budgeted Savings on Salaries

A problem in the 1982-83 budget was the allowance for $37,000 to be saved on salaries through delay in filling vacant jobs, approval of leave without pay applications, and other measures. This targeted saving was made and could only have been made as a result of the delaying of the appointment of the new Deputy Ombudsman for nearly three months following the expiry of the terms of his predecessor. While enabling the Office to keep substantially within its budget this gap was not desirable in public interest terms as it precluded or made difficult a smooth transition in the investigation of complaints being handled by the Deputy Ombudsman. Last year's Report pointed out that economies of this kind are incompatible with maximum efficiency in a small organisation with a rising workload.

It is pleasing to note that in the 1983-84 Budget the savings target has been reduced to $17,000. However, even this figure is considered unreasonable; since in an office with high and increasing individual workloads, officers who leave have to be immediately replaced by temporary assistance. In effect, the $17,000 saving required to be made represents a deduction from the Ombudsman allocation for temporary assistance.

56. Relationship with Premier's Department

Last Year's Annual Report

In last year's Annual Report the Ombudsman referred to what was described as "a somewhat anomalous position in its relationship with Premier's Department". As this reference which drew a vigorous reply from Mr G. Gleeson, the Secretary of Premier's Department, is a topic of vital importance to the operation of the Ombudsman's Office, the relevant passages of last year's Annual Report will be set out followed by Mr Gleeson's comments.

1981/2 Annual Report

"The Ombudsman's Office is in a somewhat anomalous position in its relationship with the Premier's Department. The Ombudsman and Deputy Ombudsman are appointed by the Governor as independent statutory officials. It is intended that the Assistant Ombudsman will be similarly appointed when the proposed legislative amendments to the Ombudsman Act have been passed. This independence is important if the Office is to be seen as performing its functions in a vigorous, fair and impartial manner. Decisions are based on a logical consideration of the facts and in accordance with the powers conferred by the Ombudsman Act. The public esteem of the Office depends vitally on this degree of independence from the bureaucracy which is the subject of investigations.

The anomaly arises from the fact that, administratively, the Office functions as a unit of the Premier's Department. Decisions about staffing and expenditure are negotiated with the Permanent Head, the Secretary of the Premier's Department, or officers of his Department. In this respect there is a great contrast between the position of the N.S.W. Ombudsman and that of the Chief Parliamentary Ombudsman of Sweden.

(a quotation from the Chief Parliamentary Ombudsman of Sweden is here omitted)

All cheques have currently to be signed by officers of the Premier's Department. Approval has to be obtained from Premier's Department to incur expenditure over $1,000 even although within budget. Use of air travel, even within budget, has to be similarly approved. Approval to recruit temporary or permanent staff for the Office of the Ombudsman has to be approved by the Secretary of the Premier's Department.

It is even necessary to seek Departmental approval for staff to work minor overtime hours which are well within the budgeted overtime.

(three paragraphs arguing the case for independence and the means by which it could be achieved are excluded)

Despite these comments, my gratitude to officers of the Premier's Department (and in particular Mr John Harrison) for the efficient and helpful way they have handled recruitment and related administrative matters should be placed on record."

By way of comment upon the above Sections of the Annual Report Mr Gleeson wrote a letter to the Ombudsman dated 11th November, 1982 which was in the following terms:-

"I wish to advise that the Ombudsman's Sixth Annual Report to Parliament was tabled in the House today.

I have read your report with interest. The question of whether the Ombudsman's Office should be a separate administrative unit and listed in Schedule 2 of the Public Service Act is a matter of Government policy and one for the Government to determine Accordingly, I make no comment on the matter.

Turning to your criticisms, both implied and stated, of the management services provided by the Premier's Department, I have to say that I regard them as unfair, pedantic and certainly not reflecting accurately and reasonably the assistance both to you personally and to your officers by officers of this Department over the past year.

I should like to think that judgments are based on the track record since I believe that the track record of this Department in providing management services to your administration is a good one.

If you have any specific requests, that come within my ability to control, for improving the management services then I should be pleased to receive them and to discuss them with you."

Year Ended 30th June, 1983

There have been some improvements in this area in the year under review. Following complaint by the Ombudsman about a lengthy delay in Premier's Department in inserting an urgent Ombudsman advertisement for replacement staff, the Secretary of Premier's Department appointed Mr Dennis Johnston, Senior Administrative Officer, Management in Premier's Department to be the contact point between the Ombudsman and the Department. Mr Johnston has been of immense help during the course of the year in ensuring that those functions, which under existing arrangements have to be carried out by Premier's Department on behalf of the Ombudsman's Office, are carried out expeditiously and well. He has exhibited charm and tact in dealing with some occasionally difficult situations.

The amount for which the Ombudsman can occur expenditure (within budget) has been increased to $10,000, which is a significant improvement.

The basic administrative restrictions, however, remain. All Ombudsman cheques, even within budget, are required to be signed by officers of Premier's Department. Air travel, within budget, has to be approved by the Secretary of Premier's Department personally. Approval to recruit temporary or permanent staff for the Office of the Ombudsman has to be sought from the Secretary of Premier's Department who has, as indicated elsewhere, control over the staffing of the Office. It remains necessary for the Ombudsman to seek approval from Premier's Department for staff to work minor overtime hours, even where this is well within the budgeted overtime.

Premier's Department also keep the financial accounts of the Office of the Ombudsman under current arrangements. During the course of the year this has provided some serious difficulties and problems. In particular, staff changes in the Ombudsman's Office have not always been communicated from the Staff Branch of Premier's Department to the Accounts Section of Premier's Department. Towards the end of the financial year it was extremely difficult for the Ombudsman's Office, determined as it was to keep within budget, to ascertain the available balances remaining. It is fair to say that there has been improvement in this area since that period and the Office has appreciated the cheerful assistance of Mr Phil Havenstein of Accounts in unravelling problems. However, it remains the fact that Premier's Department is a large organisation with its own priorities and inevitably from time to time the affairs of the Office of the Ombudsman will be seen as having less priority than the Office of the Ombudsman would like or think right.

Basically, despite Mr Gleeson's letter, the problems in this area result from the broad philosophical issues of independence discussed in last year's Annual Report. The Ombudsman is required to investigate public servants, including Premier's Department and its Head. In such investigations there will inevitably be some reactions. For instance, during the course of the year Mr Gleeson, in my view erroneously, in a letter to the Deputy Ombudsman, claimed that the Deputy Ombudsman had failed "to offer a satisfactory explanation for your decision to institute a formal investigation", and further stated that he "would have hoped that your conduct of this matter would have evidenced more courtesy". It is unnecessary to go into the merits of the particular dispute. The point made in last year's Annual Report, and repeated forcibly in this year's Report, is that the vigour and independence of the Ombudsman's investigation ought not to be seen by others to have been in any possible way influenced by the need for the Ombudsman for administrative reasons to keep on good terms with Premier's Department and its Head. It is submitted that the case for administrative independence of the Office of the Ombudsman from Premier's Department in the public interest is extremely strong.

SECTION B: LOCAL GOVERNMENT

57. Denial of Liability by Councils

In the last Annual Report, mention was made of the failure of many Councils to give reasons (or to ensure that their insurers give reasons) when denying liability on claims covered by insurance.

This particular aspect was the subject of an investigation involving Parramatta City Council. In taking up the matter with the Mayor the view was expressed that a Council ought to do more than merely refer such an insurance claim to its insurers. It ought to monitor the processing of the claim and ensure that the claimant, who after all is a resident and ratepayer, receives adequate reasons for any denial of liability. It is unsatisfactory and unreasonable for such a claimant merely to be told by the Council's insurance company that:-

> "our enquiries into this accident are now complete and on the basis of our findings, we deny liability on our Insured's behalf."

Reasonable conduct on the part of the Council required it to give or to ensure that there was given by the insurance company to the claimant some statement of the reasons why liability was being denied.

Subsequently, discussions were held with Council's Solicitor and with the Town Clerk.

Initially, Council took the view that to volunteer reasons for denial of a claim would prejudice its right to indemnity under the terms of its public liability insurance policy. Subsequently, however, the Mayor wrote in the following terms:-

> "However, . . . the Council has caused this question to be considered in detail by the Council's Solicitors. Those solicitors have now reported that they have canvassed with Mercantile Mutual Insurance Company Limited the question of prejudice to the insurer's position in relation to the Council's obligations under the Ombudsman Act in regard to furnishing of reasons and, in the result, the insurance company has agreed in principle to the furnishing of brief but significant reasons for rejection of a claim in all cases where the insurance company wishes to deny liability. It is contemplated that those reasons would be expressed in a letter from the insurance company to the claimant and a copy of that letter would be sent to the Council.
>
> I understand that you do not regard it as necessary that the expression of reasons should emanate in the first instance from the Council and are concerned only that clear and sufficient reasons are given either by the Council or its insurer to the claimant. I am therefore arranging for the general question to be reconsidered by the Council in the light of this information obtained from Council's Solicitors and I will inform you as soon as possible as to the Council's decision."

It took some time for Council's Solicitors to elicit a response from the Insurance company, but this was eventually received and the Mayor again wrote as follows:-

> "I wish to advise that the Council has now received confirmation from its insurers, Mercantile Mutual Insurance Limited, through Council's Solicitors, Dawson Waldron, that the insurers have no objection to giving reasons where liability is denied in connection with public liability claims and confirm that, at the time of denying liability, they would be prepared to give the complainants brief but succinct reasons for their rejection.
>
> The Council at its meeting held on November 1, 1982, resolved that in view of the advice conveyed by Dawson Waldron, in their letter of October 8, 1982 and the information supplied by Mercantile Mutual Insurance Limited in their letter of October 7, 1982, that Council adopt the policy that its insurers are, at the time of denying liability in respect of public liability claims, to give the complainants brief but succinct reasons for the rejection of their claim.
>
> Accordingly, Council has today written to its Solicitors, Dawson Waldron, asking them to convey the Council's resolution to its insurers, Mercantile Mutual Insurance Limited."

As a significant number of Councils were insured for public liability cover with Mercantile Mutual Insurance Limited, this was seen as an important breakthrough in the general investigation carried out by this Office on the matter. With the consent of Parramatta City Council, the Local Government and Shires Associations were informed of the responsible and reasonable attitude displayed by the Council in terms of its decision of 1st November 1982.

Additionally, the Government Insurance Office (which underwrites a significant amount of public liability cover for local authorities) recently informed this Office that it would in future give brief reasons to claimants for rejection of their claims, where to do so would not prejudice the rights of either that Office or its client Councils.

The Local Government Association and Shires Associations, having obtained legal advice regarding the Recommended Procedures referred to in the last Annual Report (pp 24) have now circulated all Councils with slightly amended "procedures", seeking comment on their implementation. The amended procedures circulated by the Associations (reproduced after this note) agree substantially with the procedures recommended by this Office. However, it has been suggested that paragraph 5(c) of the amended procedures be replaced by the following:

> "5(c) Where Council has reasonable doubts about the correctness of any decision of its insurer to reject liability for a claim, it should obtain a written or, in the case of minor claims, oral advice from its Solicitors."

The views of the Association about this suggestion have been invited and at time of writing, are awaited.

In the meantime, this Office has continued and will continue to investigate the manner in which local Councils deal with public liability insurance claims and, where appropriate or necessary to do so, conduct has been and will be found wrong. Considerable success has been achieved to date, as shown in the following Table:-

COUNCIL	PROCEDURES TO: ACKNOWLEDGE CLAIMS	MONITOR PROCESSING	ENSURE CLAIMANT RECEIVES REASONS WHEN CLAIM DENIED
Bankstown City	Introduced	Introduced	Introduced
Burwood Municipal	Existed	Existed	Introduced
Greater Taree	Existed	Introduced	Introduced
Kempsey Shire	Existed	Introduced	Introduced
Ku-ring-gai Municipal	Existed	Existed	Introduced
Marrickville Municipal	Introduced	Introduced	Introduced
Parramatta City	Existed	Existed	Introduced
Ryde Municipal	Existed	Existed	Introduced
Sydney City	Existed	Existed	Introduced
Wollongong City	Existed	Existed	Introduced
Wyong Shire	Existed	Introduced	Introduced

Investigation of the procedures used to deal with claims is current in respect of a number of Councils, namely:-

Albury City
Armidale City
Ashfield Municipal
Auburn Municipal
Broken Hill City
Concord Municipal
Gilgandra Shire
Gosford City *
Great Lake Shire
Hastings Shire
Hornsby Shire *
Hunters Hill Municipal *
Illawarra County
Inverell Shire *
Lake Macquarie Municipal
Lane Cove Municipal
Maitland City
Manly Municipal
Nambucca Shire
Newcastle City *
North Sydney Municipal *
Penrith City
Randwick Municipal *
Sutherland Shire *
Tamworth City *
Warringah Shire
Willoughby Municipal

(* : Report of wrong conduct either at "draft report" or later stage.)

Recommended Procedures for Claims Against Councils Involving Insurers

1. When the claimant verbally contacts a council he or she should be advised to submit details of the claim in writing for consideration by the council.
2. Upon receiving the formal claim, the council should immediately undertake a preliminary investigation of the factual basis on which the claim is based. The Council should also immediately acknowledge receipt of the claim to the claimant on a "without prejudice" basis and forward the claim to the appropriate insurer. This advice of claim should be accompanied by or followed by a report from the appropriate council officer detailing the results of the investigation of the incident by council.
3. The insurer upon receiving such claims information as is provided and conducting such further investigation as may be necessary examines details of the claim circumstances. Having determined its attitude towards the claim the insurer should communicate this advice directly to the council giving reasons for its decision especially if indemnity or liability is to be denied.
4. The council should request from its insurers reasons for any delay in the processing of the claim and should endeavour to ensure that the claim is finalised expeditiously. The council should advise the claimant of any reasons for delay.
5. The council upon receiving advice from the insurer regarding its attitude or recommendations regarding the claim should adopt one of the following courses of action:
   (a) If the insurer acknowledges that a liability exists to the claimant and also that indemnity will be provided to the council under the policy, the council should inform the claimant by letter that the matter has been reported to insurer and further that such insurer or its legal advisers will shortly be in contact with the claimant on behalf of the council.
   (b) If the insurer acknowledges that a liability may or does exist to the claimant but that indemnity will not be provided to the council under the policy, the council should consult its own solicitors to confirm whether a liability exists to the claimant and further that denial of indemnity by the insurer is justified.

   If the council's solicitors confirm that a liability exists to the claimant and also that the council is not entitled to indemnity under its liability policy the solicitors should be instructed to negotiate settlement terms on behalf of the council.

   However, if the council's solicitors confirm that a liability exists to the claimant but dispute the insurer's contention that indemnity is not available under the policy, the solicitors or insurance brokers for the council should be instructed to attempt to resolve the matter of indemnity with the insurer.

   (c) If the insurer contends that a liability does not exist to claimant and accordingly that liability should be denied, the claimant should be informed by letter from the council that liability is denied.
6. As soon as a final decision has been made on the claim either the council or the insurer will advise the claimant of the result and if liability is denied the reasons for such denial. It shall be the responsibility of the council to ensure that this is done.
7. The foregoing procedures are in every case to be applied subject to any contrary provisions in the particular insurance policy and subject to any contrary legal advice received by the council or the insurer.

58. Inability of Councils to Approve Existing Buildings

In the 1981/82 Annual Report, reference was made to the legal requirement that building works must be authorised by Councils before a structure is built, as they are unable to give "post hoc" approvals.

This Office's interest in the matter had arisen out of investigation into several complaints with the result that a recommendation was made that the Minister for Local Government and Lands consider certain suggestions in conjunction with the examination that was being carried out into the possible amendment of section 317A of the Local Government Act 1919.

The matter has been kept under review by this Office and advice has been received that a Committee comprising Departmental and local government representatives is currently drafting amendment proposals for consideration by the Minister. The lengthy delay in remedying a clear and acknowledged problem cannot be justified.

59. Tree Root Damage

This Office has received a number of complaints concerning local Councils' responses to claims for damage to private sewer lines caused by trees growing within public road reserves under Council control. The roots of the trees had penetrated the sewer lines either within the complainants' private property or as the sewer lines passed from private property under the reserve to the Water Board's main in the street.

Councils have adopted differing policies in dealing with public liability claims in this area. Some maintain that Council is liable only if the tree roots travel from the road reserve into private property and cause the damage there, and they deny liability if the damage occurs under the public road reserve. Others appear to have no consistent policy except to respond favourably only to the most persistent complainants. Yet others do meet the claim regardless of the location of the root penetration.

In one complaint which this Office recently investigated, the owner of the property found that the Council adopted the policy of denying liability for blockages discovered within the road reserve. Yet it emerged that Council had received the following legal advice:

> "The more difficult situation to consider is that where tree root penetration causes damage or blockage to that portion of a sewer line within the public road reserve but which is between the sewer main and the individual property boundary. Unfortunately, I have not been able to find any decided case in which this situation has been adjudicated upon. Whilst the position, therefore, is not free from doubt, I tend to the view that Council would also be held liable in the circumstances which I have postulated. A statutory licence exists on the part of the individual land holder to have between his boundary and the sewer main the sewer line in the position in which it is situate. It seems to me therefore that it is equally a nuisance actionable in his hands if tree roots penetrate the line so as to interfere with his enjoyment and use of it. This argument seems to me to be the stronger where the planting of the tree post dates the laying of the sewer connection line.
>
> There is to be weighed against these arguments of general principle the circumstance of the Council's ownership of the road reserve and also the particular immunity from liability which attaches to road or highway authorities. However, that immunity has, over recent years, been eroded considerably and in my view the approach of a Judge, particularly in the Courts likely to be considering claims of the size which have in the past been made against Council, is one which would favour liability on the part of the Council . . ."

In spite of this advice, Council denied liability. In explanation of this decision, one of the Council's senior officers submitted to the Council a report which read in part:-

> "As I have indicated earlier in an attempt to tighten up on the handling of these claims it is now common for claims to be rejected and liability denied notwithstanding the fact that when one reads Mr (X's) advice there is probably little question that Council is, if taken to Court liable. The attitude of denying liability is very much akin to the approach which is quite common amongst Insurance Companies who explore every possible avenue even to the extent of bluffing and their attempt to resist payments. (Sic)
>
> Whilst one may question the ethics or morality of such an approach it can always be argued that there is some element of doubt. It would appear however that in this type of action the Court now takes a more lenient approach and any question of doubt is usually against the Authority involved."

Council considered this Report and adopted the Engineer's recommendation that the present "hard line" approach be continued at an administrative level. It also resolved to allocate $55,000 for a special chemical treatment of regularly affected sewer lines designed to minimise tree root penetration. The complainant's claim was denied in accordance with this "hard line" approach.

The question of legal liability for tree root damage to private sewer lines within Council's property is one which can only be resolved definitely by a Court. At the time of writing, no Court had decided a matter in this area, and it is clear that differing views are held in good faith. Although this Office did not venture its own opinion in the matter, it did consider whether the administrative procedures were based on relevant and proper grounds. In this context the Council argued that because the legal position is not free from doubt it is quite entitled to use its discretion and deny liability.

This argument would have been tenable if there were evidence that the Council had considered alternative legal views on the subject of liability. In principle, a public authority should meet claims for which it is liable or reasonably believes it is liable. Having received advice from

Counsel briefed by its own solicitors that liability would probably be upheld by the Court, Council ought to have acted in accordance with this advice and met the claims. Alternatively it should have obtained fresh advice itself, or copies of relevant advice from other Councils. Instead, it seems that Council decided to act contrary to its legal advice because it was financially expedient. The views expressed by the Council officer add weight to this belief.

As a result of the Ombudsman's finding of wrong conduct the Council agreed to seek fresh advice from Senior Counsel and to review its policy in the light of that advice.

This later advice confirmed the original view that there was "no difference in principle between damage to pipes within adjoining private property and damage to pipes within the road reserve." Senior Counsel went on:

> ". . . the individual owner has a statutory licence to connect to the sewer main and I think he is entitled to defend the integrity of his pipe against any wrongful action, whether a nuisance or negligent act, by the Council.
>
> As it seems to me, the question of liability must always depend upon the facts of the particular case. In order to succeed, a plaintiff will have to show that a pipe for which he is responsible, whether within his own land or within the road reserve, has been damaged by a root of a tree growing on council land. He will also have to show either that the Council knew of the likelihood of damage by the roots to the pipe or, at least, that the council should be regarded as being on notice of the likelihood. I apprehend that a plaintiff will rarely prove actual knowledge. Whether he can prove that the council should have been aware of the likelihood must depend upon the relative positions of the tree and the pipe and the nature of the relevant tree. No doubt something depends upon the size of the tree but, as I understand the position, even more would depend upon the tree species. My understanding, which may be incorrect, is that some species of trees have a characteristic that their roots seek out moisture and are very successful in invading pipes, even at a considerable distance. I understand that other tree species rarely occasion problems. It seems to me that the test is very similar to that which would apply in a negligence action and, indeed, the two causes of action nuisance and negligence may well be interchangeable in any particular case.
>
> I think that it follows from this that it would be erroneous to work upon the principle that every time there is damage to a pipe by roots of trees growing on council land then council is necessarily liable. It would be equally erroneous to take the view that council can never be liable. The question, as it seems to me, must be asked in every case as to whether the council could reasonably have foreseen the likelihood of injury, in either planting or permitting to continue, the relevant tree. One must determine this by reference to the characteristics of that type of tree and the location of relevant pipes. If the proper factual conclusion is that the damage was foreseeable then the council is liable at law. If the proper conclusion was that the damage was not foreseeable, having regard to the known facts, then the council is not liable at law."

After receiving this further legal advice, the Council amended its procedures for dealing with claims to reflect fairly the conclusions in the advisings.

While the particular legal opinion cited above throws some light upon an area of the law that has not been tested in any court, the fact remains that any recommendations that this Office may make on behalf of complainants in such cases are purely persuasive in character. Councils are not obliged to follow them and until the matter is tested in Court, different policies will no doubt be followed by various Councils.

In future, it is the intention of this Office to monitor complaints of tree root damage to see whether Council policies in accepting or denying liability in such cases are based on legal opinion and examination of the relevant facts.

60. Local Councils as Complainants

In last year's Annual Report reference was made to the fact that Local Councils themselves had the right to complain to the Ombudsman about the conduct of a State Government Department or Statutory Authority. This right has been exercised on occasions during the course of the year under review. In one case an Alderman of a country Council who believed, with some good reason, that the Department of Local Government might have been preparing a report which could have led to the dismissal of that and another council complained to the Ombudsman. An immediate inspection of the files of the Department was made available in a very co-operative fashion by Mr Fox, the Director of the Office of Local Government. In the event, shortly after the inspection, the Minister for Local Government announced that the councils concerned would remain in office until the elections which were imminent.

In another case the Secretary of the Local Government and Shires Associations complained to the Ombudsman about certain alleged conduct by the Local Government Boundaries Commission. This investigation is proceeding.

61. Conflict of Interest in Local Councils

In the last year, this Office has received and investigated several complaints relating to the conduct of local councils which raised the question of a conflict between an individual council member's public duty and his or her private interest. For example, this Office discovered that the Wagga Wagga City Council had failed to collect a very substantial amount of overdue rates from a number of property developers, the largest of whom was the Mayor's father. The Local Ratepayers Association complained to this Office about the situation when the developer went bankrupt and the extent of the debts owing to Council was publicly revealed. While this Office did not find evidence that the Mayor had used his official position to influence the Rates Department, the situation naturally aroused suspicion in ratepayers' minds. The complaint that there had been undue delay in seeking recovery of the rates was found to be substantiated. As it turned out, the Mayor had made a general disclosure of his interest in terms of the Local Government Act some years before, and he had not taken part in the relevant discussions at Council meetings although he had been in attendance. In relation to the same Council, the Ratepayers Association complained that a Councillor, being one of the city's stock and station agents, was also acting in a supervisory capacity on a Council Committee which oversaw the operation of the City abattoirs. Again, although no specific allegation of misconduct was made, the Alderman concerned had been involved in selling cattle to the abattoirs in his private capacity while at the same time serving on the Council Committee. A final example concerned a Councillor of the Port Stephens Shire who, in his private capacity as an earth moving contractor, supplied rock fill to the owner of a marina. Later, the same Councillor formed part of Council's Inspection Committee to examine the marina to see if the owner was acting in accordance with Development Consent given by Council. The rock fill which the Councillor had supplied had been used to illegally reclaim land on the foreshore to provide car parking spaces. It did not occur to the Councillor that his private commercial relationship with the marina owner might be seen by those who objected to the illegal development as bringing his impartiality into question.

These three examples illustrate different situations which are not always fully dealt with by that Section of the Local Government Act which relates to pecuniary interest of Councillors. A conflict of interest existed between what the Councillor must do as a representative of all the ratepayers and on the other hand what he or she was doing in a private capacity. Some Councils have already established procedures for a voluntary disclosure by their members of their interests, pecuniary or non pecuniary, direct or indirect. Registers contain details, for example, of members who own land within the municipality or shire or who are involved in trade unions or business and professional associations. The Local Government Act does not require such a register to be kept, nor, if the register is kept, does the Act require members of a council to participate in any such scheme.

The Ombudman Act defines the conduct of a public authority to be "wrong" in terms which are wider than the requirement that conduct be lawful. Therefore, when complaints concerning conflict of interest within a local council are received it is important for this Office to consider what standard ought to be applied and whether that standard should be more stringent than that presently laid down in the Local Government Act. In essence, the Act itself requires that a member of a council shall not take part in the consideration, discussion or voting upon any question in which the member has a pecuniary interest, direct or indirect. Other than this requirement, the Local Government Act is silent. Yet the Ombudsman Act clearly envisages that certain conduct may be criticised without suggesting that such conduct is or should be made unlawful.

By letter of the 15th September, 1983, the Ombudsman wrote to Mr Henningham, the new Secretary of the Local Government Association of New South Wales and also of the Shires Association of New South Wales, in the following terms:-

> "During the course of the year, and indeed since local councils became subject to scrutiny under the Ombudsman Act, this Office has from time to time received complaints which directly or indirectly involve allegations that council members have participated in council decisions in which they had some personal interest.
>
> In investigating and evaluating such allegations it is necessary for this Office to apply a reasonable standard of conduct against which the conduct complained of can be judged. As you are well aware Section 30A of the Local Government Act applies to the pecuniary interests of members of councils and imposes penalties for failure to observe the statutory provisions. However, in seeking to apply the reasonable standard required of public authorities under the Ombudsman Act, it is not sufficient merely to have regard to the

criminal law. Put another way, conduct not constituting criminal conduct may nevertheless be wrong conduct in a matter of administration as defined in Section 5(2) of the Ombudsman Act. In particular, a member of council's conduct can be wrong in the relevant sense if he or she participates in a council's decision while having a personal non pecuniary interest in the matter.

While this Office will have to continue to deal with complaints on a case by case basis, it would seem sensible to reach some consensus with your Associations as to the appropriate standard to be applied. I am aware that some councils, including Lane Cove Municipal Council and the North Sydney Council have policies on disclosure of interests providing for the keeping of a register of pecuniary and other interests. More generally, my attention has been drawn to a National Code of Local Government Conduct which was adopted in the U.K. by local authority Associations in October, 1975. The extract most relevant to complaints of the type received by this Office is:-

"2. PUBLIC DUTY AND PRIVATE INTEREST

(i) Your over-riding duty as a councillor is to the whole local community.

(ii) You have a special duty to your own constituents, including those who did not vote for you.

(iii) Whenever you have a private or personal interest in any question which councillors have to decide, you must not do anything to let that interest influence your decision.

(iv) Do nothing as a councillor which you could not justify to the public.

(v) The reputation of your Council, and of your party if you belong to one, depends on your conduct and what the public believes about your conduct.

(vi) It is not enough to avoid actual impropriety; you should at all times avoid any occasion for suspicion or the appearance of improper conduct.

DISCLOSURE OF PECUNIARY AND OTHER INTERESTS

(i) The law makes specific provision requiring you to disclose pecuniary interests, direct and indirect. But interests which are not pecuniary can be just as important. Kinship, friendship, membership of an association, society or trade union, trusteeship and many other kinds of relationship can sometimes influence your judgment and give the impression that you might be acting for personal motives. A good test is to ask yourself whether others would think that the interest is of a kind to make this possible. If you think they would, or if you are in doubt, disclose the interest and withdraw from the meeting unless under Standing Orders you are specifically invited to stay."

It seems to me, at least on first consideration, that these extracts from the Code enunciate a standard to which it would be appropriate for the Office of the Ombudsman to have regard in relation to "conflict of interest" type complaints received by this Office against council members and their councils in New South Wales. If this were a correct approach, conduct which fell short of such a standard could, depending always on the particular circumstances, be considered to be wrong conduct in terms of the Ombudsman Act.

I would appreciate your reaction and that of your Executives to the above. If it was agreed that the quoted provisions, or some variation on them provided an appropriate statement of reasonable conduct in terms of the Ombudsman Act then it may be that it would be desirable for this to be more widely known both through this Office and your Assocations.

I would appreciate your co-operation in this matter and would be ready to have discussions with you and members of your Executives at any convenient time."

In reply Mr Henningham wrote:-

"Thank you for your letter of 15 September, 1983. I will include the matters you raise in a circular to all member councils. I will ascertain the views of member councils so as to whether they accept the national code of Local Government conduct adopted in the United Kingdon in 1975, as an appropriate standard.

When the responses have been received I will refer the matter for consideration to the Executives of both Associations."

It is hoped that an appropriate standard of reasonable conduct in this area can be agreed upon by the Ombudsman and the Associations concerned.

62. Power of Councils to make Ex-Gratia Payments

A recommendation which is sometimes made in a final report of wrong conduct is that the complainant receive an ex-gratia payment from the local council concerned. Some councils have claimed they lack the power to do this.

Section 504 of the Local Government Act states:-

(1) Subject to this Act the Council may expend for purposes not authorised but not expressly prohibited by law a sum not exceeding in any one year one per centum of the general rate levied in that year.

(2) If in any one year one per centum of such general rate does not amount to $2000, the Council may in that year expend $2000 under this section.

(2a) Subject to this Act a County Council may expend for purposes not authorised but not expressly prohibited by law a sum not exceeding $8000 in any one year.

It seems a reasonable interpretation of this section that it would empower Councils to make ex-gratia payments.

63. Notification to Adjoining Owners in relation to Building Applications.

The previous Annual Report outlined the Ombudsman's view that a Council's failure to allow the inspection of building application plans by "properly interested persons" was unreasonable and unjust under the provisions of the Ombudsman Act.

It was also noted that a Report on this matter had been made to the Minister for Local Government and Lands recommending certain amendments to the Local Government Act 1919. Broadly speaking, it was proposed that the Act be amended to facilitate the notification of adjoining owners and the inspection of certain plans (accompanying building applications) by "properly interested persons", and to include a requirement that Councils consider the likely effect of a proposed building or alteration on adjoining properties.

These recommendations are still under consideration by the Local Government Office. It is the Ombudsman's view that action is overdue.

64. Reports to Minister for Local Government in Council Matters

A very real difference exists between reports made by the Ombudsman to Ministers responsible for departments and authorities and similar reports to the Minister for Local Government about the conduct of Councils in that the Minister lacks the power even if he wished to exercise it to direct a Council in accordance with an Ombudsman's recommendation. His sole power over Councils is dismissal and only very occasionally will findings of wrong conduct by an Ombudsman justify this course. Accordingly, in many cases the making of a report about the conduct of a Council to the Minister for Local Government is purely a matter of form.

Here again the secrecy provisions of the Act greatly inhibit the effectiveness of the work of the Office of the Ombudsman. The most effective inducement to adoption by a local Council of the recommendations of the Ombudsman would be the power on the part of the Ombudsman to publish his reports in the local media in the area of the Council. By Section 26 of his Act the South Australian Ombudsman has full power to do this, and he has freely exercised this power in some cases immediately prior to local Council elections. Recently at a Seminar in Sydney Mr Bob Bakewell, the South Australian Ombudsman, said:-

> "The greatest power an Ombudsman has, to my mind, is that of publicity. If I feel a matter is of significant public interest, I may publish my views in any manner I think fit. My NSW colleague, unfortunately, is not so lucky in this respect."

The Government is again urged to amend the Ombudsman Act to abolish the secrecy provisions, or, at least, give the Ombudsman full power to publicise his reports to the Local Government Minister in local Council matters.

SECTION C OMBUDSMAN ACT: PRISONS

65. Introduction: Prison Statistics

Under the terms of the Ombudsman Act complaints are required to be in writing and signed by the complainant. The more important complaints from prisoners are in writing — either in the form of letters sent to the Ombudsman through the special procedure developed to preserve confidentiality or in signed statements made during visits of Ombudsman officers to prisons. However, additionally, during visits to prisons by the Assistant Ombudsman and other officers of the Ombudsman, many prisoners raise problems in interviews. Sometimes these are complaints about some matter which is outside the scope of the Ombudsman Act and the prisoner is so informed. He or she may be referred to some other agency. In other cases, during such interviews a problem is raised by a prisoner which the Ombudsman's officer by discussion with the Superintendent or other senior prison officer is able to solve. In these type of cases notes will be made, sometimes a file is opened, but no written complaint is signed by the prisoner.

The Ombudsman takes the view that the Annual Report to Parliament should correctly record the number of complaints made in accordance with the Ombudsman Act — that is, in writing — and their disposition. It has been the position in New South Wales since the inception of the Act that Annual Reports have shown tables of written complaints and indeed appeared under that heading. For the year ended 30th June, 1982, however, the figures provided by officers working in the prison area included both written and oral "complaints" and these were inadvertently included in the total of written complaints. A corrected count has been made of such written complaints and the position is as follows:-

Written complaints against Department of Corrective Services

Year Ended 30/6/82	**Year Ended 30/6/83**
Total: 741	Total: 845

In the prison area, a high proportion of the complaints received are discontinued without a positive finding for or against misconduct ever being made. This occurs for a number of reasons. First, as in other areas the availability of staff in the area is limited. Principally the complaints are handled by two full time investigating officers and the Assistant Ombudsman, with assistance from time to time from other investigating officers with a knowledge of the field. Second and importantly, prisoners like other complainants are most concerned with having their particular problem resolved. If this occurs they are not often interested in a finding of wrong conduct being made. The figures in the table indicate this aspect. Questions of priority also have to be taken into account in deciding whether to investigate a matter to finality.

The disposition of written complaints against the Department of Corrective Services for year ended 30th June 1983 are set out below:

Disposition of written complaints against Department of Corrective Services for year ended 30th June 1983

NO JURISDICTION		
Not Public Authority	—	9
Conduct is of class described in Schedule	—	18
DECLINED		
General Discretion	—	52
Insufficient interest, trading, commercial function, alternate means of redress, etc.	—	3
NO WRONG CONDUCT	—	73
WRONG CONDUCT	—	57
DISCONTINUED		
Resolved completely	—	108
Resolved Partially	—	46
Withdrawn by Complainant	—	14
Other	—	301
Under Investigation as at 30th June, 1983	—	164
TOTAL	=	845

It should be said at once that the increase in the number of written complaints between the two years or, indeed, over the longer period does not necessarily imply that the Department has been correspondingly at fault. Factors such as an increase knowledge by prisoners of the Office of the Ombudsman and its role, and an increased accessibility of that Office to prisoners clearly may play a part. The Assistant Ombudsman, Ms Susan Armstrong, who has the day to day responsibility in relation to prisons, has placed considerable emphasis on personal visits to prisons and prompt response to written or telephone requests from prisoners for urgent personal contact.

The written complaint figures set out above for the year ended the 30th June 1983 show that a total of 57 complaints or 7 per cent of written complaints against the Department were sustained. This figure needs substantial qualification. Under the Ombudsman Act before a finding of wrong conduct can be made a draft report must be submitted to the Department for its comments and, following consideration of these comments, a final report sent to the Minister. During the course of the year, 11 wrong conduct reports were forwarded to the Minister for Corrective Services. The apparent discrepancy between the 57 written complaints shown as sustained and the 11 reports is explained by the fact that on occasions one wrong conduct report covers complaints from a number of prisoners. For example 22 complaints about food in the one institution (the Central Industrial Prison) were combined in one wrong conduct report, another wrong conduct report also combined 8 complaints on the one topic.

Yet another problem of statistics is the apparent discrepancy between the statistics issued by the Department of Corrective Services and those of the Office of the Ombudsman. For example, the following extract appears in the Annual Report of the Department of Corrective Services for the year ended 30th June 1982:

> "105 complaints were made by the Ombdusman[1] on behalf of prisoners (60 of these complaints were finalized during the year, of which 8 were found to be sustained)."

The Ombudsman's Office written complaint statistics for the same period as set out above show 741 written complaints. Part of the apparent discrepancy is explained by the fact that a significant number of complaints which are resolved or otherwise discontinued following oral discussions between Ombudsman officers and senior prison officers at gaols without recourse to correspondence with head office. The same applied to complaints outside jurisdiction. Whether there are in fact discrepancies between the two sets of figures has not been the subject of analysis. In the interests of accurate reporting to Parliament, this should be attempted by the two government instrumentalities in the future.

While the Ombudsman Act requires complaints to be written, the work of the Office in discussions with prisoners should not be thought unimportant. Indeed, this type of discussion about problems and their resolution through Ombudsman investigating officers can very usefully dissipate disaffection or unrest at an early stage and provide prisoners with an independent complaints resolver.

66. Complaints about release on licence

In excess of 50 complaints were received from prisoners on the subject of release on licence — often about their failure to obtain release or about delay in dealing with their applications.

Releases of prisoners under licence are granted under Section 463(1) of the Crimes Act 1900 by the Governor on the recommendation of the Minister for Corrective Services. In terms of Item 1 in Schedule 1 to the Ombudsman Act both the conduct of a Minister of the Crown and the Governor is excluded from investigation by the Ombudsman. In view of this, most complaints were outside jurisdiction. In some cases officers of the Ombudsman carried out preliminary enquiries in relation to alleged delays. In one case an investigation officer obtained copies of departmental reports and considered that in that matter there was no evidence of wrong conduct on the part of the Department.

67. Relationship with the Department of Corrective Services

Over the past year this Office has generally maintained a relationship of constructive cooperation with the Department of Corrective Services. While in a number of cases the Assistant Ombudsman has been critical of particular actions or conduct, it has often been possible to resolve or avoid problems with the help of the Department's officers, and she would like to record her gratitude for this cooperation.

[1]This misstates the role of the Ombudsman which is to investigate complaints impartially, not submit them on behalf of others.

Last year's Annual Report was critical of the quality of administration within the Department, and pointed out the numerous problems which arose for inmates because basic management skills were not applied and because channels of communication between senior staff, prison officers, and inmates were inadequate.

The Assistant Ombudsman believes that many of these problems remain unresolved. However, over the past year, she believes it would be fair to say that efforts have been made to overcome at least some of the deficiencies identified. In particular, in July 1983 it was announced that the Establishment Division of the Department, which was strongly criticised in the last Annual Report, would be disbanded and replaced with a new Division of Custodial Services which would take over responsibility for monitoring the various gaols throughout the State and dealing with any problems arising in them. The new Division will be directed by Mr J. Nash, and is divided into three sections (each consisting of an Assistant Director and two Inspectors). These will be responsible for dealing with problems of particular gaols in the region covered by the section.

At the time of writing it is too early to judge how the new system is operating. However, it is hoped that it will provide an improved system of monitoring and dealing with problems in the gaols, and can overcome some of the deficiencies highlighted in the last Report.

68. Segregation of Prisoners

The last Annual Report criticised a number of problems in the making of segregation orders under section 22 of the Prisons Act. These problems have continued over the past year, and give rise to serious concern.

The main difficulty arises from a concern that the power of Superintendents to issue segregation orders may be being used improperly as a form of punishment rather than as a means of controlling emergency situations.

The Corrective Services Department has considerable powers available to it to deal with prisoners who have breached prison discipline. If the prisoner charged with an offence admits that the facts alleged against him or her are true, or if s/he agrees to having the matter heard and determined by the Superintendent, the Superintendent may decide the matter on the spot and impose punishment if s/he finds the prisoner guilty. The Superintendent can order that the prisoner be confined to his or her cell for up to three days, or that s/he be deprived for up to one month of various rights and privileges such as sport, visits, telephone calls, access to TV, etc.

Where the offence alleged against the prisoner is more serious, or where the prisoner does not admit the facts or consent to its being determined by the Superintendent, the matter will be heard by a Visiting Justice. The Visiting Justice will hear the evidence against the prisoner; allow the prisoner to put his or her side of the story; and then determine whether or not the prisoner is guilty. Punishments which can be awarded by one or more Visiting Justices include:

* confinement to cells for up to twenty-eight days;
* forfeiture of any remission earned by a prisoner; and
* forfeiture of any money earned by a prisoner as a result of his work in gaol.

It is obvious that this procedure for dealing with breaches of prison discipline builds in certain protections for the civil rights of prisoners. In particular, even though the lighter penalties are a considerable incentive to a prisoner agreeing to have the case determined by the Superintendent, and most cases are in fact concluded in this way, it does ensure that any inmate who considers s/he has been wrongly charged has the right to have the case heard by a judicial officer independent of the gaol. The prisoner is thus guaranteed the opportunity of a fair hearing for his or her version of what happened. It is a fundamental protection against the arbitrary misuse of disciplinary powers by the prison authorities.

No such procedure exists with respect to the making of segregation orders under section 22 of the Prisons Act. The reason for this is that segregation is not intended to be used as a punishment, but is rather a means by which section 22 of the Prisons Act gives the Corrective Services Commission power to order that a prisoner be held away from association with other prisoners where it is determined that s/he would otherwise constitute:

> ". . . a threat to the personal safety of a prisoner or of a prison officer, or to the security of the prison, or to the preservation of good order and discipline within the prison."

An order under section 22 is intended as an emergency procedure, and a proper hearing would therefore be considered inappropiate. Mr Justice Nagle, in his Report of the *Royal Commission into N.S.W. Prisons* said the procedure

". . . should be used as a purely temporary measure, to be invoked only in situations of urgency."

However, in practice a number of Superintendents have tended to use segregation orders as an alternative form of punishment for prisoners who have committed breaches of prison discipline. Not only is this practice unlawful, but it deprives prisoners of the right to have their side of the story heard at all, and means they are given no opportunity to have the matter considered by someone independent of the gaol. Thus prisoners who may, for example, have been the victim of unfair harassment or a mistake on the part of prison officers, have no avenue at all by which they can demand a fair hearing.

Two cases dealt with by this Office in the course of one report illustrate this problem. Mr D, a prisoner at Goulburn Gaol, walked through an open gate into No. 7 yard. The supervising prison officer told him to go instead into No. 8 yard, whereupon the officer alleged that Mr D said "Get fucked". The officer then ordered him to go into No. 8 yard, whereupon the officer claimed that Mr D made a rude gesture; asked "Why can't I stay here?"; and refused to obey the order.

Mr G, a prisoner at Long Bay Gaol, was involved in two incidents on the one day in which he was denied entry to particular areas of the gaol for failing to wear a name tag. The officers concerned claimed that as a result of their actions Mr G swore at them, threatened them ("You don't worry me cunt, and if ya wanna make any more of it come up to my cell and I'll beat the fuck out of ya"), and pushed past them.

The prisoners considered that both incidents had been provoked by prison officers who had singled them out and were harassing them for actions which were tolerated in other prisoners.

Both Mr D and Mr G could have been charged with a number of breaches of prison discipline, including:

* committing a nuisance;
* cursing or swearing profanely; and
* disobeying any regulation or any of the rules of the prison, or any lawful order . . . of a prison officer

Indeed one of the prison officers concerned specifically listed the breaches which he considered Mr G had committed.

Nevertheless, no charges were laid against Mr G. Instead the Superintendent specifically noted "I am not charging" on the Prisoner Report Form, and recommended that a three month segregation order be made out against him. In support of his recommendation he merely noted:

". . . from my own observations and the reported acts of misbehaviour by G, I am of the opinion he should be placed in Segregation.

I recommend a period of *3 months* be authorised however, I'll return G to normal routine when his behaviour improves."

The three months segregation order requested by the Superintendent was imposed without Mr G ever having the opportunity to put his version of what happened.

In the case of Mr D, charges of disobeying a lawful order and using insulting words to an officer were actually laid. However, instead of proceeding to impose any of the punishments which were within his powers, the Superintendent placed Mr D on fourteen days segregation, and actually wrote this in the space left for "penalty" on the Prison Report Form.

In both these cases it appears that segregation was imposed as a de facto punishment rather than as a proper use of section 22. In neither case were the incidents reported so serious that they could reasonably have led the Superintendent to conclude that there was a threat to the personal safety of a prison officer or prisoner, or to the security of the prison. In neither case do the files of the prisoners concerned disclose any recent reports of misbehaviour or other material which could reasonably have led the Superintendent to conclude that the requirements for a section 22 order were satisfied.

It appears that the real motivation for imposing a segregation order was a desire on the part of the Superintendent to deal with the matters internally rather than referring charges to a Visiting Justice, and a belief that the penalties he was properly able to impose under section 23A of the Prisons Act were insufficient to deal with what he saw as the seriousness of the incident.

Use of section 22 orders in this fashion is entirely unacceptable. In the case of Mr D, who

apparently pleaded guilty to the charges (although his written consent or admission was not obtained in accordance with the proper procedure for such cases) the consequence was that the Superintendent imposed a penalty on him which was greatly in excess of the sentencing powers which the legislature has seen fit to confer upon Superintendents through section 23A. In the case of Mr G, where no charges were laid at all, the consequence was that he was given no proper opportunity to deny the allegations nor to offer an explanation of what may have been no more than the usual verbal abuse which is, unfortunately, common in N.S.W. gaols.

Two other cases investigated by this Office illustrate different problems in the misuse of segregation orders. The first involving a well-known prison activist and summarised in Case Note 39, was a situation where a segregation order was quite wrongly used in an attempt to stifle legitimate attempts by prisoners at Long Bay Gaol to protest that they were receiving insufficient quantities of food as a result of changes in the prison menu. In the second, deficiencies in the system of imposing and reviewing segregation orders, and a failure to properly consult with the Prison Medical Service, resulted in a seriously ill young prisoner who should never have been placed on segregation in the first place, being transferred on two separate occasions to the punishment section of Parramatta Gaol, with serious consequences.

Nevertheless, it must be acknowledged that over the past year the Department of Corrective Services has endeavoured to overcome some of the problems identified in the various Reports made by this Office. In particular, in November 1982, a Circular (No. 82/60) was issued to all gaols. This:

* restated the precise criteria on which segregation orders could properly be issued;
* pointed out that segregation is not to constitute any form of punishment, and is to be invoked "only in situations of urgency as a temporary short term measure";
* required that segregated prisoners be fully informed by the Superintendent of the reasons for their segregation, and that their rights and privileges be preserved in accordance with the requirements of the section;
* required that any limitation to privileges in respect of a segregated prisoner which is necessary because of local conditions be reported to the Corrective Services Commission; and
* required that the circumstances of prisoners held in segregation be closely monitored and reported regularly to the Commission.

The initiative of the Department in issuing this Circular is to be applauded, but it would be misleading to suggest that it has solved the problem. This Office is concerned that there is still no effective machinery for monitoring decisions made by Superintendents in these matters to ensure that they are properly made in accordance with the powers set out in section 22 of the Prisons Act.

69. Prisoner Grievance Committees

The investigation of a number of complaints clearly raised the question of what rights inmates have to bring legitimate problems to the attention of the authorities, and to act as spokespeople on behalf of their fellow prisoners. It is important that prisoners have such rights, yet it is obvious that prisoners will be reluctant to take on such a role if they believe they will be victimised for doing so. In his report on N.S.W. Prisons, Mr Justice Nagle noted that "prisoners must be allowed to voice their complaints according to a procedure which inspires their confidence". More specifically the Commission's report concluded:

> "The Commission considers that prisoner committees have a real role to play in handling prisoner grievances and thus reducing tensions which otherwise build up in gaols through prisoners not having a voice which can be heard. But unless grievance mechanisms gain the credibility of both prison officers and inmates, they will not work and will be viewed with suspicion, if not hostility, by both.
>
> Prisoner committees should be given official status and, so far as possible, should properly represent the prisoner community. Prisoners should register their complaints with committee members, either verbally or by placing them in a complaints box which should be locked but readily accessible to prisoners. Regular meetings should be held, at least once a month. A prison officer selected by the Superintendent should be chairman, but have no voting rights. The committee should draw up an agenda before the meeting, and full minutes should be kept. The minutes should be sent to the Superintendent who, within three days, should inform the committee of his decisions. Any complaints he has not the power to handle should be sent to Head Office and the committee should be informed of this without delay. Complaints sent to Head Office should be answered within fourteen days. The Superintendent should then pass the answers to the Committee."

Although Committees were set up at all gaols after the release of the Nagle Report, it is noteworthy that no such Committee now exists at the CIP, nor at many of the State's other gaols. Had such a Committee existed, it is likely that a number of problems investigated by the Office of the Ombudsman would not have arisen. The Assistant Ombudsman has noted with concern comments made by many prisoners to the effect that prisoners are deterred from establishing or serving on such Committees because candidates for membership are likely to be transferred to another gaol.

A new Circular (No. 82/59) has relatively recently been issued by the Commission. This required the establishment of *some* formal process to deal with prisoner grievances, even if falling short of a prisoners' grievance committee, and endeavoured to control the unjustified transfers of prisoner spokespeople. The Circular, issued in November 1982, advised Superintendents that they are:

> "required to satisfy the Commission that there is some *formal* process whereby they can show at all times that they are in touch with views of prisoners in their gaols concerning issues which affect the welfare and management of prisoners. Whether this is via a Problems and Needs Committee or some other similar method is the prerogative of individual Superintendents."

The Circular further states:

> "It has come to the attention of the Commission that the efficient functioning of a number of Prisoners' Problems and Needs Committees has been disrupted at times by the transfer of one or more of their members to other institutions. The Commission cannot countenance any transfers of prisoners simply because they are performing the function required of them as representatives, namely presenting grievances on behalf of other prisoners. Whilst the Commission does not intend to formulate a blanket policy precluding committee members from being transferred to other institutions, it will be necessary in future to fully document the reasons for such transfers."

This Office applauds the Commission for its initiative in issuing the Circular. Unfortunately, however, it appears to have had little effect on the practices within the Department, and few gaols appear to have established any formal process for ensuring that prisoner grievances can be aired and given proper consideration.

70. Sentence Calculations

The 1981/82 Annual Report criticised the inefficient system used by the Department to maintain records of sentences being served by inmates. At present these complex records are maintained on a purely manual basis, a procedure which has a number of disadvantages.

1. The calculation of sentences is complex and time consuming, and when changes in the basis of calculation are ordered as a result of court proceedings, the necessary recalculations take a considerable time to complete.

2. There is no system for supplying inmates on a regular basis with a statement setting out the length of time they are required to serve recalculated regularly in accordance with remissions accruing from time to time; and

3. Errors of calculation are not uncommon.

As a result of these deficiencies, this Office receives a considerable number of complaints from prisoners who dispute the date of release which has been calculated for them, or who are confused about some aspect of their entitlements. In a few cases, prisoners have suffered considerable detriment because of errors on the part of the Department.

By way of example:

> Mr D, a prisoner who had served several years in a N.S.W. gaol, was due to be considered for release on parole in November 1981. In September 1981, when he was considering whether to apply for parole, his parole officer advised him that his full time release date would be in March 1982. This information was confirmed as correct by Cessnock Gaol, and as a result Mr D elected not to seek parole but instead to wait the extra four months so that he could be released without parole conditions.
>
> However, the information given to Mr D turned out to be incorrect and in February 1982 he was advised that his full time date of release was not due until June 1982, some 100 days later than he had been informed. At this stage, Mr D sought and obtained release on licence, but

as a result of the incorrect advice given to him it would appear that he probably served several months longer in gaol than would have been necessary had he applied for release on parole in November 1981.

The Department of Corrective Services acknowledged its error in this case but declined to accept the recommendation made by the Assistant Ombudsman that Mr D be compensated for his extra imprisonment by way of an *ex-gratia* payment. Accordingly, Mr D received no compensation for the additional time he spent in custody even though this was clearly as a result of the Department's error.

The Department has now embarked on a programme which involves the computerisation of all inmate records involving sentence calculations. It is understood that, when this has been completed, inmates will be given a regular statement of their current sentence obligations, and it is hoped that this will greatly reduce the number of problems in this area.

71. Transfer to Police Stations for Interview

This Office is concerned at the practices being adopted by the Department with respect to the transferring of prisoners to police stations for interview.

In January 1982, a complaint was received from Redfern Legal Centre, to the effect that a number of prisoners from Parramatta Gaol had been involuntarily removed to Parramatta Police Station for questioning by police in relation to the death of a prisoner, without being given any information as to their legal rights or any opportunity to seek legal advice. Investigation showed that approximately 70 prisoners had been so removed, and that the Department had relied, as authority for the movements, on section 29 of the Prisons Act. This section authorises the Commission to order that a prisoner be taken temporarily from any prison "for any purpose in aid of the administration of justice", and is normally used to authorise the removal of prisoners to attend Court hearings.

This Office questioned the legality of using section 29 to authorise the compulsory removal of prisoners for interview by police in these circumstances. As a result, the Department sought advice from the Crown Solicitor, and was advised that section 29 could not lawfully be used in this way. The relevant section of the Crown Solicitor's advice is as follows:

> "Although I concede the matter is not beyond doubt, in my opinion the transfer of prisoners from gaol to a police station for questioning in connection with a criminal investigation into the death of an inmate cannot be said to be for a 'purpose in aid of the administration of justice' within the scope of Section 29(1) of the Act. Accordingly, I do not think that Section 29 can be utilised for the purpose under consideration."

As a result the Department suspended the transfers forthwith, and subsequently issued Circular No. 82/19, which appeared to resolve the problem. That Circular drew attention to the Crown Solicitor's advising and directed that "the transfer of prisoners to Police Stations is to be suspended forthwith". It went on to set out the procedures which are to operate when police wished to interview a prisoner — prison officers are to notify the inmate's legal representative if asked to do so, and inmates are to be given the opportunity to contact the Prisoners' Legal Service. It also pointed out that prisoners can refuse to see a police officer unless the Superintendent authorises the officer's visit as one occurring in the course of his official duty. The issuing of this Circular, which remains in force, appeared to resolve the problem, and the original investigation was concluded on that basis. However, in subsequent cases the Department has simply disregarded the Crown Solicitor's advising and its own Circular where it saw fit to do so.

Subsequent to the issue of the Circular, a number of prisoners were removed from Goulburn Gaol to Goulburn Police Station for interviews in the course of police inquiries into a serious disturbance at the gaol which had caused extensive damage to the Gaol's minimum security wing. In all cases the removal was sought to be authorised by the issue of a section 29 order.

By way of explanation, the Chairman of the Corrective Services Commission made two points.

* That the advice given by the Crown Solicitor "is an opinion only, and he disputed the view put to him by the Assistant Ombudsman that the orders were issued unlawfully; and
* That the intention of Circular 82/19 was to prevent the use of section 29 orders for authorising police station interviews "as a general practice". However, he made it clear that the Corrective Services Commission believed that special circumstances may arise where the administration of justice will be better served when inmates are interviewed away from the institution in which they are confined.

In her report on the matter the Assistant Ombudsman restated her view that the issuing of section 29 orders for this purpose was unlawful and that the Department was not entitled to disregard the Crown Solicitor's advice on this matter.

A later case occured in April 1983, when about 17 prisoners were transferred from the Metropolitan Remand Centre to Maroubra Police Station for interviews related to the alleged hanging of a prison officer. The prisoners alleged that they were given no prior warning or explanation of why they were being removed from the gaol, nor offered any opportunity of obtaining legal advice.

The Chairman of the Corrective Services Commission advised that he signed the orders because the alleged assault was a very serious matter, and moreover, three teams of detectives wished to conduct simultaneous interviews, which would not have been possible if questioning had been conducted in the gaol.

This Office does not accept that the Department is entitled to disregard the Crown Solicitor's advice in situations such as these. The Crown Solicitor's advice clearly sets out the Department's legal obligations, and it has not been suggested that the Department has received contrary advice which would justify it in declining to accept the advising. The Department is a Government authority and has a clear obligation to stay within the terms of its powers as laid down by Parliament. If change to these powers is needed, this is a matter for the legislature, not for unilateral Department action.

Police officers investigating crime within gaols consider it important that witnesses be questioned away from the gaol environment so that prisoners can speak to police at length without this fact being known to their fellow inmates. It is also accepted that the need to ensure prisoners are not afraid to give material evidence against their fellow inmates is an important matter, and that prisoners wishing to provide information, may feel less intimidated if removed from the gaol environment.

However, the disadvantages which prisoners suffer in dealing with the police should also not be forgotten. In the community generally people whom the police have not arrested cannot be compelled to attend an interview with police; do not have to answer questions put to them by police; and can seek to have their legal representative present during questioning. In theory, prisoners being questioned by police have the same rights as any person in the community. However, in practice they are significantly disadvantaged in two ways:

1. Under regulation 76B they have no right to refuse a visit from a police officer engaged on official duties; and
2. Because they are imprisoned they have no ready access to the usual avenues of advice — lawyers, legal aid, social workers, friends, and so forth — normally available to people in the community.

In any event, and regardless of the merits of the situation, the Corrective Services Department is not entitled to disregard its clear legal obligations.

72. Prison Medical Service

Over the years since the commencement of the Ombudsman Act, this Office has received a considerable number of complaints from prisoners about the medical and dental attention they have received while in prison.

In general, each complaint was investigated separately, with steps being taken to arrange for the speedy resolution of specific problems, if any, uncovered in each case. However, on 31 December 1982, a judgement was handed down, in the Supreme Court, in which Mr Justice Waddell suggested that it could be appropriate for this Office to conduct an investigation into the medical attention available to prisoners which in his opinion, did "not really add up to a service which is as adequate as one would expect". On this basis an investigation was carried out into complaints relating to the main areas of administrative concern with respect to the nature and quality of the medical services available to inmates of prison institutions in this State.

The starting point for this investigating was the Prisons Act, 1952, which contains the following provision relating to medical attention for prisoners:

> "16(1). Every prisoner shall be supplied at the public expense, with such medical attendance, treatment and medicine as in the opinion of the medical officer is necessary for the preservation of the health of the prisoner and of other prisoners and of prison officers, and may be so supplied with such medical attendance, treatment and medicine as in the opinion of the Commissioner will alleviate or remedy any congenital or chronic condition which may be a hindrance to rehabilitation."

The investigation relates to the administrative conduct of the Corrective Services Commission, as well as to the conduct of the Department of Health, as the medical and dental services available to prisoners are actually provided by the Prison Medical Service (PMS) of the Department of Health. The buildings occupied by the PMS, as well as the officers required to ensure the security of PMS staff, equipment and supplies, are provided by the Corrective Services Commission. A draft report will shortly be sent to both the Department and the Corrective Services Commission for their comments.

73. Peter Schneidas

Mr Schneidas has been in one form of isolated detention or other since September 1979 when, while in gaol, he assaulted and killed a prison officer. He was subsequently convicted of murder.

Mr Schneidas presents the Corrective Services Commission, and indeed society, with a most difficult problem. On the one hand, the attitude of prison warders towards someone who has killed one of their colleagues is understandable. On the other hand, the long term effects of solitary confinement on a human being are well known. Under the Prisons Act segregation of a prisoner from other prisoners can only be continued by the Commission for a maximum period of 6 months. Subsequent additional periods of segregation can only be ordered with the sanction of the Minister for Corrective Services. Accordingly the 4 years of segregation experienced by Mr Schneidas has resulted from successive 6 months' segregation orders made by the Ministers for Corrective Services of the time. Such orders, of course, are made following receipt by the Minister of advice from the Department.

From time to time during the course of his incarceration Mr Schneidas has made various complaints to the Ombudsman. During the year under review his position received much media coverage following a hunger strike and court proceedings. A brief account of the role of the Ombudsman in relation to this prisoner should be included in this Annual Report.

In April 1981 the Redfern Legal Centre made a complaint to the Ombudsman about the conditions in the Special Security Unit at Goulburn in which Mr Schneidas was kept. The Assistant Ombudsman, Ms Susan Armstrong, carried out an investigation. Her conclusion in November 1981 was expressed in a letter to the Redfern Legal Centre as follows:-

> "I refer to your representations to this Office on behalf of Mr Schneidas, who is currently being detained in the Goulburn Special Unit.
>
> I acknowledge the validity of your criticism of this Unit, and observe that these have been, on various occasions, supported by the former Chairman of the Corrective Services Commission, Dr T. Vinson.
>
> I accept that in these circumstances, Mr Schneidas' complaints are justified, but on the other hand, it does not appear from the material available to me that this is due to misconduct on the part of the Department.
>
> Rather, the difficulty arises from the lack of suitable facilities within the N.S.W. Prison System for the handling of "problem" prisoners in a decent and humane environment. I note that Mr Schneidas has declined an offer to transfer him, on a temporary basis, to Maitland Gaol Segregation Centre, and I expect you will appreciate the problems faced by the Commission in assessing eligibility for the Special Care Unit at Long Bay, particularly, in the early stages of its operation."

On 13th November, 1981 Mr Day, the then Acting Chairman of the Commission wrote to the Ombudsman a letter in which he said, inter alia:-

> "I would also like to assure you that his case is under constant review by the Commission, and whilst I agree that another year at Goulburn is not a satisfactory prospect, there appears to be no other option."

By June 1982 the Commission was actively considering transferring Mr Schneidas to the Special Care Unit at Long Bay. It appears that this move had the support of the new Chairman of the Commission, Mr Dalton, but was being blocked by threatened industrial action.

In November 1982, while still at the Goulburn High Security Unit, Mr Schneidas commenced his first hunger strike. A letter he wrote to the Anti-Discrimination Board was passed on to the Office of the Ombudsman. Essentially this letter raised the legality of his threatened forced feeding by prison medical staff.

During this first hunger strike Mr Schneidas had discussions with Mr McTaggart, the then Director of Establishments. These discussions led to the termination of the hunger strike and the transfer of Mr Schneidas to Maitland Gaol in late 1982.

In January 1983, Mr Schneidas made a number of oral complaints to Mr Hartigan, an investigating officer of the Ombudsman's Office who was visiting Maitland in the ordinary course of his duties. These complaints related to the conditions of his segregation at Maitland and the alleged non-compliance by the Commission with undertakings he had been given in the course of discussions with Mr McTaggart. The Assistant Ombudsman raised these complaints with the Commission. In reply, Mr Day who was then acting as Chairman, stated:-

> "3. The Commission supports the view that Mr Schneidas should have access to recreation facilities away from the segregation unit. Negotiations with the Prison Officers' Vocational Branch are continuing, but so far the Branch has refused to allow its members to supervise Mr Schneidas in such a programme."

While the continued decisions of the Ministers for Corrective Services to make successive segregation orders are excluded from scrutiny under the Ombudsman Act (Schedule 1 Item 1(b)), the Ombudsman, as he is entitled, decided to examine the recommendations made by the Department to the Minister, which under the Act can be made the subject of investigation. By letter dated 18th February 1983 the Ombudsman asked the Chairman of the Commission, inter alia:-

> "In the circumstances, so that I may appreciate the position, would you please provide me with the following information:-
>
> (a) For how long now has Mr Schneidas been in segregation?
>
> (b) Does the Commission have some plan or criteria as to the possible release of Mr Schneidas from segregation?
>
> (c) If so, would you outline the type of circumstances in which you would envisage that segregation of Mr Schneidas may come to an end.
>
> (d) In your Minute to the Minister dated 6th January 1983 I note that you quote Mr Penning, the Superintendent of Maitland Gaol as stating that the prisoner's conduct and attitude have been satisfactory but "not to the extent where he could be discharged to normal prison discipline". In so far as this question is not dealt with in your answer to the previous question, what is meant by the quoted words?"

At about this stage Mr Schneidas was transferred back to the Goulburn High Security Unit. He commenced another hunger strike, and by early April 1983 was reportedly near death at Prince Henry Hospital.

In this situation Mr Schneidas commenced legal proceedings in the Supreme Court for an injunction against forced feeding. The matter came before Mr Justice Lee. In his judgment dated 8th April, 1983 His Honour concluded:-

> "I would make it clear that the plaintiff, on his own evidence, is a man who has decided to take his life if his demands to be removed from the Goulburn High Security Unit are not met. I would also make it clear that there is nothing before me to indicate that the plaintiff is being wrongfully or unfairly treated, and he does not in these proceedings claim that the prison authorities are not lawfully and bona fide exercising their powers under the Prisons Act and the regulations made thereunder in keeping him in that section of the prison system. It is also to be made clear that there has been no suggestion in the evidence or from the plaintiff's counsel that the defendants, in deciding to feed him, are not inspired by other than a human desire to save his health and his life.
>
> . . . . . .
>
> But the substantial matter that would lead me to refuse an injunction, even if the contemplated feeding was unlawful, is that to grant an injunction would put the plaintiff's blood on my hands if he dies of starvation. He has made it clear in his affidavit that he is prepared to take his own life by denying his body necessary food and he is thus in the course of attempting to commit suicide: that is a crime under our law. He comes to this court inviting me, in effect, to aid and abet him in the commission of that crime by removing an obstacle which stands in the way of him carrying out his intention. I firmly refuse to do so . . . ."

Ultimately discussions between Mr Schneidas and a representative of the Department led to a termination of the second hunger strike. In reply to the Ombudsman's letter, and by way of a description of developments since, by letter of the 28th April, 1983 Mr Dalton advised:-

> "Mr Schneidas has been in segregation since 12th August, 1979. Recently, following lengthy negotiations which resulted in Mr Schneidas ending his hunger strike, a proposal concerning his future placement was agreed to. This proposal involves returning Mr Schneidas to the Goulburn Security Unit for a short time, when he is medically cleared, and then spending short periods of time in gradually less secure environments. The success of this proposal will be dependent on Mr Schneidas exhibiting satisfactory behaviour throughout each stage of the programme."

Under the Ombudsman Act the role of the Ombudsman is to investigate allegations of wrong conduct against a Department or Public Authority in relation to a matter of administration. This provides limitations on what can be done in a situation such as that involving Mr Schneidas. Decisions of Ministers, such as to continue segregation, are not examinable. Questions of law, such as the legitimacy of forced feeding, are better determined, as they were, in the courts. Alleged agreements made between a prisoner and a single officer of the Department, in the situation of a hunger strike provide obvious difficulties of assessment and, in any event, are probably not "matters of administration" within the Act. Recommendations to Ministers can be looked at for factual accuracy and fairness, but no wrong conduct on the part of the Department in this area has been found. Further, a public authority in administering its Act is entitled to take into account industrial factors. However, a point can be reached where failure to follow a preferred course because of union opposition can constitute wrong conduct on the part of the authority.

The general programme set out by the Chairman in his letter, namely that Mr Schneidas should spend "short periods of time in gradually less secure environments" subject to his exhibiting satisfactory behaviour throughout each stage of the programme at least provides some guidelines in which any future complaint to the Ombudsman can be gauged. Whatever one thinks of the past conduct of Mr Schneidas, he is entitled to a fair application of the policy enunciated by the Commission.

74. Alleged involvement of Prison Officers in Drug Distribution

In early June 1983, a prisoner in an interview with an officer of the Ombudsman Office made detailed allegations as to various modes of drug distribution in a particular gaol. He named both prison officers and prisoners alleged to be involved.

Where complaints of wrong conduct involving allegations of serious continuing criminal offences are made to the Office of the Ombudsman the exercise of sound judgment is required. In normal circumstances such allegations should first be investigated by the Department and if necessary police. Among other things there is always the risk that independent investigation by the Ombudsman, even though within jurisdiction, might prejudice existing detection procedures or on-going intelligence gathering or even create special risks for the informant. In this case the Assistant Ombudsman who made arrangements for the interview, with the consent of the prisoner, decided to hand the detailed statement to Mr Dalton, the Chairman of the Corrective Services Commission for investigation.

More recently (October 1983) the Ombudsman has been making enquiries with regard to the manner in which the information given was investigated and the results. Such follow up is clearly an appropriate function under the Ombudsman Act.

PART II

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT

75. Statistics

For the period July 1, 1982 to June 30, 1983, a total of 1,349 complaints against police were received. This compares with 1,121 received the previous year.

Of the 1,243 complaints finalised in the course of the year, 55 (4.4%) were found to be sustained, 269 not sustained, and in 302 (over 24%)[1], because of a limitation of powers, it was impossible for the Ombudsman to determine whether or not the complaint was sustained. Details are as follows:-

1/7/82 to 30/6/83		
Not Sustained	269	
Sustained	55	
Not Proceded with	145	
Conciliated	286	
Declined	175	
No Jurisdiction	11	
Unable to determine	186	(302)
Unable to determine — Not Sustained *	116	(302)
Total	1243	

*This figure represents the number of Unable to Determine matters which were found Not Sustained in accordance with the decision of Mr Justice Lee given on 25/11/82. This decision was reversed by the Court of Appeal in mid 1983 (see paragraph of Annual Report).

[1] Representing approximately 48% of all complaints fully investigated during the year.

76. Pilot Study Results: Police Complaints

For the year ended 30 June 1983, the Law Foundation of NSW generously provided, free of charge, the assistance of a statistician to process and computerise statistics in relation to complaints about the conduct of police.

Regrettably, the Law Foundation, because of a limit·tion of funds, did not see its way clear to continue the arrangement into the 1983/84 financial year. The continuation of the project as an element in a more comprehensive statistics system covering all aspects of the Ombudsman's work, was contemplated in the budget submission, which sought funds for a micro-computer. However, as Treasury saw fit to reject this application, it has not been possible to continue processing and analysing the statistics on police cases, although this data will continue to be kept. A further submission will be lodged next year seeking funds for a micro-computer which, if obtained, will be used to continue the statistics as well as others in the general area, provide fast retrieval of past cases, and generally reduce clerical time.

Although it was not possible to obtain a full analysis and cross tabulation of the data, the available statistics showed among other things:

1. Of the complaints that were investigated, the single largest category of complaints (20%) related to assault, with neglect of duty, unauthorised or unnecessary actions, and wrong treatment accounting altogether for a further 33%.

   The least number of complaints were received in relation to wrong administrative conduct (2%) and misuse of office (3%).

2. Two thirds of all complaints were made in relation to incidents which allegedly occurred within the Sydney Statistical Division, with the largest percentage (approximately 15%) originating from the City of Sydney. Most other incidents are alleged to have occurred at Blacktown, Bankstown, Fairfield, Baulkham Hills, Marrickville and Warringah, which altogether account for just under a third of all complaints in relation to the Sydney Statistical Division.

3. Although persons identifying themselves as Aborigines accounted for less than 3% of all complaints, over 40% of these complaints related to allegations of assault by police officers, with just over 10% relating to unauthorised and unnecessary actions such as unnecessary detention, unnecessary arrest, and unnecessary use of force.

4. In all, four times as many complaints were lodged by males compared to females. The main complaints from males related to allegations of unauthorised and unnecessary actions, neglect of duty and assault. Nearly all complaints concerned with abuse, evidence or threats were lodged by males. On the other hand, the main complaints lodged by females, related to neglect of duty, unauthorised and unnecessary actions, wrong treatment, rudeness and assault.

77. Investigating Police Complaints: Amendments Foreshadowed

In last year's Annual Report the Ombudsman referred to the position in which he was placed under a system where the police carried out investigations and all that the Ombudsman received or was entitled to consider under the Act were statements by the complainant, police officers and other witnesses. He had no power of enquiring or questioning himself. As the statements were often conflicting the Ombudsman, in July 1981 following the advice of Senior Counsel, introduced the category of "Unable to Determine" decisions.

Sergeant Moroney, in respect of whom a complaint was placed in this category, instituted proceedings in the Supreme Court seeking an order that the Ombudsman find the complaint against him not sustained. Ultimately, on 24th May 1983 the Court of Appeal, by a majority, found in favour of the Ombudsman and dismissed the proceedings with costs.

The President of the Court of Appeal canvassed in detail the relevant sections of the Police Regulation (Allegations of Misconduct) Act and in particular sections 27 and 28 and the "satisfaction" required of the Ombudsman before making an affirmative finding of sustained or not sustained. Mr Justice Moffitt dealt with this aspect of the matter in the following passage:-

> "Upon the analysis I have made of section 28 generally and in relation to examples, there is obviously a substantial area where the Ombudsman will have no means of satisfying himself one way or the other that the conduct complained of occurred, irrespective of the conclusion of the police investigator and despite the apparent proper conduct of the investigation. This could well be applicable to many complaints likely to come to the attention of the Ombudsman, being cases where there is allegation and denial of conduct.

> It may well be that cases where there is no conflict of fact concerning the conduct or its essential quality may be minimal. If then there are cases, whether few or many, where the Ombudsman cannot be satisfied one way or the other concerning conduct complained of, so his mind does not reach the state of satisfaction required for a report under section 28, I do not see why the words of section 27 should not be given their ordinary meaning, so that there will be cases which do not fall within either section 28 or section 27 but fall into what might be referred to as the non-proven area. I do not think it should be inferred that the Legislature, in enacting section 27 and 28, considered that every case would fall into one or other category. The precise words used in section 27 suggest the contrary. In the compromise which was made in regard to complaints against police officers, there was left outstanding an area where the Ombudsman cannot make up his mind. I think that may well be quite a large area, but that is not really presently relevant. It is not relevant further to discuss the cases where the Ombudsman may be able properly to arrive at a state of satisfaction where he can give a report under section 28 or section 27. It is sufficient to say they would appear to include cases where there is no material dispute about the facts or where, when the complaint was investigated by the police, the complainant made concessions or new facts proper to be accepted appeared, so that, as it were, the Ombudsman is able to be satisfied on the transcript with or without the aid of the conclusion of the investigator."

Following consideration of the judgements of the Court of Appeal, the resultant public reaction and the recommendations of the Stewart Royal Commission, on 5th July the then Acting Premier Mr Ferguson and the Police Minister Mr Anderson made a joint press statement foreshadowing amendments to the Police Regulation (Allegations of Misconduct) Act. That press statement was in the following terms:-

> **"NEW PROVISIONS TO ENABLE INDEPENDENT INVESTIGATION OF COMPLAINTS AGAINST POLICE**
>
> The Acting Premier, Mr Jack Ferguson, and the Minister for Police and Emergency Services, Mr Peter Anderson, jointly announced today that the Ombudsman will be empowered to undertake independent investigations of complaints against Police.
>
> They said that the proposed changes take into account recent criticism of the existing procedures and in particular the Stewart Royal Commission recommendation that the New South Wales Ombudsman should have some powers of independent investigation of complaints against Police as already apply to the Commonwealth and some other State Ombudsmen.
>
> As at present all complaints against Police will continue to be referred to the Commissioner of Police for initial investigation. However, if the Ombudsman is dissatisfied with the Police Investigation and finds that he is unable to determine the complaint then he will be able to make further independent investigation.
>
> Selected members of the Police Internal Affairs Branch will be seconded to assist the Ombudsman with such investigations.
>
> The Commissioner of Police will continue to have responsibility for taking any disciplinary action. However, if there is a disagreement between the Ombudsman and the Commissioner concerning disciplinary action then the matter will be referred to the Police Tribunal for final determination. For this purpose the Police Tribunal will be a District Court Judge.
>
> The necessary amendments to the POLICE REGULATIONS (ALLEGATIONS OF MISCONDUCT) ACT will be introduced in the Budget session of State Parliament.

The speech of the Governor opening the New South Wales Parliament on August 16, 1983 stated simply:

> "Legislation will be introduced to empower the Ombudsman to undertake independent investigations of complaints against Police."

78. Anonymous Complaints

There has been dispute between the Ombudsman and the Commissioner of Police as to whether written complaints forwarded to the Office without any identification of the person making the complaint are within the existing terms of the Police Regulation (Allegations of Misconduct) Act.

From time to time the Ombudsman receives written complaints of this nature which are forwarded to the Commissioner of Police for investigation. Three such complaints the subject of contention during the course of the year under review illustrate the position. In the first anonymous complaint it was alleged that a police officer and a Justice of the Peace had signed search warrants in blank. Photocopies of the relevant documents were forwarded with the letter of complaint. (This complaint was the subject of a Report to Parliament on 14th September, 1982.) The second anonymous complaint related to alleged conduct by an Inspector of Police in a northern country town. It was said that the Inspector habitually drove after consuming excessive amounts of alcohol. It was further said that in particular on 2nd November, 1982 the Inspector after attending a named race meeting and consuming an excessive quantity of alcohol was involved in an accident in which he was in the wrong while driving the police car. It was further alleged that he left the scene of the accident, had to be chased by the innocent party, that no action was taken by the police, and that in particular that he was not submitted to a breath test. The third example was from a citizen who gave a detailed account of an incident at an identified time and place which his 17 year old son witnessed involving police brutality towards a youth who was being apprehended.

In each of these cases the Commissioner of Police advised the Ombudsman that an investigation had been carried out, but refused to provide the Ombudsman with copies of the statements taken during the course of the investigation and the reports of the investigating police officers. The Ombudsman took legal advice in the matter. Opinions were obtained from Junior and Senior Counsel and these were of the view that written anonymous complaints were within the Act. These opinions were supplied to the Commissioner of Police who obtained a contrary opinion. The latter opinion was submitted to the counsel advising the Ombudsman who reiterated their original view that anonymous complaints were within the Act. Further correspondence ensued between the Ombudsman and the Police Commissioner on this issue without any change in the respective views. Faced with this impasse the Ombudsman decided to take legal proceedings against the Commissioner of Police and instructed counsel to prepare legal process. As a last attempt to avoid litigation between public bodies the Ombudsman referred the legal opinions received and the court process to the Minister for Police and sought his intervention.

The issue raises important considerations of public interest. These were conveniently dealt with by Senior Counsel retained by the Ombudsman in the following terms:-

> "In my opinion the opening words of Section 5, i.e. 'Where a person complains' are clear and unambiguous and there is no warrant for qualifying them by the addition of a gloss that such person must be known to the Ombudsman or the Police Department.
>
> I am fortified in my view by a consideration of the purpose of the legislation. This is to be found in the preamble to the Act which provides:
>
> 'An Act to confer and impose on the Ombudsman and the Commissioner of Police certain powers, authorities, duties and functions with respect to the investigation of, and adjudication upon, allegations of misconduct made against members of the Police Force and to constitute a Police Tribunal of New South Wales.'
>
> From that preamble it appears that the legislative intent was to impose upon the Ombudsman and the Commissioner of Police duties and obligations in relation to 'allegations of misconduct made against members of the Police Force'. There is nothing in that purpose to suggest that the legislature intended that well founded, fully established, anonymous complaints of grave misconduct should not be subject to the Act simply because the complainant did not disclose his identity. Indeed, there is every reason why such complaints should be fully and carefully investigated. Common experience tells us that whereas the ordinary citizen is often happy to sponsor a trivial complaint, he frequently seeks to avoid the controversy associated with grave complaints against persons in high authority. These are often the subject of anonymous notification.
>
> The purpose of the Act is to impose a duty to investigate 'allegations of misconduct'. In my opinion, that purpose would not be achieved if identification of the complainant is treated as a condition precedent to the operation of the Act. It would mean that the well founded complaint of grave misconduct would not be within the Act and subject to its discipline. This can hardly have been the intention of the legislature. Certainly there is no indication in the Act to that effect. In my opinion the Courts will treat this legislation as remedial in that it provides a method and forum for investigating misuse of power by persons in authority. It will therefore receive a construction which will achieve the apparent intent of the legislature.
>
> Accordingly, in my opinion, both because the words of Section 5 are clear and unambiguous and also because the intent of the legislature, as I read it, is to cover all complaints, I am of the opinion that Section 5(1) of the Act applies to any complaint, whether made by an identified complainant or an anonymous person, and I so advise."

It should be emphasized, of course, that the mere fact that the Ombudsman decides that a matter should be investigated does not involve any conclusion whatsoever on the substance of the

complaint, whether anonymous or otherwise. For example, in the first of the examples mentioned above it has been suggested to the Ombudsman that the police officer concerned was of undoubted integrity and that he was in fact "set-up" because of investigations he himself was carrying out into alleged police corruption. Malice on the part of the complainant must always be a possibility in anonymous complaints as well as in others. However, this is not a reason why "the lamp of the Ombudsman's scrutiny", to use the words of Mr Justice Lee, should not be cast upon such an allegation. The result of the Ombudsman's scrutiny in such a case might indeed be to ensure that a police officer is not subjected to unjustified disciplinary process which might move him from a position that he is fulfilling with integrity and distinction.

The Minister for Police had separate discussions on the issue both with the Ombudsman and the Commissioner of Police. The Premier has very recently announced that the Act will be amended to specifically cover anonymous complaints subject to appropriate safeguards.

79. Delays in Police Investigations

Delays in investigations by Internal Affairs Branch or other police of citizens' complaints are extensive. Leaving aside conciliated matters, rarely are investigations completed within three months.

The history of a not untypical complaint involving an incident between a police officer and a taxi driver, his two passengers who supported him and other more peripheral witnesses was as follows:

6 September 1982	Complaint to Commissioner of Police
13 September 1982	Letter from Commissioner of Police to Ombudsman sending copy of complaint
16 September 1982	Letter from Ombudsman to Commissioner of Police agreeing to investigation by Internal Affairs Branch. Letter from Ombudsman to complainant advising and explaining procedure.
18 February 1983	Request by Ombudsman for present position of investigation.
24 February 1983	Letter from Commissioner of Police to Ombudsman advising investigation "nearing completion".
10 May 1983	Letter from Commissioner of Police to Ombudsman containing 22 statements — 1 by complainant 11 by independent witnesses 1 by police officer subject of complaint 9 by other police officers 22 Also comments by Commissioner of Police on results of investigation.
27 May 1983	Letter Ombudsman to complainant with copies of relevant material for comment.
24 June 1983	Detailed comment by solicitors for complainant to Ombudsman.
11 July 1983	Review of material by Senior Investigation Officer.
19 July 1983	Letters from Ombudsman to complainant, Commissioner of Police and police officer that because of conflict of evidence unable to determine whether sustained or not.

This type of delay, whatever the position earlier, will not be tolerable if the Ombudsman, as announced, is to be given the power to re-investigate certain complaints. For re-investigation to be meaningful it has to be undertaken while recollections of witnesses are still relatively fresh and the "scent" not too cold. Accordingly, the Ombudsman will have to be alert to undue delays in particular matters and if these persist to an unreasonable extent the Ombudsman will have no alternative than to make individual reports to Parliament detailing the delay. The separate problem of deferrals pending court proceedings is referred to in the next paragraph.

80. Deferral of Investigations.

A major problem with determining complaints against police is the extensive delays which have occurred in many cases where the investigation has been deferred because of criminal proceedings.

Section 20(1) of the Police Regulation (Allegations of Misconduct) Act permits the Commissioner, with the consent of the Ombudsman, to defer an investigation where criminal proceedings have been instituted and the subject of the complaint is or may be at issue in those proceedings. This situation arises very commonly. For example, in most cases where a person complains that he or she has been assaulted by police, that person will be facing criminal charges. They may be charges arising directly out of the alleged incident (for example charges of assaulting police or resisting arrest), or they may be unrelated charges where it is nevertheless possible that the alleged police assault may be raised as part of the defence.

The previous practice of this Office has been to agree to the Commissioner's request for a deferral wherever it appeared likely that the substance of the complaint would be raised in the proceedings. It is the Ombudsman's view that this is the proper approach, both because a court is in a better position than the Ombudsman to determine disputed issues of fact, and also because many people are understandably reluctant to make statements to police for the purposes of an investigation under the Police Regulation (Allegations of Misconduct) Act when proceedings are pending.

However, the endeavour of the Office of the Ombudsman to co-operate with the Police Commissioner in this area has led to serious problems which require at least a partial reconsideration of approach. One of the major problems is that in a considerable number of cases, extensive delays in finalising the criminal proceedings have meant that by the time the investigtion of the complaint is resumed enquiries are pointless because memories have faded and witnesses have disappeared.

Cases illustrating this are:

(a) In April 1981, Mr M. lodged a complaint through his local member of Parliament that he had been bashed with batons and kicked by police during a disturbance at Mt. Panorama race track. His injuries included a broken nose.

Mr M. was charged with "causing serious alarm and affront", and the Commissioner of Police sought permission to defer the investigation until Court proceedings were concluded. This was granted by the Ombudsman. Mr M. was convicted by the magistrate, but the conviction was ultimately set aside on appeal by the District Court in April 1983.

Investigation of Mr M's complaint that he was bashed and injured by police finally began a full *two years after the complaint was made.* The extent to which this delay will hamper the investigation, both by making it difficult for witnesses to be found and also by making it hard for those who are found to remember what occurred, is obvious.

(b) In November 1981, Mr D. complained that he had been the victim of a serious assault by police. The assault allegedly occurred at Flemington Police Station, where police were questioning him in relation to two stolen cheques. Mr D. said that when he denied knowing anything about the cheques, police pushed him to the floor and knelt on him; lifted him up by his hair; pushed him against a wall (causing the hand with which he hit the wall to make a hole in the plaster); kicked him in the head near his ear and in the face. Medical examination of Mr D. on the following day disclosed bruising and tenderness in the ear, arms and hand, and blood in his left ear.

Mr D. was charged with:

- stealing two blank cheques;
- falsely passing two cheques with a total value of $1,250; and
- maliciously injuring the police station wall.

In February 1982, the Commissioner sought and was granted permission to defer the investigation pending the determination of these charges. At that stage no investigation of the actual complaint had been conducted — police inquiries had been directed only to formulating and proving the charges laid against Mr D.

However, by May 1983 — more than eighteen months after the complaint was made — the charges against Mr D. had still not been listed for trial. At this stage, in view of the seriousness of the allegations, the Assistant Ombudsman withdrew consent to the deferral and directed that all relevant statements be obtained and witnesses be questioned. No further information has so far been received as to the progress of the investigation.

(c) On 19 March 1981, Mr S. complained to the Ombudsman that he had been assaulted by police. According to Mr S. the incident arose because he observed police endeavouring to handcuff a female friend of his who was waiting for him outside his place of employment. Observing that she was both distressed and naked from waist up, he went over and endeavoured to put his shirt around her. He was advising her to calm down, but she began screaming "my arms, my arms", and he noticed that one of the police officers had pressed her arms up behind her back. Mr S. then put his hands in between them to try to ease the pressure, saying to the officer: "Ease off you are breaking her arms". At this, one officer punched Mr S. twice, breaking his jaw. As a result of the incident, Mr S. was charged with three offences — assault police, hinder police and resist arrest.

The investigation began in March 1981, but on May 5, 1981, the Police Commissioner sought permission to defer further investigation pending the hearing of the charges against Mr S., which had been adjourned to May 26, 1981. At that stage no investigation had occurred beyond the taking of brief statements from the police officers concerned. In particular, no statements were taken from three people who were apparently eye-witnesses to the incident.

The request for deferral was agreed to by the Ombudsman, but in fact the matter did not proceed in May and the case was adjourned again for hearing in December 1981. In December it was again put off to April 1982, then further postponed to November 1982.

The charge of "assault police" was eventually heard in December 1982, nearly two years after the incident occurred. Mr S. was acquitted. However, even then no investigation was launched by police into his original complaint that he had been assaulted without justification. Instead the Deputy Commissioner of Police advised that he proposed no further action on the matter.

It was apparent from the terms of the Deputy Commissioner's letter that a "deal" had been done between police and Mr S. Police agreed to withdraw the charge of "resist arrest" which was still outstanding against Mr S, and in return he signed a release giving up all rights to private legal action against the officers, and withdrew his complaint. Mr S. pleaded guilty to the other charge of "hinder police", but the matter was dismissed without penalty in accordance with the provisions of section 556A of the Crimes Act.

This Office took the view that it was entirely inappropriate to abandon the investigation because of some private "deal" done with Mr S. The complaint involved an allegation of serious assault in which a police officer had broken Mr S's jaw, and substance was lent to Mr S's version of what happened by the decision of the magistrate to acquit him of the charge of assault police. It would have been extremely difficult for the magistrate to reach this decision if he had fully accepted the version of events put forward by the police officer.

In April 1983, this Office therefore exercised its right to require that a proper investigation be carried out. However, further delays then occurred while the police endeavoured to obtain a copy of the court papers, and at the present time (October 1983) no more has been heard as to the fate of this investigation. Almost three and a half years have now passed since the complaint was made, and of course it is possible that the three witnesses who apparently saw what happened have either disappeared or forgotten the incident.

Where serious allegations are made against a police officer the Commissioner has an obligation to investigate those allegations as promptly and fully as possible. This is necessary both to protect the community interest by ensuring that violent or corrupt officers do not go undetected and unpunished; and also to protect the rights of police officers who may be subjected to unfounded allegations. It is proper that where the whole issue will be raised and determined by a court, then investigation under the Police Regulation (Allegations of Misconduct) Act be deferred pending the court decision. However, it is my view that at present there is a tendency on the part of the Police Commissioner to use forthcoming court proceedings as an excuse to take no action on a particular complaint, or to defer any action to the stage when investigation is pointless.

On some occasions, the Commissioner seeks to defer investigation of a complaint even where there is only the remotest and most tenuous connection between the conduct of the police officer and the forthcoming court proceedings.

An example is:

Mrs H. complained that her 16-year-old son had been forcibly pulled off his trail bike, held in a headlock, punched in the face, and knocked to the ground by a police officer apparently speaking to him in relation to his riding the bike in a laneway beside his home. The boy was subsequently charged with:

- ride unregistered motor cycle
- ride uninsured motorcycle
- not wear safety helmet
- unlicensed rider

- state false name and address; and
- disobey direction to stop.

It is apparent that the court hearing these charges would not be likely to entertain evidence relating to the alleged assault, as such evidence would be totally irrelevant to the charges before it. Nevertheless, the Deputy Commissioner sought permission to defer the investigation of the complaint until after the charges had been determined. Consent to such a deferral was refused. (It may be noted that deferral of the investigation in this case was subsequently approved when the complainant launched private proceedings for assault against the police officer concerned.)

In order to overcome some of the problems caused by the attitude of the Police Commissioner in this matter, this Office has now adopted the practice, in cases where serious allegations are made, of requiring that all basic investigative work along the lines of the taking of statements from witnesses etc., be completed before the question of deferral of further investigations is considered. The effectiveness of this policy cannot yet be judged, but it is hoped that this will avoid instances of gross delays such as those described above.

81. Investigation of Alleged Police Involvement in Tow Truck Rackets

Persistent allegations that police officers favour certain tow-truck companies when giving advice to motorists after accidents have been the source of many complaints about the police.

One notable complaint was made by Mr Keith Wellington, of Windsor, in late 1979. He accused certain police officers in the area of receiving money for giving tip-offs about accidents to a rival towing firm. To support his allegation he and two of his employees provided a list of alleged incidents of improper behaviour. The Internal Affairs Branch began investigations under the Police Regulation (Allegations of Misconduct) Act in October, 1980.

In a progress report in August, 1981 Internal Affairs Branch said the investigation of the complaints, some 65 in all, would take some time to complete.

The incidents mentioned were being investigated one by one, and in nearly a year only two reports had been finalised. The complainant, Mr Wellington, wrote that he was very disappointed in the manner in which the investigation had been conducted.

In January, 1982 a third and a fourth report were received. The fourth report dealt with an incident of alleged corruption: a claim that Sergeant 'X' received $150 for the remains of a motor vehicle which was in police possession.

The Police Prosecuting Branch considered the evidence against Sergeant 'X' and advised:

> "In considering all the facts in the light of the available evidence, I am of the opinion that it is inappropriate to prefer any criminal charge. Whilst there is considerable suspicion attaching to the actions of Sergeant 'X', I am not satisfied that any criminal charge would succeed. I have considered a charge of the Sergeant soliciting a bribe under the provisions of section 15 of the Police Regulation Act No. 20 of 1899. As this offence is summary in nature with a time limit of six (6) months being allowed to institute proceedings no good purpose is served in further pursuing this possible offence."

In fact, Sergeant 'X' had resigned, which meant that he was no longer covered by the Police Regulation Act. In 1981 Sergeant 'X' had been presented with a National Medal for long service and good conduct.

The Ombudsman sought advice from the Crown Solicitor's Office on whether there was sufficient evidence to justify criminal proceedings against Sergeant 'X'.

A report was made to Parliament in August, 1982, on the "Deficiencies and Limitations of the Current Legislation Which Regulates the Handling of Citizens' Complaints Against Police — Investigation of Alleged Police Involvement in Tow Truck Rackets". It summarised the position that month as follows:

> "9.1 On 23rd June, 1982, Mr Wellington contacted me and advised that after carefully going through the Reports provided by the Police he had discovered some errors and inconsistencies and that he had documents to prove it. He expressed the opinion that given the form the investigation had taken with the Police merely trying to disprove his complaints and discredit his employees, the whole exercise had become a waste of his time, the time of the Internal Affairs Branch and the public's money. Although some officers had been transferred, nothing had really changed — "it was the same game — just different faces".

"9.2 As at 11th August, 1982, twenty-two (22) months later, twenty-five (25) reports have been received, a Police Sergeant has resigned, four Police Officers have been disciplined — two with a charge of 'Neglect of Duty' and two with the charge of 'Disobedience' — the investigation is still not completed and Mr Wellington states nothing has really changed.

Recommendations in the report to Parliament were:

"14.1 That the present system of investigating complaints against the Police should be reviewed with consideration being given to the allocation of concurrent discretionary investigative powers in relation to complaints against the Police to a body independent of the Police (whether or not that body be the Office of the Ombudsman).

14.2 That provision be made to permit Police disciplinary action to be taken against a member of the Police Force who resigns prior to the conclusion of an investigation into his conduct.

14.3 That the present period of six months for bribery charges under the Police Regulation Act, No. 20 of 1899, be reviewed and consideration be given to an extension of that period and an increase in the amount of the penalty.

14.4 That as the investigation is unlikely to be concluded for some time, that directions be given that the Tow Truck Act, 1967, be effectively policed and enforced."

One newspaper editorial said:-

"The internal police inquiry has been so slow it has fizzled out and the operator has complained of police harassment." (Sun, 20.8.82).

It went on to say:-

"There was a clear case for changing the system by which police investigate complaints against themselves."

On 10th May, 1983, Judge Melville, of the Police Tribunal, found charges of disobedience and neglect of duty proved against a Sergeant 'B'.The charges related to allocation and recording of towing rights after a fatal accident.

In June, 1983, a squad known as the Internal Security Branch was formed to investigate alleged corruption within the police force. According to a police spokesman quoted in the press, the squad would be looking particularly at areas where breaches of police regulations affected whole stations or divisions. He was quoted as saying:

"For example, this squad would have dealt with the under-the-lap payment to police by tow truck drivers."

82. Conciliation Statements

As noted in last year's Annual Report the number of complaints made by citizens against police officers which have been conciliated has risen considerably. This year conciliated matters represented 23% of all complaints finalised. Provided that the conciliation is voluntary and represents an acceptable outcome to a dispute this tendency has to be welcomed.

There remains an obligation upon the Ombudsman to endeavour to ensure that no pressure has been applied to a citizen to withdraw a complaint or conciliate it. Accordingly, as soon as the papers relating to a conciliation are received by the Ombudsman it has recently become standard practice to forward photocopies to the complainant. The latter is invited to notify the Ombudsman if the facts set out are not correct.

In one such case the complainant has alleged that one of two complaints was not conciliated and that pressure was applied by the police officer complained against to drop the complaint. A photograph of the alleged police officer making his way from the premises has been produced. This matter will be followed up by the Ombudsman.

83. Misconduct by Highway Patrol Officers

An area of concern over the past year has been the considerable number of complaints alleging quite serious misconduct on the part of highway patrol officers.

It is usual policy not to require the investigation of complaints where one of the complainant's allegations is the wrong issue of a traffic ticket or summons. The reason for this policy

is that the proper place for determination of such claims is the appropriate court, and many people who complain that the officer acted rudely or in an overbearing manner are really concerned primarily with whether the ticket or summons was wrongly issued.

Once the issue of guilt or innocence has been settled in court, this Office will direct that investigation of the complaint proceed if the complainant wishes to pursue the matter and it is considered that inquiries are justified. However, comparatively few complainants wish to proceed at that stage.

In any event, investigation of these complaints is usually pointless under the existing system as there are rarely any independent witnesses to the encounters. The typical profile of such an incident is that the motorist alleges that ill-treatment by police, and the police officers deny the allegation. As this Office has no power to interview the parties concerned and make assessments as to their credibility, an "unable to determine" finding is almost inevitable.

Nevertheless, the quite serious allegations made in relation to many highway patrol officers are cause for some concern. For example, the following five complaints, set out verbatim below, are very typical. They are a random batch and were selected because they all arrived at the Ombudsman's Office on the morning of 1st June, 1983.

In all cases the complainant was advised that the complaint would not be investigated, but that they could have the matter reconsidered once the traffic matter had been dealt with if they wished to do so.

(a) "(The Officer) issued me with a Radar Traffic Infringement notice no. 5408233 on the 1/5/83 at . . .

This particular officer was arrogant to the point of being extremely rude.

After he pulled me over he got out of his car with a Traffic Infringement Notice Book and wrote me a ticket for failing to keep my log book current.

He then started checking the tyres on the truck and acted in a manner which was not becoming of the N.S.W. Police Force.

I then stated to the officer concerned that although the tyre was getting down, in my opinion it was still legal.

With that statement he then returned to his car and got a Radar Traffic Infringement Notice book and threw it onto the bonnet of the car and started to write another fine.

I asked him what he was doing and he said, I am booking you for speeding 101 KPH.

Preceding this instance whilst driving along, I knew there was a patrol car ahead through my CB and other cars flashing their lights and the fact that my log book was not filled in I was sitting exactly on 80 KPH.

In my opinion if I did not specify that my tyre was safe I would have received a fine for a bald tyre namely $50.00.

The fact that I could have driven to the nearest police station for a second opinion on the tyre resulted in me receiving an unfair Radar Traffic Infringement Notice.

After writing the ticket he showed me on the clock in the car, which did record 101 KPH and although I do not believe that the Radar equipment to be faulty I believe that this officer has recorded another vehicle and used this against me.

Sir, I would also like to point out that I gave this Officer no reason whatsoever to get on his high horse, and if this is his usual way of carrying on in his occupation then I only hope that this letter will bring to your attention, just what is going on."

(b) "On 4/3/83 I was driving my Blue F100 south towards . . . . a highway patrol vehicle passed me going in the opposite direction, he turned around and pulled me over to the side of the road, asking if I owned the Blue F100. I said 'yes', he checked it out on his radio, when he came back to my F100 he said he was looking for a stolen Blue F100, he said it wasn't mine but he presented me with an on the spot fine for one half smooth tyre, I said to him 'are you going to give all the Blue F100's you pull up a ticket', he said smart prick oh! does your horn work. I tried it, and it didn't, so he started to write out another ticket which I have, but on the ticket I only have his opinion that the fine is $30.00 could you please clarify this, as the officer could have put the fine at $5.00 or even $100.00. Surely I am entitled to some evidence of some nature."

(c) "At approximately 10.15 p.m. on Friday night 14/1/83, I was travelling South along A . . . . Street, ... I indicated and as I was turning left into O . . . . Road a blue Commodore

marked Police car made a U-Turn as it was coming out of O . . . . Road, and proceeded to follow me. As I came to the stop sign at C . . . . Street, I had my indicator on to turn left and I stopped up the hill. I indicated to turn right into E . . . . Street and then stopped at the stop sign, looked in my rearview mirror and the police were still behind me. I looked all directions and the road was clear so I proceeded right, along E . . . . Street and the The D . . . . and then the police flashed their high beam lights so I pulled over to the left hand side of the road in The D . . . . .

I got out of my car and asked the officer what I had done. He replied 'You went through the Stop sign back there,' and I said 'No I didn't, I know I didn't'. Another car had stopped behind the police car. It was a white Holden Gemini van and a police officer got out and said 'Got any drugs in your car?'. I said 'No' and he asked if I minded if he put his dog through the car to have a look. I said 'No, I don't mind because I don't have any drugs'.

So he got an Alsatian on a lead from the Gemini van and put it in my car. After a few minutes he got the dog out and put it back in the van stating that it was 'All clear'. The first Officer asked if I had been drinking that night at all. I told him 'No Sir' and he said 'I think we will put you on the bag'. I said 'Alright'. I co-operated the whole time. I blew into the bag and it read negative.

I then asked if I could go and they said 'No you're going to be booked'. I asked what for and he said it was for going through the Stop sign. I told him I didn't but he proceeded to write out the ticket. Meanwhile the second . . . .

I was upset at what was happening because I had done nothing, I had not committed any offence. The Officer then handed me the ticket for going through a Stop sign $70 and said you have 21 days to pay. I was upset and lost my temper and I ripped up the fine and said I didn't do it and I'm not paying for an offence I didn't do. The Officer saw what I had done and he said to the second Officer 'He didn't use his indicator back there did he?'. The second Officer said 'No, I don't think he did'. I said 'I don't believe this, you know I used my indicator'. Then the Officer wrote out another ticket and handed it to me — NOT SIGNAL INTENTION $40.00. I told him that it wasn't fair and he said, 'When you shut up, we'll stop writing fines'. They then did a warrant check on me which was clear. I told them I didn't do these offences and asked why they booked me but they got into their car and said that I have 21 days to pay it or I will go to court. I don't think this is right and ask for you to judge it properly. Thank you."

(d) "Please find enclosed infringement notice. As I was not doing the speed this police officer charged me with and at the time, the vehicle I was driving was not even capable of doing that speed. ALSO when I asked to see the speed on the radar, this Officer said he did not lock it in. I asked how he could book me when he did not have a speed to show that I was speeding. He said 'We can do what we like'.

When I said I would fight it in COURT he said 'That was good OUR judge just loves you . . . Truckies'. There is no way I will pay a fine for something I did not do, even if it means going to jail.

The attitude of this police officer leaves a lot to be desired, as he was very rude and arrogant. I have been driving on the roads for over 20 years now, and have never received *such* treatment from one of your officers."

(e) "With reference to the serving of the above ticket on Monday 2nd May 1983 I wish to place a complaint regarding the manner in which I was approached by one of your traffic officers.

This Officer was extremely rude, using a very loud and arrogant voice which was particularly embarrassing as there were a number of men working on a site nearby.

Whilst writing the ticket — after asking and being informed of my employment — he apologised. However, I believe his change of attitude was due purely to my place of employment." (The complainant was a JP employed in a responsible position.)

"I do not consider it necessary for a member of the police force to be rude to members of the general public."

84. Discretion to Prosecute: Recommendations for Independent Prosecutors in Police Matters

In New South Wales the large majority of prosecutions for both summary and indictable offences in Courts of Petty Sessions and Summary Jurisdictions, Coroners Courts and other Courts presided over by Magistrates are conducted by members of the Police Force known as police prosecutors. These police prosecutors form part of what is known as the Prosecution Branch.

The role and position of police prosecutors in New South Wales has been the subject of consideration and recommendations by Mr Justice Lusher in his report of the Commission to Inquire into New South Wales Police Administration. He recommended the phasing out of the Police Prosecutors Branch and its replacement by a Prosecuting Department through the Attorney-General or other appropriate officer, and a Legal Branch under the control of the proposed Police Board, to advise the Board and Police Force on matters of law and procedure. Basically, his view was that prosecutions should be conducted by legally qualified staff independent of the Police Commissioner.

The recommendations of Mr Justice Lusher, in his Report dated 29th April, 1981, were recently supported by the Chief Justice of New South Wales, Sir Lawrence Street, in his report of the Royal Commission Inquiry Into Certain Committal Proceedings Against K. E. Humphries (July 1983). In that report the Chief Justice recommended that prosecutions should be handled by a Prosecuting Department under the Ministerial authority of the Attorney-General in place of the present system of prosecutions being by a branch of the Police Force.

The reasons behind these recommendations are of course obvious. A prosecutor is required both to be and to be seen to be impartial, detached and independent. The arguments against the use of police prosecutors are even greater where the accused is a police officer.

Currently, the Police Rules prevent police officers from preferring any charge or laying any information against another member of the Police Force in a criminal proceeding unless authorized by the Commissioner. The Commissioner relies on advice from the Prosecution Branch in such matters. If they come to the conclusion that the available evidence is insufficient to justify a prosecution in such cases, then that decision is more likely to be seen as reflecting bias towards a fellow member of the Police Force than similar decisions in regard to ordinary citizens.

Further, during the conduct of a criminal trial numerous decisions, such as which witnesses will be called, the matters to be cross-examined on, etc. are required to be made. There is far less likelihood of criticism on the grounds of bias in favour of an accused police officer if the role of prosecutor is undertaken by someone other than a member of the Police Force.

In relation to the initial question of whether or not to prosecute special considerations particularly arise when the person the subject of a possible charge is a police officer. Recently, the Solicitor General, Ms M. Gaudron, has expressed the position in the following terms, with which I completely agree:-

> "The position is, I think, different when it comes to a question of the exercise of the discretion to prosecute. A member of the police force is not only an essential part of the legal system; it is upon the public behaviour of the members of the police force that society's confidence in the legal system primarily depends. Very special circumstances must exist to justify the exercise of the discretion not to prosecute when the alleged offender is or was a member of the police force."

In a recent case, following investigation the Ombudsman believed that there were grounds for considering a criminal prosecution against a police sergeant who had recently resigned. The Police Prosecuting Branch was of the view that no prosecution should be brought. The Ombudsman recommended that the matter be referred to the Solicitor General who, after applying the test stated above, advised that proceedings should be instituted.

In this context the Commissioner of Police wrote to the State Crown Solicitor a letter which included the following:-

> ". . . if it is considered that sufficient evidence exists to substantiate Court proceedings against former Sergeant X . . . ., I do not believe that, having regard to the circumstances, any member of this Force should act as informant."

This is in my opinion both an extraordinary statement and also supports the view of the reluctance of police officers to be involved in proceedings against their own colleagues.

The conduct of members of the Police Prosecuting Branch in conducting prosecutions is excluded from scrutiny by the Ombudsman because it comes within the exemptions of Paragraphs 6 and 8 of Schedule 1 of the Ombudsman Act. However, from time to time in the course of investigations by this Office, criticism is made of the conduct of police prosecutors in cases where police officers are defendants.

In a submission by the solicitor for the complainant to the Ombudsman in relation to such a case, the following was said:-

> "There is at least one aspect of the prosecution of Constable X which causes us grave concern. During the hearing, which I attended as a spectator, it was intimated to me by

> Inspector Y who had conducted internal affairs investigation that the prosecutor proposed to call a number of Police Officers whose evidence was that no assault upon Mrs Z took place. During the course of the prosecution such witnesses were in fact called. At least two witnesses were called who gave evidence that no assault had taken place. I believe that further witnesses would have been called had I not intervened and remonstrated with the Prosecutor as to the propriety or otherwise of the prosecution calling people who were in effect defence witnesses. The Prosecutor's view was that he felt under an obligation to adduce exculpatory evidence. We appreciate that the prosecution is under a duty to call all relevant evidence and that there is a school of thought which holds that the prosecution in a criminal trial should call exculpatory evidence if it is available. We can only comment that this practice is very rarely adopted in Petty Sessions hearings and that it is strange to say the least that this virtually unprecedented course should have been chosen where the Defendant was a Police Officer. We recall also that the Police, when they elected to prosecute X chose to charge him only with 'assault female' when our client's injuries would have justified the laying of a charge of assault occasioning actual bodily harm. We regard the prosecution of X as having been conducted in an unsatisfactory manner and as giving rise to grave doubts as to whether the Police Force can be relied upon to prosecute 'their own'."

Such comments as the above would be much less likely if the prosecution was in the hands of an independent Prosecution Branch, as recommended by Mr Justice Lusher and the Chief Justice. There is overwhelming evidence in favour of this reform, which should be introduced as soon as possible.

85. Collaboration Among Police Under Investigation

Under the present system, complaints by the public against police officers are investigated by other police officers whether members of the Internal Affairs Branch or otherwise. The normal practice is for the Police Commissioner to nominate a member of the Police Force to conduct the investigation and in the case of nominated officers other than those in the Internal Affairs Branch, the consent of the Ombudsman is necessary. It is the duty of the police officer concerned to obtain statements from and question the complainant, the police officer(s) complained about the other witnesses who may include police officers. Whatever may be the position where police are gathering evidence for a prosecution of a citizen, it is clear beyond argument that a police officer investigating a complaint against a member of the Police Force ought to take stringent steps to avoid collaboration or collusion between police officers concerned with the subject matter of the complaint.

A document has been prepared for the guidance of police officers entitled "Departmental Investigations". It was prepared by Sergeant 1st Class L. D. Kellock, the then Officer-in-Charge, Administrative and Special Services Section, Police Internal Affairs Branch in October 1979. It appears that it is used as a guide or reference book by officers of the Internal Affairs Branch of the Police Force and others when they are investigating complaints about other police officers. Paragraph 43 of this document states:-

> "Where possible, it is desirable in cases where more than one police officer is subject to a complaint to arrange for a contemporaneous *handing* of memorandae to such Police in order that they can separately furnish *immediate* reports. This of course can obviate any subsequent claims of collusion and possible bias."

Notwithstanding this departmental guideline, it is apparent in a significant number of cases, that the departmental guide is ignored. In my opinion, the recommendation against collaboration ought to be greatly strengthened and given the force of legal obligation on the part of police officers conducting investigations against their fellow members. In the Australian Capital Territory, following discussions between the Commonwealth Ombudsman and the then Commissioner of Police, Sir Colin Woods, a series of directives were agreed upon and given the force of instructions which are required to be obeyed in regard to investigations of police misconduct. In the Ombudsman's opinion, police procedures for the investigation of complaints of police misconduct under the Police Regulation (Allegations of Midsconduct) Act, 1978 should be urgently amplified or amended to include at least the following procedures adopted by the Australian Federal Police:-

> (a) That a directive given by the appointed police investigating officer to any police officer from whom information is sought, should be in writing and the date and time of service of such directive should be recorded on the document and on the investigating officer's copy.

(b) Where there are a number of police officers involved, as far as practicable in the circumstances, the service of such directives should be contemporary and the police officers so served shall be kept separate until each has completed his report and been interviewed on any matters relevant to the complaint.

(c) Any interview with a police officer, that may be necessary following the submission of a report, shall be recorded verbatim with the date and time of commencement and completion of the interview being shown on the record.

(d) Only if the need arises, and then only after the full account of the subject of the investigation has been obtained, may a statement or report of any part of a statement or report by police or any other person relevant to the complaint be shown to or brought to the attention of any other witness or police officer. Where, in the opinion of the police officer investigating the complaint, it is necessary to show another police officer or witness a report or statement or any part of a report or statement and he does so, he shall report fully on the reasons for his opinion and action.

These amended procedures should be immediately set forth in appropriate regulations.

86. Calibre of Internal Affairs Investigation: Parramatta Police Citizens Boys Club.

In paragraph 36 of this Annual Report reference has been made to the persistent complaints made by Mr Azzopardi relating to the affairs of the Parramatta Police Citizens Boys Club and of certain police officers connected with that Club. In the course of investigating the complaints made by Mr Azzopardi against the failure of the then Department of Services to investigate earlier allegations made by him, copies of certain reports prepared by members of the Internal Affairs Branch were obtained by the Ombudsman. These include a report by Chief Superintendent Masters and a report by Detective Inspector Lascelles.

In the report by Chief Superintendent Masters, the allegations made by Mr Azzopardi were discounted and the Report concluded as follows:-

> "Since 1979 all the matters referred to have been investigated by senior members of the Police Internal Affairs Branch and reports on those inquiries submitted to the Minister. There has been no occasion where any of the allegations inherent in and inferred by the questions or representations have been substantiated."

In his report Detective Inspector Lascelles also found that there were no irregularities in relation to the conduct of certain Art Unions and concluded as follows:-

> "My inquiries have indicated nothing sinister or underhand in any of the matters dealt with in this report."

Against those reports can now be put the report of the Auditor-General to Parliament, where he states the results of his findings as follows:-

> **"Special Audit"**
>
> On 5th January, 1983, the Treasurer, acting under Section 12 of the Lotteries and Art Unions Act, 1902, sought a special audit of art unions conducted by the Parramatta Police and Citizens Boys' Clubs.
>
> Early in the audit signs of irregularities were apparent and there was found to be an intermeshing of the art union transactions with those of the Club itself. It thereupon became necessary to exercise the functions of an inspector through Section 11 of the Charitable Collections Act, 1934, to extend the review to activities of the Club as a registered charity. It was found also that a Police investigation was in progress into other matters affecting the Club.
>
> An interim report was delivered to the Minister on 1st July, 1983, referring to extensive known and suspected irregularities in the conduct of art unions and in the financial affairs generally of the Club. The report included recommendations for further action pending the completion of audit and inspection.
>
> Simultaneously, in acknowledgement of a common law duty, information on suspected indictable offences was referred directly to the Commissioner of Police. On 6th September, 1983, a former Police Sergeant was charged with an offence arising from the conduct of an art union. Additional charges were preferred on 19th September, 1983.

> In a further report to the Minister I expressed the view that action by the Federation of N.S.W. Police-Citizens' Boys Clubs to control the operations of the Club had been, in my opinion, ineffective. I have notified the company, known as the Federation, that I propose to exercise the functions of an inspector under the Charitable Collections Act in relation to the company's operations as a registered charity. Some aspects of art union and Club operation are still under investigation and it is not appropriate yet to report further details."

One, at least, of the Internal Affairs Branch reports was known to be required by a Minister of the Crown. The reports formed the basis of statements made by the Premier in the House. The calibre of police investigations when investigating fellow police officers is thrown into considerable doubt by this whole matter.

87. Alleged Sexual Assault by Police Officer

In late 1981, a woman who had been living in a semi-isolated area on the outskirts of Sydney complained that the local police sergeant had visited her to inform her that some warrants for outstanding parking fines had arrived at the Police Station for her. She alleged that she had given the officer a cup of coffee out of courtesy for his consideration in informing her of the warrants, but that prior to leaving the house he had forced her to have sexual intercourse with him against her will.

The matter was investigated by a member of the Internal Affairs Branch. The officer involved admitted to having sexual intercourse with the woman but claimed that it was with her full consent and at the invitation and instigation of the woman. There were no independent witnesses involved in the matter.

The Superintendent in charge of the Police Prosecuting Branch advised the Commissioner that whilst he was of the opinion that it might be possible to establish a prima facie case of sexual assault against the Sergeant, a successful prosecution was unlikely.

The Commissioner advised that in the circumstances, he was proposing to not proceed with any criminal charge, but rather to lay a Departmental charge of "misconduct" against the Sergeant for indecorous behaviour.

As the matter was of a serious nature, the Ombudsman sought advice from Counsel to assist in assessment of the investigation. That advice pointed to what were considered to be substantial errors in the assessment of the evidence made by the Superintendent of the Police Prosecuting Branch. Counsel recommended that, in the circumstances, it was a proper case for the Crown Solicitor or a Crown Prosecutor to prepare an opinion on the desirability of commencing a prosecution.

On the basis of this advice which was forwarded to the Commissioner, the Ombudsman required him to obtain such an opinion. The Commissioner in response first sought advice from the Crown Solicitor on whether the Ombudsman was legally empowered to require such action.

While the advising he received did not support the view that the Ombudsman could legally require the Commissioner to obtain such further legal opinion, the Commissioner in the circumstances acceded to the request, which was a course of action that the Crown Solicitor saw no objection to.

Consequently, the Attorney-General considered the matter and was assisted in his deliberations in the matter by an advising prepared by the Crown Solicitor and an opinion from the Solicitor General.

The outcome of this was a request to the Commissioner to carry out some further investigation into certain aspects of the matter.

This was carried out, and the matter was again considered by the Attorney-General with the assistance of the Solicitor General.

Their subsequent assessment was that the available evidence in the case did not justify prosecution.

The Ombudsman was then faced with a duty under the Police Regulation (Allegations of Misconduct) Act 1978 to attempt to satisfy himself whether the allegation of the complainant was either sustained or not sustained.

In the circumstances, lacking the powers that would enable him to resolve the essential conflict of evidence of the two main parties in the matter, the Ombudsman considered he was unable to determine where the truth lay. In accord with the then current judgement of Mr. Justice Lee in the case *Moroney v The Ombudsman and Anor*, he reported that under the circumstances he was obliged to report that he was safisfied that the complaint had not been sustained. As reported elsewhere in this report, the judgement of the Honourable Justice was overturned in the Court of Appeal in May, 1983 where a majority judgement confirmed the right of the Ombudsman in such cases to find that he was not able to satisfy himself affirmatively either that the complaint was sustained or not sustained.

The initial complaint in this matter was made on 15th November, 1981. The report on the initial investigation was received in this Office on 4th March, 1982. Action with respect to the charging of the Sergeant with "Misconduct" by the Commissioner was delayed pending the further legal opinion from Crown Law Officers; delayed again pending subsequent additional investigation; and again following the final advice on the matter from the Ombudsman which occurred in January, 1983 following the Commissioner supplying the reports of the further investigation approximately a week earlier. During this time the Sergeant concerned continued in his duties at the same police station. The Commissioner had decided in March 1982 to give consideration to his transfer when all action associated with the proposed Departmental charges had been finalised.

Eventually, the Sergeant was Departmentally charged with "Misconduct" for indecorous behaviour and pleaded guilty. The Sergeant accepted the opportunity offered him and submitted a report in mitigation of penalty.

On 3rd March, 1983, following his consideration of the available facts, and the report of the Sergeant, the Commissioner of Police directed that he be transferred to another station to be selected by the Assistant Commissioner, Personnel, within the Metropolitan area, and to be paraded before his District Superintendent and warned and that the question of other penalty be deferred for a period of 12 months.

The Sergeant was subsequently paraded before the Chief Superintendent of "H" District on 15th March, 1983 and on the recommendation of the Chief Superintendent was transferred to another police station in a relatively nearby town.

88. Alleged Perversion of Justice

In the 1981-82 Annual Report concern was expressed at the use made by Police of charges of "Public Mischief" against some complainants to this Office. That report recommended that the government consider amending the relevant legislation to ensure that the only penalty for making unfounded complaints to the Ombudsman would be as set out in the Ombudsman Act.

Under the provision of Section 37(1) of the Ombudsman Act, a person shall not:

> "(c) Wilfully make any false statements to or mislead, or attempt to mislead, the Ombudsman or an officer of the Ombudsman in the exercise of his powers under his or any other Act."
>
> The penalty for such an offence is set at one thousand dollars.

As can be seen, the provisions of Section 37 refer to "any other Act" which clearly must include the Police Regulation (Allegations of Misconduct) Act 1978, under the provisions of which most complaints to this Office about the conduct of Police are investigated.

Since the presentation of the 1981-82 Annual Report to Parliament, another situation has arisen where the Police Department is taking action against a complainant to the Ombudsman. In this case the Deputy Commissioner has directed that a charge be preferred in terms of the common law offence of "Attempting to pervert the Course of Justice". Such proceedings are as objectionable as those for public mischief. The Ombudsman has written to the Premier seeking legislative amendments which will confine police action against citizens who complain against police to the express provisions of section 37 of the Ombudsman Act.

PART III

CASE NOTES

(a) Public Authorities and Departments (see next index for issues raised in cases).

Index of issues raised in Case Notes

(b) Local Councils (See next index for issues raised in cases).

Index of issues raised in Case notes

CASE NO. 1

COUNCIL OF AUCTIONEERS AND AGENTS

Inaction over complaint about Managing Agent of Strata Plan

On 10th September, 1981, Mr G. lodged a complaint with the Council of Auctioneers and Agents concerning the conduct of a former Managing Agent of his Strata Plan. The complaint dealt with:

(i) the alleged inefficiency of the Managing Agents in dealing with maintenance matters

(ii) the alleged non-compliance of the Managing Agents with directives of the Council of the Body Corporate

(iii) the alleged poor state of accounts and financial records returned to the Body Corporate following the resignation of the Managing Agents. In particular, there were 31 blank cheque butts returned with no statement of whom the cheques were written to, a number of unpaid bills and unposted cheques.

The Council did not take up this matter until 14th October, 1982, thirteen months after Mr. G. had complained. One of the Council's Inspectors interviewed the former Managing Agent about the matters Mr. G. had raised, and reported back to the Council. The delay, according to the Inspector's Report, arose because other complaints and inspections were more pressing.

On 16th November, 1982, the new Managing Agent for the Strata Plan wrote to the Council seeking the result of the inquiries of which it had heard nothing. Mr. Selby, the Acting Registrar, replied for the Council on 9th December, reporting the statements made by the former Managing Agent in response to the allegations. He also informed the Body Corporate that the Council "had no power to assist you further, as there is no evidence of the agent acting in contravention of any of the provisions of the Auctioneers and Agents Act, 1941."

Mr. G. considered this response unsatisfactory and on 24th January, 1983, he complained to this Office.

It emerged that the new legislation providing for the licensing of strata managing agents took effect only from 1st October, 1981. Therefore, the obligations and responsibilities placed upon those agents were not applicable to the period during which the conduct complained of by Mr. G. took place. In these circumstances, it is highly doubtful whether the Council had jurisdiction to make any inquiries into Mr G's complaint.

Even if the Council did have jurisdiction, the Auctioneers and Agents Act does not provide machinery for complaint handling. The inspectorial powers of the Council relate to the examination of agents' books for funds held in trust. Strictly speaking, complaints from the public concerning poor management do not fall within the scope of present legislation, and, even if proven, would not give rise to an action under the Auctioneers and Agents Act. As a matter of policy, the Council does accept complaints from the public even if they do not relate to the Council's licensing functions or to allegations of a failure to account for trust fund moneys. Council Inspectors make some inquiries as a matter of goodwill even where the Council has no power to conciliate or pursue a complaint under its Act.

Once an agent holds a licence, it may be cancelled only by a Court of Petty Sessions upon a complaint laid either by the Police or the Registrar of the Council. The grounds of action must be either that the licence was improperly obtained contrary to the Act or that the licensee is not "a fit and proper person" to continue holding a licence. An appeal from the court lies to the District Court. The Council therefore must be reasonably confident that the evidence it obtains would satisfy the Court that a licence should be cancelled before commencing proceedings.

The only aspects of Mr. G.'s complaint which might have led to Court proceedings were those relating to the application of funds held in trust by the Managing Agent for the Body Corporate. Mr. Selby and his Inspector conceded that the matter of the blank cheque butts might have pointed to possible misapplication of funds, although as it turned out the Managing Agent had an automatic cheque writing machine that eliminated the need to draw cheques manually. Had the funds actually been misapplied or misappropriated, the fact that Mr. G.'s complaint was "out of time" in relation to the amending legislation meant that the council could only have referred Mr G. to the Police.

General Operation of the Council

Because of the delay of more than a year in the Council's reply to Mr. G., this Office also inquired into the general complaint handling operation of the Council.

The Council receives approximately 700 complaints each year from the public. At the time of this Office's first inquiries, about 200 complaints were unattended to, 180 of which had been with the Council for twenty-one days or more; no complaints had been recently allocated for investigation as there was only one inspector currently available and he was fully committed on outstanding matters. The inspectors each had about 15-20 complaints on hand at the time, and many complaints had not been allocated. Complaints were divided into zones, depending on where the agents concerned had their businesses; and in the northern region no complaints had been dealt with for about two months as there was no inspector available for that zone. As at 18th February, 1983, the Council had 148 complaints uncompleted of which 115 were twenty-one days or more in arrears. The oldest complaint was received by the Council on 14th April, 1982, although the main bulk of arrears commenced in and after August, 1982.

The reason for this backlog was principally the shortage of staff at the Council where the following vacancies existed as at 28th February, 1983:

(i) Audit Clerk

(ii) Chief Clerk

(iii) Inspectors (2); and another two Inspectors were dealing with audit and claims matters instead of field work

(iv) Claims Clerk

(v) Receptionist/Typist; the present holder of the position was acting as a Computer Operator

(vi Applications Clerk; the present holder of the position was working on the computer

(vii) Secretary/Shorthand/Typist

Mr R. W. Hearn, Deputy Director of the Department of Consumer Affairs was appointed Acting Chairman from 1st July, 1982, for a six month period on the recommendation of the former Minister, the Hon. P. F. P. Whelan. His appointment expired on 31st December, 1982, and, at the time of these inquiries, he had not been re-appointed. In this context, Section 8A(1) of the Auctioneers and Agents Act states *inter alia* that, "The Chairman ... shall devote the whole of his time to the duties of his Office". Clearly Mr. Hearn as Deputy Director of the Department was never in a position to fulfil this requirement.

Concerning use of the staff available, there was sharp disagreement between the former Chairman, Mr. Tucker, who had made a number of submissions for increased staff numbers and for restructuring existing positions, and the present Chairman, who as Deputy Director on Consumer Affairs dealt often with Mr. Tucker's submissions.

There is no doubt that Mr. Tucker believed that the work of the Council particularly in conducting inspections and in checking agents' Audit Certificates and prosecuting those agents who did not supply such certificates was falling far behind. He drew attention to the staff problems in the 1980-81 Annual Report as follows:

> "The work load for Council Staff has gradually increased over the years with a marked increase in recent times.
>
> Staff members have not increased, despite a number of requests, resulting in utter frustration with some senior members because of their inability to cope with and efficiently handle the work load and that of their subordinates..."

Mr. Hearn, while conceding that staff shortages did affect the Council's operation, considered that Mr. Tucker did not properly manage the existing staff at the Council. The Department had sought in May, 1980, advice from the Crown Solicitors in respect of the Department's control over the Council and its staff. The Crown Solicitor in concluding his advising made the following comment:

> "I do not know the circumstances which have prompted the request for advice in this matter, but if the Council and the Department Head are in disagreement on fundamental principles then it would seem to me that steps should be taken as soon as possible to resolve the problem. The essential legal point to bear in mind is that the Council is an independent statutory authority and has been for a period of nearly 40 years. If it is considered that the Council should be shorn of its independence then the Act will have to be amended. Clearly the staff appointed under S.17 of the Auctioneers and Agents Act should not be placed in a situation where there is a possibility of receiving conflicting directions from the Council and the Department Head."

The strained relationship which continued until the expiration of Mr. Tucker's term of office may have made it harder for the Council to perform its duties.

In general, even the Council's statutory responsibilities could well exceed its capacity to carry them out. With over 36,000 licensed agents and registered salesmen, the tasks of renewing licences, checking Audit Certificates, managing the funds of the Council, conducting inspections and dealing with complaints are onerous. The addition of strata managing agents to those agents already under the Council's jurisdiction has added a further burden.

As a result of the investigation this office found that the Council of Auctioneers and Agents had acted wrongly in failing to deal with Mr. G.'s complaint for over thirteen months. The fact that the Council then had no power to deal with the complaint only compounded the wrong conduct. Mr. G. ought to have been informed as soon as possible after making his complaint that the only remedy available to him was either civil action against the agent by the Body Corporate or, if he suspected

misappropriation, a complaint to the Police.

This Office also found that the Council had acted wrongly in taking up complaints generally from the public even where it has no jurisdiction to deal with them. This procedure has had two undesirable effects; firstly, it has raised the expectations of complainants who then imagine that the Council is dealing effectively with their problems; and secondly, it has added duties to the workload of the Council when it already has difficulty dealing with the areas in which it does have jurisdiction.

Another area of concern was that until such time as the position of Chairman of the Council is lawfully filled by the Governor, there was no Chairman of the Council. Any directions issued to Council staff by Mr. Hearn appear to be authorised only as a result of his position as Deputy Director of the Department of Consumer Affairs, and this position might have the effect of making certain of these directions, together with any actions taken by him purportedly in the role of Chairman, *ultra vires*.

The Ombudsman Act defines conduct as wrong, if it is "contrary to law". It is noted that Mr. Hearn was in the invidious position of acting as Chairman in circumstances which prevented his compliance with Section 8A(1) of the Auctioneers and Agents Act that he devote "the whole of his time" to the duties of that Office. Further it is noted that since 1st January, 1983, he has acted as Chairman, without being the lawful Chairman. He was, perforce, acting wrongly.

The responsible Minister, the Honourable D. P. Landa, referred to an earlier recommendation that the position of Chairman of the Council of Auctioneers and Agents by filled by a person able to fulfil the requirement of Section 8A(1) of the Auctioneers and Agents Act as soon as possible. He informed this Office that he was proposing to introduce legislation in the 1983 Budget session of Parliament to restructure the Council. Among other things, this restructuring would review the functions, duties and role of the Chairman's position. In view of this, the Minister saw no point in filling the post of Chairman when the incumbent would retain the position, as it was presently defined, for a few months only. The Minister considered it preferable to hold the position of Chairman vacant pending the passage of the new legislation. In this respect he drew attention to Section 18 of the Act which provides that no Act or proceeding of the Council shall be invalidated or prejudiced by reason only of the fact that there was a vacancy in the office of any member of the Council.

In the light of the Minister's intentions, and on the understanding that no great practical problems would result from the temporary vacancy in the position of Chairman, no recommendation was made concerning that post. Section 16(2) of the Act provides for the members of the Council, being the elected members or the official member, to elect one of their number to preside at their meetings in the absence of the Chairman.

The Council had apologised to Mr. G. for the delay in dealing with his complaint and no further recommendation was made in this regard.

This Office did recommend that until such time as the Council can deal promptly and effectively with complaints and routine inspections clearly falling within its statutory powers, the Council cease forthwith investigation of complaints where it has no jurisdiction or where it is clearly improbable that it can offer any redress to complainants.

Case No. 2

BUILDERS LICENSING BOARD

Delay in advising claimant of ineligibility of claim

Dr. W. had complained that it had taken the Board 2½ years to advise him that his insurance claim under Clause 3(b) of the Home Purchasers Agreement was invalid as it had not been lodged within the prescribed time period of three years from the date of commencement of the building work (Clause 5(2) H.P.A.).

Dr. W. had purchased the unit in 1978 and by late 1979 it had become apparent that certain drainage problems existed and his roof was leaking. He lodged a complaint with the Board in January, 1980 and was advised to make a claim which he then did. As the building involved was a unit, the Body Corporate also made a claim in respect of the affected unit in June, 1981. In May, 1982 the Secretary was advised that the claim was "out of date" as it had been lodged outside the prescribed period.

The Board's files were obtained and it was found that although the complaint and claims had been lodged in January, 1980, no quotes were assessed by the Board until March, 1982. The matter was then put to the Board with the recommendation that the claim be declined "as (it) had been lodged outside the statutory three year period."

Enquiries revealed that the fact that the claim was outside the stipulated three year period and therefore invalid was evident from the time the complaint was processed. For Dr. W.'s claim to be valid it would have had had to be lodged prior to August, 1979; yet when lodged in January, 1980 it was accepted by a standard letter of 5th February,1980 which said that certain investigations were necessary to establish the validity of the claims and that the Board was considering it on a provisional basis. However, the Body Corporate claim lodged on 22nd June, 1981 was accepted by letter dated 30th June, 1981 when it was 22 months out of time. No indication was given by the Board that this claim did not comply with the H.P.A. In fact, both the terms of a copy of the original contract and proof of payments made to the builder were requested, supporting the idea that the claim was eligible for consideration. The Body Corporate's claim had stated the contract date to be August, 1976.

A file note reveals that the Body Corporate's claim was recommended for referral to the Board on 16th September, 1981. However, this was not done until 16th March, 1982, when the claim was declined as it was invalid. There was no apparent reason for this delay and the file recorded little action taken in the meantime. There would appear to have been little efort made by the Board to determine the matter. After the intervention of this Office the matter was again put before the Board and in September, 1982, the Board "resolved to approve settlement of the claim under Clause 3(b) of the Home Purchasers Act".

Provision exsits under Clause 5(2) of the H.P.A. to waive the three (3) year restriction yet despite the Board's delay in dealing with both Dr. W.'s and the Body Corporate's complaint this option was not exercised by the Board until the intervention of this Office.

As a result of the investigation, it was found that there had been inordinate delay by the Board in dealing with and deciding the matter and that the Board had been remiss in that it:

(a) Failed to realise that the claim was invalid when it was processed and examined the first time;

(b) Processed the Body Corporate's claim some 18 months later without recognising for a further nine months that it was invalid.

The Ombudsman's report recommended amongst other things "that a check list be created so that the eligibility of the claimant is determined as soon as possible ...".

The Ombudsman was advised in May, 1983, one month after the report was made final that:

"Following careful consideration of the recommendation contained in your Report the Board has approved of the implementation of the following improvements to the current claims processing procedures:-

(1) Upon receipt of a Notification of Claim under the House Purchasers Agreement, it is initially examined by the Senior Claims Officer, Grade 3, or one of two claims officers, Grade 2, who ensure that immediate action is taken to ascertain the relevant date of contract or commencement, and date of substantial commencement of the building work.

If such information is unavailable from Insurance or Inspection Branch files and the complaint is still current, the Investigating Inspector is asked by means of memorandum to provide that information.

Alternatively, further details are sought from the claimant who is also put on notice, in writing, as to any doubts as to the claim's ineligibility for insurance benefits.

Concurrently, the Inspector is requested to indicate to Insurance Branch the classification of known justified items of complaint to enable an early determination as to whether the claim has or has not been lodged within the prescribed time limits.

A check list has been created and will be introduced as a control measure as from 1st June, 1983.

(2) Immediately it becomes apparent from the information obtained, that a claim is likely to be ineligible due to prescribed time limits being exceeded, the Claims Officer brings the claim to the attention of the Section Head. If not already supplied, the claimant is invited to submit written reasons which would justify an extension of time as provided by Section 11(4) of the Builders Licensing (Amendment) Act, 1976. On receipt of the claimant's submission, the claim is referred for the Board's

consideration. Upon the Board's decision being made the claimant is informed accordingly.

(3) In all cases, a final assessment and classification of claim can only be carried out by the Inspection Branch *upon receipt of quotations from the claimant.*

(4) In all cases where a complaint has been lodged, the complaint file, and the information contained in it is consulted in processing a claim.

The following additional administrative controls have already been introduced which in conjunction with the foregoing measures should provide a satisfactory system of claim processing particularly in cases of late lodgement.

(a) Acknowledgement of receipt of claim has been amended to advise claimants that acceptance of the claim does not imply or infer a claim for benefits exists. A copy of the House Purchasers Agreement is enclosed and particular reference is made to Clause 5 of the House Purchasers Agreement which relates to time limitations under which a claim can be made.

(b) A claim is now classified as overdue when it has been with the Board in excess of three (3) months. All claims in this category are brought to the personal attention of the Section Head, Claims. To identify these claims a quarterly check of the resubmit system has been introduced. When the check is undertaken each file is examined to ensure that any delay has not been caused by the Board. Positive action is then taken when appropriate, (e.g. final letter), with a view to finalising the claim as soon as possible.

(c) In regard to letters and requests for assessment of quotes, files are resubmitted for a maximum of one month only. Requisition letters are restricted to one, then a final letter.

(d) If any assessment of quotes or a complaint report has not been made available within one month of request, the matter is immediately brought to the attention of the Chief Building Inspector by means of a memorandum."

It is expected that these improvements to the current claims processing procedures used by the Board should overcome the problems highlighted by Dr. W.'s complaint.

CASE NO. 3

DEPARTMENT OF CONSUMER AFFAIRS

Failure to follow up a Tribunal order or respond to enquiries

The complainant had lodged a complaint with the Department against a firm and this had led to a number of hearings at the last of which she was awarded a sum of money in July 1981. A re-hearing of the matter was sought by the firm and this was refused in October 1981. The papers were then filed. It appears that usually the Department awaits contact from the claimant if there is no compliance with the order made and then enforcement papers are issued. A legal centre wrote on her behalf in the following January and February seeking the result of the hearing and the Department acknowledges that neither letter was replied to nor was any advice given in response to telephone enquiries other than that the file could not be located.

Following our enquiries, this was rectified and an apology tendered, although the complainant had not received compensation by December 1982.

The conduct of the Department in this case was found to be wrong. Initially, it was recommended that the Department institute procedures to ensure replies to all correspondence and to advise the Ombudsman of their implementation. However, in the light of the Commission's assurances that this case was an instance of "human failing" not warranting such measures, the Ombudsman was content to simply find the conduct wrong.

CASE NO. 4

DEPARTMENT OF EDUCATION

Demountable classrooms placed next to home

Our complainant protested that the High School had placed the classrooms next to her back fence without consulting her and without any real need, considering the extent of the School's grounds.

The reasons given were the need for at least four classrooms, the convenience of supervision in that location and distance from sporting activities which might disrupt classes. When a site meeting was proposed by the investigating officer at the suggestion of the Department, the Chief Administrative Officer of the Region replied that the Department had a "legal and moral right" to so place the classrooms and that there was "no hope of moving that building". Inspection took place nonetheless and investigation officers were not convinced that there were not equally suitable alternatives which would cause less invasion of pricacy, such as the area which they were told was reserved for cross-country running.

A formal inquiry was held and the principal, his deputy at the relevant time and Departmental staff were questioned. It appeared that the normal procedure of a committee decision had led to another site close to the main part of the school being chosen. The principal, on the basis of increased demand figures for classrooms had later taken the decision in question. At no stage during the inquiry was the complainant's privacy or amenity considered as a matter warranting attention prior to the placement of the buildings. She was not considered in any way prior to the placement.

The investigation officer concluded that:

(a) the complainant's privacy and interests were not considered; and

(b) the decision to place the classrooms was made by the Principal without reference to any authority.

There was also concern that the Departmental correspondence did not frankly or at all reveal the central role which the principal played in relocating the classrooms.

It was recommended that greater consideration be given in such cases to neighbours' amenity and that the classrooms in this instance be moved.

The Ombudsman consulted with the Minister for Education, who said he would visit the school himself and discuss the question with the complainant. He did so, and as a result the classrooms have been moved and procedures for consulting neighbours instituted.

CASE NO. 5

DEPARTMENT OF ENVIRONMENT AND PLANNING

Failure to inform contractor about new allocation system

Mr. S. had heard that the Department of Environment and Planning had introduced a new system for the allocation of maintenance work to electrical contractors. Although regularly utilized by the Department in the past, he had not been advised of the details of the new system or of any change in work procedures. Mr. S. advised that he had not received any new job allocations in 1981 and despite his repeated requests that the Department advise him about the new system and the reasons for this cessation of job allocations, no such information or reason had been given.

In Mr. S.'s letter of complaint he stated that, as an electrical contractor, he had carried out maintenance work for the Department (on the recommendation of Prospect County Council) for the past 10 years and he believed he had a good working relationship with the Department. He had received a lot of work up until 1981. After having received no new work in 1981, Mr. S. rang the Department and spoke to an officer who advised him that there was a new system. On 17th March, 1981 he wrote to the Property Manager, Mr. K. Glover, requesting information but received no reply. He later made a number of telephone calls to Mr. Glover and, on one occasion, called at Mr. Glover's office to see him but he was told, on all those occasions, Mr. Glover was not available. Eventually, on 25th June, 1981, he succeeded in speaking to Mr. Glover and was told that the

situation would be looked into and a reply would be sent. However, no formal advice was ever received and Mr. S. had still not been advised of the new system or procedures when he complained to this Office in September, 1981.

The matter was raised with the Department and the Director advised, inter alia:

(i) "... since January, 1981, Mr. S. has been engaged to carry out maintenance work for the Department on thirteen (13) separate occasions";

(ii) "From time to time during 1981, Mr S. has complained direct to the Department that he is being disadvantaged as a result of the allocation of electrical maintenance work. In response to his complaints the position in this matter . . . has been explained to Mr S. on several occasions by officer of the Department".

Mr. S. disputed the Director's report and advised that his reecords showed that no such jobs had been done in 1981 with the exception of a Prospect job. He rationalised that if he had been informed of the new procedures as the Director maintained, he would have had no cause for complaint to the Ombudsman's Office.

Mr. Glover was interviewed in an attempt to resolve these inconsistencies. He advised that the place was in an absolute mess when he took over as Property Manager and that the allocation system had to be overhauled. He further advised that he was unhappy with the standard, frequency of repairs and cost of work done by Mr. S. and that the work done was unsatisfactory and embarrassing to the Department.

Mr. Glover agreeed that it was probable Mr. S. had not after all been allocated 13 jobs since January, 1981. The Department's invoicing/order/card system was such that it was not possible to ascertain on what date the work had been done by him. It was noted that Mr. S.'s card had been marked "Do not use until further advice from P. Manager 17.6.81". Mr. S. had not been advised of the reasons for this decision (allegedly his high charges and poor workmanship) and the Director was asked to comment as: "... it seems to me to be the responsibility of your Department, particularly in view of the marking on his card, to inform Mr. S. as to why the Department will not be using his services in the future".

The Director advised:

"With reference to your comments in the letter under reference that 'the Department will not be utilizing Mr. S. as a contractor' I advise that the Department has not made any such decision and has and will in future utilize Mr. S.'s services provided he carries out work in a satisfactory manner and submits tenders which are successful".

The Director's letter was dated 8th February, 1982. Mr. S. later advised that from 8th February he had again started receiving work from the Department.

Mr. S. was interviewed and advised amongst other things, that:

(i) The present system was identical to the old one except that when the Department contacts him now they supply him with a job number.

(ii) It was untrue that he had been engaged on 13 occasions since January, 1981. He had been paid for past work in 1981 but had not been allocated any new work.

(iii) The Department had never complained to him about the standard of his work. He had never received a letter from the Department nor had the new procedures ever been fully explained to him on the telephone until February, 1982.

Mr. S. signed a statutory declaration and produced a number of excellent references.

Despite the Director's advice that "since January, 1981, Mr. S. has been engaged to carry out maintenance work for the Department on thirteen (13) separate occasions", and from the information made available, it was found to be unlikely that Mr. S. had undertaken the recorded eleven (11) jobs on the 27th January, 1981. Further, if indeed Mr. S. had been an unreliable contractor with poor workmanship, the Department could have been expected to have taken some censorial action during the previous 10 years they had utilized his services rather than the procedure adopted during 1981.

The conduct of the Department was found to be wrong as Mr. S. had made a reasonable request for information yet this information was not made available to him. Defamatory statements were made about the quality of his workmanship, his ethics and his character yet he was given no opportunity to defend himself or to state his case. The withholding of information about the new system and of the reason for his not receiving work (whatever it may have been) was unreasonable and discriminatory. The continued exclusion of Mr. S. from consideration for the issue of

maintenance contracts, for no apparent reason, and the marking of his card "Do not use until further notice" by the Property Manager, was unreasonable and unjust.

Mr. S. is still receiving electrical contract work from the Department and on 23rd February, 1983, almost 2 years after his initial request for information, the Director wrote to Mr. S. advising him of the new system and setting out the new procedures.

CASE NO. 6

DEPARTMENT OF HEALTH

Injury to resident at Peat Island Hospital

Mr O. complained to the Ombudsman about insufficient action taken by the Health Department following injury suffered by his son, while he was a short-term resident in the Peat Island Hospital. His son is intellectually handicapped and requires total care.

The boy was left at Sanbrook Annexe, Peat Island Hospital, for a period of two weeks. During his stay, his ten fingernails were removed. The removal was the subject of investigation by those in charge of Sanbrook Annexe and the parents were informed that the nail removal had probably been occasioned by one of the other adolescents who were short term residents. Mr O. was not satisfied with the action taken following the incident and consequently raised the matter with the Minister for Health.

The Minister advised that a Commission of investigation had looked into the matter. He expressed great concern at the fact that there had been a period on the day of the incident during which the children were left unsupervised. As a consequence, the Minister drew the matter strongly to the attention of the Medical Superintendent of the Hospital and apologised. Mr O. remained dissatisfied, and made a complaint to the Ombudsman.

A thorough investigation into the time and place of the incident failed to uncover who was responsible for removing the nails. Several avenues were explored. There was a report that one particular adolescent resident had access to the boy at the relevant time. The possibilities of the boy removing his own fingernails or surgical removal by a staff member were considered.

Two doctors at the Hospital, Doctors Connolly and Vidot, took the view that the nails could have easily been removed by the boy himself or another mentally retarded adolescent because they were abnormally fragile. On the balance of the evidence available, that view was not accepted. Firstly, it was doubted whether the boy or another comparably retarded adolescent would have sufficiently developed motor co-ordination to easily remove fingernails. Secondly, there was substantial evidence, including that of a specialist in the field, which indicated that the boy's nails were not abnormal in any way.

However, there was sufficient evidence to make a finding with respect to the inadequacy of staffing. On the day of the incident, it was established that the staff/resident ratio during the period 11.00 am to 2.00 pm was critically low. For part of the day, there was no supervision inside the Annexe for 2 residents and limited supervision (2 nurses) outside for 19 other residents. This was found to be inadequate. In contrast, the Department of Education staffing of the Sir Eric Woodward Memorial School, St Ives, provides 2 paid staff and 1 voluntary staff member for each 6 residents.

It was also found that the follow-up investigation carried out by Hospital officers and officers of the Department of Health was inadequate. The Hospital staff did not advise the police of the incident. The Medical Superintendent accepted that the boy was suffering from a condition akin to Allbright's Syndrome, which rendered his nails fragile, but made no attempt to check this fact which must now be considered in some doubt. The Medical Superintendent sought written submissions from the medical staff within the first week after the incident and stated that he had conducted interviews with a number of those who had made statements. It was later found that no such discussions took place, although the Medical Superintendent did speak to the Senior Charge Nurse and the Director of Nursing.

The final report made four recommendations. Recommendations (1) and (2) called for the staffing ratio at Sanbrook Annexe to be increased and to be maintained at all times during the residents' waking periods and that full supervision be provided during staff meal breaks and residents' meal times. The Department of Health agreed that those staffing changes would be necessary if Sanbrook Annexe continued to provide care for children and teenagers. However, following a review of the role of the Annexe and the availability of alternative facilities for the care of children and teenagers, it was decided to change the role of the Annexe to care for adults only. This course was adopted on the understanding that care for children requires a higher staffing ratio than for adults.

Recommendation (3) stated that the Department of Health and Sanbrook Annexe should establish a proper and adequate system for the reporting of accidents and incidents in Sanbrook Annexe and in similar centres. The system should provide for immediate independent inquiry following incidents and the police should be informed in appropriate circumstances. The Department accepted this recommendation and a circular to all hospitals was issued on 3rd February, 1983.

Recommendation (4) called for the Department of Health to give favourable consideration to making a payment to Mr and Mrs O. for the stress that they suffered, and also to Mr O. in trust for his son for his maintenance, education and advancement. Such payment would be made on the basis that the boy endured pain and suffering for which he may have had the opportunity of recovering compensation, had the matter been fully and promptly investigated. The Department has advised that there is no provision in the Health Administration Act, 1982, which would allow the Department to make such an ex gratia payment. This issue is being further pursued by the Ombudsman's Office.

CASE NO. 7

DEPARTMENT OF INDUSTRIAL RELATIONS

Apprenticeship Directorate's delay over indenture papers

Ms C. complained to the Ombudsman that the approval of indenture papers, a task which should only take a short number of weeks, had taken at least nine months, and that as a result of this delay she had been unprotected and lost her job. Although steps had been taken in March 1981 to have new indenture papers drawn up to cover her new position, the papers had still not been signed by her employer in November 1981 when her employer decided to terminate her services. The main objective of Ms C's complaint was to ensure that other apprentices were not disadvantaged by these delays in the system or "clerical oversights" as they had been termed by the Directorate.

"An indentured apprenticeship begins with a three-month trial or probationary period . . . At the conclusion of the probationary period, the Apprenticeship Directorate will send the employer a prepared Indenture of Apprenticeship. The indenture must be signed by the employer . . . This must be done within 28 days . . . Once the indenture is signed the employer and apprentice are each bonded to the other for the period of time specified on it. It may not be cancelled *(which means employment may not be terminated)* (my *italics*) except by the mutual agreement of all the signatories or by an order of the appropriate apprenticeship committee . . . An employer may not suspend, stand-down or dismiss an indentured apprentice without the approval of the appropriate apprenticeship committee . . ." (pp 12-14, "A Guide to Apprenticeship in NSW") An indentured apprentice gains security from the fact that their employment may not be terminated except by mutual agreement. However, should the indenture papers not be signed by the employer for some reason there is no such protection and an illegal state is created.

Ms C. had commenced employment on 28 February 1981 and as her previous employer refused to transfer her indenture papers, a new set were drawn up on 4 March 1981. The three-month probationary period expired on 4 June 1981, however, no Indenture of Apprenticeship had been forwarded to her employer and no papers had been signed within the regulatory 28-day period. In early November 1981, Ms C's employer decided to terminate her employment and Ms C. went into the Apprenticeship Directorate to find out why it had taken so long to get the papers out and whether the position could be rectified with the papers sent out and signed while she was still employed. Although the Apprenticeship Directorate acted speedily to correct the situation once the matter was brought to its attention, it was too late. Ms C. lost her job. An investigation revealed that this "clerical oversight" had only been discovered when Ms C. called into the Directorate to find out what had happened. The Apprenticeship Supervisor was interviewed and it was established that due to staff problems and an increase in applications last year, the Directorate was about five

months behind in dealing with some matters. Errors such as that which occurred in Ms C's case had also been discovered on other occasions during the day to day operations of the Apprenticeship Directorate. These had been rectified.

It was found that there had been inordinate delay due to administrative oversight in dealing with Ms C's indenture papers and this constituted wrong conduct in terms of the Ombudsman Act. While the reasons for delay were noted, such delay and reasons for it are the concern of the Department and should not result in disadvantage to the users of such a system. Accordingly various recommendations were made.

As new procedures had already been implemented by the Directorate in order to overcome "clerical oversights" and a large data word processing system was to be installed, it was recommended by this Office that the Directorate, in order to avoid unreasonable delay in the processing of indenture papers, should in future monitor the progress of applications and indenture papers. It was further recommended that checks should be considered and implemented where necessary to ensure that this situation does not recur prior to the installation of the data/word processing system and once installed, controls should be inbuilt where possible to minimize the risk of it happening in the future.

In April 1983, the Under Secretary, Mr Riordan, wrote to the Ombudsman advising:

> ". . . Your findings have been given very thorough consideration.
>
> As previously indicated, new procedures have been introduced which involve the use of new technology. I am confident these new procedures will eliminate the type of delay which occurred in this case."

It is expected that these new procedures should prevent a recurrence of the problems experienced by Ms C.

Case No. 8

MARITIME SERVICES BOARD

Failure to adequately control the operations of a marina

This complaint was from a Residents Action Group, the office bearers of which were neighbours of the Double Bay Marina.

The families concerned had been complaining for a considerable period of time to the Board over what they considered to be an over intensification of use of the Marina. It was located in a Residential Area, was established many years ago and continued to operate by virtue of its "existing use rights".

The complainants had pointed out in correspondence both to the Board and to this Office that a delicate balance existed between the Marina site and its surrounding residential area. The homes adjoining and nearby to the Marina had common problems of being on dead end streets, narrow frontages, very little off-street parking and with several blocks of flats nearby. Because of the nature of the area it appeared a lot of the complaints stemmed from the growth in boating popularity together with the increased number of motor vehicles belonging to local residents and Marina customers.

Areas of Complaint

The various matters of concern to the complainants covered the following:

(i) The sale of vessels from the Marina premises and moorings.

(ii) Persons residing permanently on moored vessels.

(iii) The pollution of the harbour and bay by people residing on moored vessels.

(iv) The length of the craft moored in the leased areas were greater than was allowed in terms of the lease and as a consequence the sterns of the boats extended into the harbour interfering with some residents' views.

(v) The construction of an additional set of boat slips.

(vi) The slipping of vessels frequently blocked the free access of the public across the Marina's water frontage.

(vii) The construction of a fence which also contributed to the difficulty to the public in being able to walk freely across the waterfront.

(viii) The delivery vehicles to the Marina and customers' cars frequently blocked the nearby residents access to their homes and garages.

As part of the investigation the complainants were interviewed, their extensive files and photo album viewed and a Section 19 Inquiry held with Officers of the Maritime Services Board being required to attend. Also an inspection of the site was conducted.

The specific areas of complaint raised with the Board as the basis for investigation included:

— That several vessels had been used as residences for extended periods of time in breach of the "3 day maximum occupancy" rule imposed by the Board and that the Board and Marina owner failed to enforce this rule.

— That persons residing on those vessels polluted the harbour by dumping refuse, sewage, etc., overboard and that the Board had failed to take action following the reporting of such occurrences.

— That the Board has failed to ensure that the Lessee kept all vessels moored at the jetty in such a way that they did not extend beyond the row of piles defining the limits of the leased areas.

— That the Board had permitted or not taken steps to prevent, the construction of a third or northern boat cradle.

— That the jetty, boat slips and cradles were constructed and used in such a fashion that the free and uninterrupted passage of the public across the 3.6 metre public access right-of-way on the water front was prevented; also that the board had failed to enforce the clearing of such obstructions following the issue of directions.

During the investigation it was revealed that in regard to persons residing on vessels, while the Board's Officers had investigated some reports of breaches of the rule, it appeared that no follow-up action had taken place. For instance, no inquiries were made at the home address of the people involved nor were inspections carried out by the Officers outside of what would be considered normal working hours. One of the vessels involved in this practice belonged to the Marina's "resident" shipwright whose yacht was moored at the Marina while he was refitting it and while he worked for the Marina proprietor on other projects. Evidence was provided by the complainants that the shipwright's family resided on the yacht with him on a regular basis. Several other vessels also were named for similar breaches of the 3-day maximum residence rule.

The complainants had written to the Board in August, 1981, requesting that the State Pollution Control Commission be asked to test the waters of the bay and to monitor it over a period concerning the possible discharge of raw sewage from vessels moored in the area. The request was forwarded to the State Pollution Control Commission, and, as a result, bacteriological tests were conducted by the Health Commission. The result of these tests proved that E. Coli levels in the bay were highest at the discharge point of the Sherbrooke Avenue drain and therefore the marina was not the source of any pollution.

The Maritime Services Board had subsequently written to the Metropolitan Water Sewerage and Drainage Board to request that the matter be rectified.

In regard to the alleged obstruction of views by vessels extending beyond the leased areas, photographic evidence was provided by the complainants showing vessels extending beyond the piles delineating the leased areas, and also moored outside the leased area.

During the course of the inquiries, the Board's Officers pointed out that the extension of boats beyond the piles (i.e. sterns protruding) was something that had been in existence for many years and they produced aerial photographs from 1965 to 1981 to prove the point.

These extensions (or overhangs) were a result of larger (longer) vessels using the moorings and consequently extending outside the leased area.

To overcome this situation the Board was at the time considering a request from the lessee to extend the leased areas to provide for the longer vessels.

Plans were produced by the Board showing the various areas of mooring including the following.

AREA "A"

The granting of mooring rights was not favoured in that area as such would be considered to constitute an undue provocation to the adjoining freehold neighbour (i.e. the complainants).

AREA "B"

Vessels had always extended beyond the existing mooring area at the north-eastern side of the marina and it was not considered unreasonable that there be an extension of the mooring area as shown on the plan. Such action would allow the existing boats to remain at the site. It was pointed out that the number would remain unaltered and, therefore, no increase in car parking should occur.

AREA "C"

The lessee advised that the area at the northern end of the marina was currently used to fuel, service and maintain deep draught vessels. It was indicated that although there was no basic survey objection to the granting of a mooring area as shown marked "C", the mooring in that location had not been established historically to a significant degree.

AREA "D"

Vessels had always been moored at the inner sought-western side of the jetty and the lessee had advised that this area was used for boat brokerage purposes whereby the boats were not permanently moored for any great period of time. It was indicated by the Board that there was no survey objection to the establishment of a mooring area, as shown marked "D" on the Plans and that the interests of the adjoining western freehold owner would not be adversely affected.

The Board finally agreed that the extension of the mooring area marked "A" on the plans should be refused, as such would constitute an undue provocation to the adjoining land owner; and the mooring areas marked "B" and "C" and a small portion of "D", be approved as they would allow the lessee to conduct a viable business at the premises using the vessels which were currently moored at the marina.

In conclusion, the Board pointed out that no extension of the Marina itself had been involved. The approved extensions to the mooring areas were seen to be only of a relatively minor nature and merely regularised a situation which had existed in practice for many years. Also, it was stated that the Board was not prepared to consider any further extension to the "mooring limits" and would require any vessel moored outside the approved limits to be relocated either within the limits or removed from the site.

Concerning the alleged additional set of boat slips during inspection of the premises, the proprietor pointed out (and this was confirmed by the Board) that the extra set of slips to which the complainants were referring was the original hand operated winch and slip, but that a new cradle for the main (or largest) set of slips was in the course of construction on the site of the old winch. This apparently was the cause of the confusion about just what was in fact in use for slipping boats.

The area of complaint about slipped vessels blocking the right-of-way revealed that the lease of the Marina showed a 3.6 metre wide public access strip across the water frontage of the Marina. The complainants provided photographs of boats on the slips which they claimed protruded across the right-of-way and which prevented their free and uninterrupted passage across the waterfront. The Board advised that, on each report of an incident of the blocking of the the right-of-way, its Officers had inspected it. However, while there had been some breaches discovered, following the matter being drawn to the proprietor's attention, the strip of land was maintained clear of vessels. On the inspection of the premises by this Office, during which a large vessel was on the slips, it was found that it did not obstruct the righ-of-way although from the photographic evidence made available by the complainants, there was no doubt that previously the right-of-way had been frequently blocked.

Also, in regard to a fence blocking the right-of-way it was discovered that a low fence had been constructed by the proprietor which also contributed to the blocking of the right-of-way. Following a direction from the Board, the proprietor had cut a space in the fence to restore the public access across the waterfront.

It had been pointed out to the complainants by the Board that any obstructions by motor

vehicles parked in the adjoining streets was rightly a matter for the Police Department and was not its concern.

After consideration by the complainants and the Board of the draft report the following findings were made:

"(i) Persons Residing on Moored Vessels

That in the past the Board did not adequately carry out its investigations of complaints in regard to people residing permanently on moored vessels, that is, beyond the 3-day maximum time limit, and did not conduct inspections outside of what would be considered normal business hours; nor were these complaints adequately followed up to ensure that the breach of the lease did not continue."

Comments

In its reply dated 30th July, 1983, the Board stated:

"The Board concedes the fact that it would have been more appropriate to pursue its investigations into this aspect of the complaints by continuing surveillance of the marine facility outside normal working hours and, particularly, during the hours of darkness."

However, in mitigation the Board pointed out that it had done some follow up investigations of initial complaints and had written to the proprietor pointing out the conditions of his lease and the need to comply in regard to persons living aboard moored vessels. Also that if extended surveillance had to be undertaken it would have involved overtime payments and possible industrial difficulties. By letter dated the 20th August, 1980, the Secretary of the Board advised as follows:

"Further to the board's letter of 30th July, 1982, I wish to advise that following recent surveillance of the above premises the Board has obtained evidence that a person resided aboard the vessel for a period of four consecutive nights.

Accordingly, a notice of Breach of Covenant, pursuant to Section 129 of the Conveyancing Act, 1919, has been served on the Lessee, requiring that the breach be remedied within a reasonable time.

The Lessee has been requested to advise the Board what action is to be taken to comply with the notice, otherwise the Board would give consideration to terminating the lease."

It was clear that prior to the complaint the surveillance carried out by the Board had been inadequate and therefore the finding was confirmed.

(ii) Mooring of Vessels beyond the Leased Area

That the Board failed to take sufficient steps to ensure that the lessee of the Marina did not moor vessels outside the leased area, particularly in area "A"

Comments

The Board had agreed to regularise the existing situation by extending the Marina's leased areas to allow for longer vessels which used the mooring areas.

In regard to Area A, the section of main concern to the complainants, the Board in its letter of 30th July advised that after serving several notices on the proprietors, the Marina was inspected on 28th July when it was found that no vessels were moored outside the defined areas.

The complainants were grateful that Area A was not to be expanded but were still of the opinion that any extension of the mooring areas was not necessary and that the increased usage of the Marina interferred with the amenity of the area. The view was taken that the extension of the lease area was a matter of policy for the Board and involved no "wrong conduct" under the Ombudsman Act. However, on the facts, finding (ii) was confirmed.

(iii) Blocking Public Access

That the Board failed initially to take adequate steps, to ensure that no vessels were slipped in such a way that the public's free and uninterrupted passage across the waterfrontage was impeded.

Comments

The Board admitted that on several inspections the right-of-way was "partly blocked by a slipped vessel but not to the extent that pedestrian access was impaired". However, it also advised that on many other inspections the right-of-way was not obstructed in any way.

The complainants, however, pointed out that boats were slipped that continued to block the right-of-way and also that the hole in the fence had been "boarded up and another small hole cut at the point where the fence meets the western wall of the boatshed". They also requested that the 3.6 metre public access strip be restored to allow people to pass freely along the waterfront.

From the evidence it was decided that on occasions pedestrian's access across the right-of-way had been unreasonably impeded and that the Board's officers had failed to take adequate measures to rectify the situation.

(iv) Warning to Lessee

That the Board failed to draw the attention of the Marina proprietor to the conditions of the lease preparatory to serving a notice on him under the terms of his lease if the breaches continued.

It was noted, from the Board's letter of 20 August, 1982, that it had written a warning letter to the lessee.

The following recommendations were then included in the report to the Minister:

(i) Where it receives a complaint or otherwise has reason to believe that the 3-day maximum occupancy on moored vessels rule may be being breached, the Board take adequate steps to investigate and police the matter, including patrols at irregular hours.

(ii) That the Board continue to draw the attention of the Double Bay Marina proprietor to the conditions of his lease pointing out the penalties for failure to comply with these conditions particularly the mooring of vessels outside the leased areas and the blocking of the public right-of-way.

(iii) Should the proprietor of the Marina fail to respond to the Board's direction that, following the issuing of sufficient warnings, action be taken to terminate the company's lease.

The report was made final after it was discussed with the Minister and the Board advised that it would take every step possible to comply with the recommendations of the report.

In conclusion the complainants wrote thanking this Office for its efforts and advised that the Marina had been sold!

Case No. 9

MEDICAL APPEALS BOARD

Shortage of Specialist Consultants

Preliminary enquiries into a complaint made by Mr H. revealed an apparent anomaly in the administration of the Medical Appeals Panel. Due to a shortage of Ear Nose and Throat Specialists available to the Panel and the long waiting time to arrange consultations, some appellants such as Mr H. had no opportunity to have their appeal determined prior to the expiration of the six-month period during which the Medical Examination results are considered valid.

Mr H.'s complaint was that in February, 1981, he joined the Department of Industrial Relations and undertook the required Medical Examination on 7th April, 1981. He was then referred to a specialist for a further opinion and notified that his acceptance would be deferred. He was advised on 13th August, 1982, by the Secretary of the Medical Appeals Panel of his right of appeal and responded by appealing on the 1st September, 1982. Information available to the Panel showed that two qualified Ear Nose and Throat Surgeons had provided markedly different opinions and it was decided to refer the matter to an Ear Nose and Throat Specialist of eminence for an opinion which would be respected. However, such a specialist was not available and the six-month period during which medical information is considered to be valid, expired. This resulted in the Panel being unable to resolve the appeal even if the third opinion was obtained as part of Mr H.'s examination was now outdated.

Mr H. had been advised by the Secretary of the Panel that his best interests would be served by foregoing his current appeal and undergoing re-examination by the Centre. However, no guarantee could be given that an Ear Nose and Throat Specialist would be available and Mr H. was of the opinion that as "my medical condition has not changed, a further medical by the Health Commission would be pointless and if I had to re-apply to the Board (Panel) it would put my case back a further 12 months and with no guarantee of a quicker decision next time."

An appraisal of Mr H.'s complaint and the function of the Medical Appeals Panel suggested that the matter fell within the exclusion specified by Clause 12 of Schedule 1 of the Ombudsman Act, namely, the conduct of a public authority relating to the appointment or employment of a person as an officer or employee. For that reason it was decided to decline to investigate Mr H.'s complaint. However, due to the apparent anomaly in the functioning of the Medical Appeals Panel raised by Mr H.'s complaint, it was brought to the attention of the Secretary of the Department of Health with the request that the matter be reviewed if possible.

The Secretary advised the Ombudsman within a week that:

> "A communication has been received from the Otolaryngological Society of Australia nominating a number of specialists to the Medical Appeals Panel. This will ensure that where persons who appeal against medical assessments in the future require referral to an Ear Nose and Throat Specialist, a number of Consultants will be available to assist the panel."

This advice confirms that steps had been taken to overcome the problem highlighted by the complaint.

Case No. 10

METROPOLITAN WATER SEWERAGE AND DRAINAGE BOARD

Water Board agrees to safety fence

The parents of a fifteen-month old boy who survived a fall into a canal began a campaign to have a protective fence erected. Their son was luckily not injured, although the canal was six feet deep. At the time of his fall, it was dry; otherwise there would have been a grave danger of drowning. They contacted the owners of the canal, the Metropolitan Water Sewerage and Drainage Board, and told them the canal was too dangerous to remain unfenced.

The parents were assured a Water Board officer would make an immediate inspection. Three weeks later they complained to the Ombudsman's Office that no inspection had yet taken place.

An investigation officer wrote to the Chairman of the Metropolitan Water Sewerage and Drainage Board and, when no reply had been received a month later, telephoned an officer of the Board. She was told that the Sewerage Maintenance Branch would report on the matter shortly.

Two weeks later a letter was received from the Deputy Secretary of the Water Board, who said that the Board agreed that the unfenced channel would constitute a safety hazard to children playing on the block. He continued:

> "I am pleased to advise therefore that arrangements have been made to erect a 1.2 metres high cyclone fence along the boundary, similar to the one on the opposite side of the channel. It is anticipated that this work will be completed within the next two months."

A copy of this letter was sent to the boy's parents. A few days later the mother telephoned to say the fence was already up. In view of the satisfactory resolution of the complaint, the Ombudsman's Office discontinued the investigation.

Case No. 11

METROPOLITAN WATER SEWERAGE AND DRAINAGE BOARD

Sewerage Rates Levied on Unconnected Properties

A complaint was received from a resident of Caravan Head Road, Oyster Bay, alleging that the Metropolitan Water Sewerage and Drainage Board acted unreasonably by levying a sewerage rate on his property.

On 6th December, 1974, the sewerage main passing through the rear of the complainant's property was Gazetted and liability for sewerage rates commenced on 4th February, 1975. However, even though the complainant's dwelling was located over 75 metres from the sewer, placing it outside the Board's statutory rating limit, and an escarpment and steep terrain separated the dwelling from the sewer line, the Board was of the opinion that sewerage from the house could be drained into the sewer.

As the complainant's dwelling was not connected to the subject sewer, the Board determined that the rates were to be paid by the complainant on the basis of the area of the complainant's property which was located within the 75 metre statutory rating limit, and was capable of being drained to the sewer.

A major contention put forward by the complainant was that the sewer was located at the rear of his property for the convenience of the Board and not for the specific purpose of providing facilities to his dwelling or to his neighbour's dwelling. In response to this argument, the Board advised that: the subject sewer was constructed to provide sewerage to the buildings located above the level of the sewer; a point of connection had been provided within the complainant's property; and, the sewerage main was located at the lowest possible level in order to provide sewerage facilities to as much of the land as possible. This was apparently based on the possibility that the complainant's land (and the adjoining land) was capable of subdivision.

In this connection it would be noted that the complainant advised he had no intention (at that time) of subdividing the land and that the Board had located only one (1) point of connection with the complainant's property and not two (2) as would be required should the land be subdivided.

In support of his complaint the complainant further advised that on the basis of a written report from the Board, he had estimated that it would have cost over $16,000 (on 1980 prices) to connect his dwelling to the sewer, due to the distance involved and the escarpment and steep terrain separating the home from the sewer. Whilst questioning the basis on which the complainant arrived at this estimated cost, the Board did concede that the cost of connection would be high.

The Board has stated its views on the question of complainant's liability for rates in the following terms:-

> "At first sight, the use of the word 'may' in Section 90 might give the impression that the Board has discretionary power to levy rates. The use of the word 'may' in this Section has previously been considered by legal counsel who proffered the opinion that 'the scheme of the Act, particularly in the light of Section 94, is to oblige the Board to levy rates despite the use of the word may in Sections 89, 90 and 91' of the Board's Act. He supported his view by citing certain legal authorities."

Whilst no question is raised as to the Board's right to levy a sewerage rate on land (even vacant land) within the 75 metre statutory limit, concern was expressed that the Board appeared to have no flexibility under its Act to take into account geographical problems which could make it extremely expensive and difficult for a property to be connected to a sewer main. On this basis the opinion was adopted that the Board's conduct in this matter was wrong in terms of Section 5(2)(b)(1) of the Ombudsman Act, in that whilst it was in accordance with law or established practice, that law or practice was unreasonable or improperly discriminatory. In the circumstances, it was recommended that consideration be given to amending Section 90(1) of the Metropolitan Water Sewerage and Drainage Act 1924 to include a further exception giving the Board discretionary power to levy rates in relation to land from which it would be abnormally difficult or expensive for sewerage to be drained into any sewer of the Board.

In response to this recommendation the Board advised that it did, in fact, exercise certain discretion in relation to the making of decisions as to whether land is ratable. For example, the Board will not levy a rate if it is virtually impossible (extremely difficult) to connect a dwelling to a sewer, or where a house service line would have to cross adjoining private property to connect to the Board's sewer.

As this approach adopted by the Board appeared to remove the necessity for any amendment to Section 90 of the Board's Act (and as the Board was concerned that any such amendment would result in numerous endless disputes as to the level of difficulty involved in connecting to the Board's sewer) the matter was discontinued on the basis that the Board was prepared administratively to levy the sewerage rate on that section of a property which is within 75 metres of the sewer main based on a classification consistent with the *use* of that part of the land.

This approach was a modification of the previous basis under which a property classification was adopted in respect of the whole of the property. In respect of the complainant's land, this meant that instead of the rates being based on a residential classification for the area partially liable to the sewer main (at the minimum rate of $110.20 per annum) rates would be levied on a non-residential classifiction at the appropriate rate on the dollar (with a minimum rate of $61.00 per annum). The Board offered to apply this policy from 1st July, 1982, to all properties in similar circumstances to that of the complainant, affording some rate relief without ". . . . denying the community some contribution from these properties towards the cost of providing the sewerage service . . . ."

CASE NO. 12

METROPOLITAN WATER SEWERAGE AND DRAINAGE BOARD

Ambiguous Advice to Intending Purchaser

The complaint was that the Board advised an intending purchaser of a property under which a sewer and storm water channel passed in the following terms:

(a) "it is not known whether access to the channel could be gained under the building to carry out repair work without affecting the stability of the building," and

(b) "The building also appears to be affected by the sewer line situated at the south-eastern corner. Again, it cannot be said if access to the sewer is available without affecting the stability of the building."

As regards (a), a manhole on the property was available to and known by the Board's staff, and as regards (b) there is no evidence of the building being affected at all and there are two access points to the sewer line in front of the property and marked on the Board's sewerage diagram.

Initially the Board refused to withdraw these statements because future consequences of building or of access to the conduits could not be predicted.

The difficulty lay in the interpretation of the words "appears to be affected". Intending purchasers and their solicitors took this to mean that some adverse effect has been observed, whereas the Board insisted that what they mean, and would not resile from, was "that it is possible there may be some effect". Initially, the Board rejected the possibility that another form of words be used.

The President of the Board, having received a draft report under Section 26 of the Ombudsman Act, suggesting the Board's conduct was unreasonable in this, reviewed the matter and the Board agreed to a revised form of words proposed by this Office, as follows:

> "The building also appears to be above the sewer line at the south-eastern corner. While internal inspection is available, external inspection and repair work, should they be required, could possibly affect the stability of the building by undermining that corner."

As this met the objections of the complaint and was agreed by the Board, the enquiry was discontinued.

CASE NO. 13

METROPOLITAN WATER SEWERAGE AND DRAINAGE BOARD

A Non-Consumer Charged for Consumption

The complaint was that water consumption accounts were issued in respect of a property to which water was not connected.

The Board confirmed that this was so, as the Board's records incorrectly described the property adjoining, to which water was supplied, as the one in question. As a result of our enquiries the conduct of the Board was found wrong, the accounts were redirected and apologies made to both proprietors.

CASE NO. 14

DEPARTMENT OF MOTOR TRANSPORT

Misallocation of School Bus Route

The complainant was a bus proprietor in Alstonville on the North Coast. When he acquired his business the Conditions Document issued by the Department of Motor Transport clearly showed as included a school charter bus service between Wollongbar and Alstonville. Such charter services require the agreement of the Department of Education, and the route was not approved or in operation. The complainant therefore engaged in negotiations with the Department with a view of

operating that service, and claims that he discussed the matter also with the local office of the Department of Motor Transport (D.M.T.). The D.M.T. also amended the Conditions Document to add another route to it and did not remove the Wollongbar-Alstonville Route.

In view of the provision in the Conditions Document, our complainant continued to negotiate with the Education Department. The D.M.T. relieving officer in Lismore wrote to the Education Department Office in Lismore saying that the office would not foresee any difficulty in the complainant's bus service re-establishing the school charter bus service.

At the beginning of the next school year the major bus operator in the area sought from the D.M.T. permission to provide an additional timetable service from Wollongbar to Alstonville for the purpose of carrying children to and from Alstonville. Permission was granted on the day the application was received.

When our complainant protested he was told that the route appeared on his Conditions Document as a result of a clerical error and that this was an extension of normal (i.e. non-charter services) by the other operator in the territory covered by that operator. The result for the Education Department was a substantially higher cost than if a charter service had been provided.

The Department of Education wrote seeking confirmation from the D.M.T. that it could still negotiate a charter with either operator. This letter was never answered.

Investigation of this matter by this Office elicited the explanation by the Department that the route remained on the Conditions Document by a clerical error, that the office dealing with the second operator's request was unaware of the negotiations of our complainant with the Education Department and that, in any event, the Department was bound under the State Transport (Co-ordination) Act to grant permission only to the operator whose territory this route was in.

The Ombudsman found that the conduct of the Department of Motor Transport in this matter was wrong. The complainant had every reason to believe that he was entitled to operate such a service, and the D.M.T. so quickly acceded to his competitor's request that his negotiations with the Education Department were brought to nothing. It was also found that the State Transport (Co-ordination) Act did not oblige the Department to give the permission to the competitor.

The view of the Crown Solicitor was sought on this latter point and he agreed that the Act did not so oblige the D.M.T.

As a result the Minister for Transport sought to have the question reviewed and our complainant re-applied to the two Departments.

The Regional Office of the Education Department first replied to the following effect:

> "The decision of the D.M.T. to withdraw the passenger bus licence condition from (the complainant) and grant such a provision to (the competitor) means that this Department has no option for the establishment of a separate service."

The D.M.T. then declined this application as follows:

> "A licence for a school charter bus service would only be issued at the behest of the Department of Education and where the proposed service would not unnecessarily duplicate or compete with existing transport facilities in the area.
>
> Having regard to the terms of the Director of Education's advice to you (the quote above) . . . a copy of which was referred to this Department, the application has been declined."

From this it appears that the decision found wrong in the first instance was regarded as a fait accompli. Further, the decision as taken was misunderstood by the Regional Director of Education. The application of the complainant had not been considered on its merits as one for a school charter service, because the Education Department believed it was precluded by D.M.T. policy, although in the course of this investigation the Department vigorously rejected that view.

As reconsideration did not change things for the complainant he was advised to discuss with his lawyer the possibility of legal action.

CASE NO. 15

DEPARTMENT OF MOTOR TRANSPORT

Classification of Station Wagons

The complaint was that the Department of Motor Transport classified station wagons as goods vehicles for the purposes of third party insurance.

The investigation revealed that a station wagon is defined under the Motor Traffic Regulations as a "motor lorry". The Department argued that it therefore followed that such a vehicle be classified as a "goods vehicle" for third party insurance purposes.

At the time of the complaint the table of premiums prescribed under the Motor Vehicles (Third Party Insurance) Act described a goods vehicle as:-

> "Any motor vehicle not included in class 5, 9, 10, 11, 12, 15 or 16 constructed principally for the conveyance of goods."

The Department's stated view was that despite developments in the construction of station wagons, they continue to have substantial loading space behind the rear seat for the carriage of goods and this space can be increased either by folding down or removing the seat.

So the issue was whether or not having loading space behind the rear seat constitutes being "constructed principally for the conveyance of goods".

The word 'principally' is defined in the Shorter Oxford English Dictionary as follows:-

> "In the chief place, mainly, above all, for the most part, in most cases."

On the Department's own view a station wagon merely provides substantial loading space. This does not mean that the vehicle is constructed for the carriage of goods mainly or for the most part. Support for this view is to be found also in the judgement of Lord Parker in Flower Freight Co. Ltd v Hammond (1963) IQB275 (at 282).

It is unlikely that a Court would find a Peugeot station wagon to be constructed principally for the carriage of goods, but would rather have found it to be a motor car on the definitions then applying.

It was concluded that the Department had misclassified the station wagon as a goods vehicle and that that action was wrong conduct in terms of the Ombudsman Act.

It is noted that by Government Gazette of 24th December, 1981 the Schedule to the Motor Vehicles (Third Party Insurance) Act was amended by addition of the following to the definition of "goods vehicle".

> "(c) being a station wagon where the unladen weight does not exceed 2 tonnes,
>
> (d) being a station wagon where the unladen weight exceeds 2 tonnes,"

which would probably have the effect of deeming station wagons to be "goods vehicles". The draftsmanship of the new Table in Schedule 1 is far from clear. It would seem preferable to treat station wagons as a separate class of vehicle and nominate such maximum third party premiums as is thought proper.

It is noted that the Department is proceeding to introduce a new classification for station wagons.

CASE NO. 16

DEPARTMENT OF MOTOR TRANSPORT

Registration of a Stolen Vehicle and Issuance of Incorrect Information

On 6th May, 1980, a stolen Chrysler Galant Sedan, previously bearing a Victorian registration, was registered at the Parramatta Motor Registry.

On Sunday, 29th June, 1980, the complainant negotiated to purchase the vehicle, then registered with NSW plates. On the following day he telephoned the Department of Motor

Transport at Rosebery to make enquiries and was informed that the owner of the car was a Mr E. (from whom he had agreed to purchase it) and that the car was not stolen. The same day he completed the purchase of the car. However, in October, 1980, he was informed by the local Police that the vehicle was stolen. It had apparently been stolen from Glebe, Sydney in March 1980. The Police took possession of the car, although the complainant was subsequently able to regain possession of it after negotiations with the true owner in Victoria.

The complaint was that the Department accepted for registration a stolen motor vehicle without undertaking proper checks into the title of the car and the circumstances surrounding the application for registration. A further complaint was that when the complainant sought information about the title of the car, he was provided with misleading information as a result of which he completed the purchase.

The Police Department, as part of its normal procedure, had passed on the details of the stolen vehicle to the Department of Motor Transport. This information was stored in the computer memory and included the engine and registration numbers of the vehicle. The chassis number was not included, as such particulars are not recorded in Victoria, although NSW practice is to record both the engine and chassis numbers.

To effect the registration on 6th and 7th May, 1980, the person who had apparently stolen the vehicle attended at the Parramatta Office giving his name and stating that it had been purchased from a person in Chippendale; that the previous registration papers had been lost and that he had a U.K. driver's licence. (The person who registered the vehicle, Mr E, was subsequently discovered by the Police to have several aliases.) The vehicle description was also completed showing among other details, the engine number as 57698 and chassis number A510129381. After the rectification of several mechanical faults the vehicle was described as fit for registration. However, before the registration was issued an enquiry was made and the computer printed out details which showed the engine number as S7698 and recorded that neither the engine or chassis check recorded the vehicle as stolen. The Certificate of Registration was then issued, however the engine number was shown as *57698* and not *S*7698 as had been printed out by the computer.

Department Comment on the Registration of 7th May, 1980.

Following enquiries, the Department advised this Office that it was standard procedure in New South Wales, before registration of a secondhand vehicle, to check the engine number and chassis number, where available, to establish whether the vehicle has been reported stolen.

When the original registration form was typed, the engine number was shown correctly as *57698* and not as the incorrect number that had been given to the computer on enquiry. As a consequence, when the transaction was recorded on the Department's computer based records, a message is said to have alerted the appropriate officer to the registration of a vehicle with an engine number that had been reported stolen. The Department commented that in the absence of the chassis number on the stolen vehicle record, the officer could not possibly establish that the vehicle registered on 7th May was the one reported stolen on 14th March, 1980, and registered in Victoria, or whether a duplication of engine number had occurred. An enquiry was made on the 15th May, 1980, by a departmental officer with the Police Department Stolen Motor Vehicle Index Section for advice as to whether the vehicle was in fact stolen or whether a duplication of the engine number had occurred. No reply was received from the Police Department and no action was taken to follow up the enquiry or to make enquiries of the then registered owner (Mr E). A reply was given, much out of time, by the Police Department after the motor vehicle had been recovered on the 14th November, 1980.

The duties of the officers of the Department of Motor Transport are set out in the Motor Traffic Act and Regulations and, in addition, a manual of "Instructions to Motor Registry Officers".

The departmental instructions on the recording and noting of engine and chassis numbers are quite explicit and indicate that registry officers should exercise extreme care in ascertaining the correct engine and chassis number of every motor vehicle submitted for registration, including all prefixes and/or suffixes, if any, associated with such numbers and in carrying out the engine and chassis numbers checks in the case of secondhand vehicles presented for registration and in transcribing full particulars on to the registration forms. This was not successfully done in this case.

Stamp Duty

A further question arose concerning the market value of the vehicle, which was stated as $500 although the true value was in the vicinity of $2000. The instructions to motor registry officers indicate that the responsibility for deciding the market value of the motor vehicle rests with the applicant, but that if it appears to the registry officer that the amount stated by the applicant is

considerably less than the price normally payable for a similar vehicle, he should inform the applicant that such amount will be liable to a subsequent check by the Commissioner for Stamp Duties and send a suitable minute to the Commissioner. This was not done.

Findings in Relation to Registration of the Vehicle

Of the officers registering the vehicle, only one, a mechanical inspector, was identified. However, the following findings were made:

(1) Although a number of aspects of the application form were unsatisfactory, no enquiry was made by the officers effecting the registration. The vehicle, when registered in Victoria, bore Victorian plates KVW . . . and a registration label on the windscreen. When the vehicle was presented for registration the number and State of registration was not stated. If it bore registration plates when it was driven into the Registry, then the Registry Officers would have been required to check the Department's computer records providing the vehicle registration number in order to verify the registration particulars and to determine whether or not the vehicle was stolen. If the vehicle bore no registration plates or windscreen sticker, then the Registry Officers ought to have made enquiries about the previous registration of the vehicle. There was wrong conduct by the Registry Offices in not making an enquiry about the previous registration of the vehicle.

(2) The name and address of the last registered owner was described as having been lost. It appears that no enquiries were made of the applicant about this statement, despite the fact that the Registry Officers ought to have been on notice that there may have been a problem in relation to the title as the particulars of the last registration had not been provided. This was wrong conduct.

(3) No enquiries were made concerning the identity of the person from whom the vehicle was acquired whose name was provided on the application, nor were enquiries made of that person to obtain advice on the particulars of the last registered owner or last registration. This was wrong conduct by the Registry Officers.

(4) The vehicle was described as having a market value of $500. The vehicle was subsequently purchased for $2000 and the sum of $500 would have not represented the value of the vehicle at the date of application for registration and an inspection of the vehicle would have clearly indicated this. The acceptance by the Registry Officers of the valuation without enquiry resulted in the applicant paying a lower registration fee than he might otherwise have been required to pay. This was wrong conduct by the Registry Officers who certified that the motor vehicle was correctly described.

(5) The Registry Officers made an enquiry of the computer stating an incorrect engine number. The correct engine number of 57698 was given as S7698. The Department advised that the officer who made the check of the engine number misread the handwritten number on the application form which was completed by a departmental officer. The engine number as written on the application form could possibly be misread as S7698 and it may have been an honest mistake by the officer. The Commissioner's view was that it was an honest mistake. The engine number may have been misread by him so that he intended to write S7698. The figure '5' recorded as engine number was reasonably dissimilar to the '5' recorded in the chassis number on the next line. In either event, it was wrong conduct of the Registry Officer to note the number incorrectly.

(6) The engine number was read S7698 by the officer making the enquiry of the computer. It was not known whether this was the same officer as had taken the engine number from the vehicle but the reading of the number as S7698 was wrong and constitutes wrong conduct.

(7) The Registry Officer on receipt of the computer printout clearly identifying the engine number as S7698 then proceeded to register the vehicle as having engine number 57698 and the certificate of registration issued on 7th May, 1980, correctly recorded the engine and chassis number and the certificate bore the additional endorsement that the vehicle was verified "not stolen — direct access". In the circumstances, the issue of such a certificate of registration was wrong conduct by the Registry Officers.

Action Taken by the Department in Relation to Enquiries by the complainant on 30th June, 1980.

On 30th June, 1980, the complainant telephoned the Department to enquire about the car as he wished to buy it. He described the car and the name of the registered owner. The Registry Officer checked with the computer record and replied that the owner of the car was as described and when the complainant then quoted the engine number the reply was that it was not a stolen car.

The Department, on enquiry from this Office, advised that the departmental officers in responding to an enquiry as to whether a vehicle has been reported stolen are only in a position to advise whether the records show an engine or chassis number has been reported stolen.

When the complainant made an enquiry of the Department on 30th June, 1980, the Department was in possession of the information that the engine bearing the number 57698 was stolen and had been the engine in vehicle Victorian registration KVW . . ., which had been reported stolen. The Department also knew that an enquiry had been made of the Police Stolen Motor Vehicle Index Section on the 15th May, 1980, to enquire whether the vehicle which had been registered in New South Wales KRD . . ., but had engine number 57698 was a stolen vehicle or whether the engine number had been duplicated. No reply had been received from the Police Department. On enquiry from this Office the Department admitted that if the officer to whom the complainant spoke on the 30th June, 1980, had correctly checked the record it would have shown that engine number 57698 was recorded stolen when fitted to Victorian registration KVW . . . and that the vehicle registered KRD . . . (NSW) had an engine with a number identical to that in the stolen Victorian vehicle.

The failure to provide correct information to the complainant may have been because of officer error or it may have been because the system was faulty. The Department stated that even if the two basic pieces of information have been put together, they would not have established conclusively that the vehicle registered as KRD . . . (NSW) had been stolen, but the complainant would have been advised to contact the police. In this way he might have been warned not to buy the car.

Enquiries were also made of the Police Department as to the system adopted. The following information was provided:-

> "In respect to the system operating between this Department and the Department of Motor Transport; each weekday, Monday to Friday, the Department of Motor Transport is supplied by this Department with lists of vehicles stolen and recovered in New South Wales and other States of Australia.
>
> The New South Wales Police computer supplies a daily list of all motor vehicles stolen and recovered in this State during the previous 24 hours. Also supplied are copies of Telex lists received from other States of vehicles stolen and recovered in those States during the same period of time.
>
> Upon receipt of the lists, the Department of Motor Transport flags as stolen the corresponding record they have of any listed vehicle which is registered in New South Wales. They maintain two records for each vehicle, a registration record which contains a complete description of the vehicle, including ownership details, and an engine record for the vehicle which identifies the vehicle by its engine number. Each of these records is flagged. A chassis file is also created for each stolen vehicle and this also is flagged. As the Department of Motor Transport does not have corresponding records for interstate vehicles it creates an engine file for any stolen vehicle registered interstate and flags it as stolen. No chassis file is created for these vehicles as chassis numbers are rarely supplied for these vehicles.
>
> The computer printout establishes that details in regard to the theft of the vehicle purchased by (the complainant) were fed into the Police computer at 1434 hours on the 14th March, 1980, and the Department of Motor Transport would have been supplied with such details the following day."

The Department of Motor Transport admitted that errors often arise in the system of registration. Engine numbers are often misquoted; sometimes even with the firing order of pistons given as engine numbers. Other errors occur with simple transcription/punch errors. Motor Registry Offices in country towns do not have a direct link into the Head Office computer. Offices there need to ask the Police to telex the details to Police Headquarters for access to the Police computer, and this process causes more errors. It would also be possible, it emerged, for an officer, as a result of a bribe or otherwise, to make an error in recording the engine number or the chassis number or both. The Department could, in the event of a mistake being discovered, send an inspector to check the vehicle. In this case it did not do so.

The Police Department also indicated what action had been taken to follow up the reported fraudulent sale:-

> ". . . It has been ascertained that the person who sold the motor vehicle to Mr P-- is Allan John C--, born 8 September, 195-, who is known to this Department. Inquiries of the real Leslie Barry E-- disclosed that he was not implicated in any way in the theft of the vehicle or its sale to Mr P--. He said that the renewal notice for his licence had apparently been stolen and used by the offender to register the stolen vehicle at the Department of

Motor Transport. He has been viewed by Mr P-- who has stated that he is not the person who sold him the vehicle.

After initial inquiries and immediate avenues of inquiries to locate C-- had not been successful, on 7 October, 1980, a wireless message was circulated to all cars and stations for the informaiton of Police that C-- was wanted for interview in respect of this matter and giving his full description, Photo Supplement and Special Photograph references. A notation was also made on his fingerprint record card at the Criminal Records Unit.

On 4 January, 1981, C-- was arrested at Blacktown under the name Allan John D-- on three traffic offences and was bailed to appear at the Blacktown Court of Petty Sessions on 12 January, 1981, but he did not appear in answer to his bail.

Allan John C-- is well known to the local Police and despite a general lookout and surveillance of his wife's residence he has not been sighted within the boundaries of the local Division. '

It was concluded that there was wrong conduct by the Department in that its officers did not advise the complainant that the vehicle had an engine number which was recorded as stolen.

There was wrong conduct also by the Department in not providing an effective cross-referencing system so that the particulars of the stolen car from Victoria were collated with the details of the New South Wales vehicle.

Failure to make further enquiries of the person effecting registration or of the vehicle to determine whether it was stolen was also wrong; as was failure to follow up with the Police the enquiry as to the vehicle that had been made on the 15th May, 1980.

In conclusion the following recommendations were made:

(1) The Department should completely re-examine the system of motor vehicle registration to prevent the type of mistake or fraud that occurred in respect of the registration of the vehicle in New South Wales. This was subsequently done.

(2) The Department should completely re-examine the system of computer records that is conducted with the co-operation of the Police Department so as to provide for immediate follow up of errors that are brought to notice and for the provision of the information sought in such follow up. This also has been completed.

(3) The Department should compensate the complainant for his loss. He stated he paid $2075 for the motor vehicle and when subsequently contacted by the true owner, was asked by her to pay a further $1800. He indicated that he could not possibly do this and he subsequently negotiated to purchase the vehicle for $1200. He thus paid out in all a sum of $3275. Whilst the vehicle was held by the Police he claimed that the general condition of the car and the engine deteriorated so that his loss as the $1200 paid to the true owner plus the loss in value of the car which he estimated as $300. In all the complainant stated that he lost $1500 on the transaction. The Commissioner indicated that the Department does not admit liability, however, as the registration of the vehicle occurred following an error made by the Department's officers and would not have been registered if such had not occurred, and as the information given to the complainant was incorrect and led to his loss, it was recommended that an ex-gratia payment be made.

Consultation was held with the Minister and the Under Secretary, Ministry of Transport by the Ombudsman. The Minister indicated as a result of the report he had raised with the Department its registration procedures and also brought forward the topic at a subsequent meeting of the Australian Transport Advisory Council (a biannual meeting of Ministers and Senior Public Servants responsible for transport matters).

In conclusion, the Minister indicated that the Department was considering the granting of an ex gratia payment.

The Department subsequently advised that $1200 had been paid to Mr P-- and that its systems had been improved to prevent similar occurrences in the future. These changes included the banning of giving such information by telephone and requiring persons requesting details of vehicles to apply and pay a search fee.

CASE NO. 17

DEPARTMENT OF MOTOR TRANSPORT

Taxi Drivers' Seniority Register

Over a number of years this Office has received complaints from taxi-drivers over their exclusion from the Taxi-Drivers' Seniority Register. Inclusion in the register entails the allocation to the person of a taxi-plate. These are worth about $50,000 on the open market. Those eligible are (most recently) applicants who are employee taxi drivers who have worked as such for 40 hours a week over the last 15 years with no breaks in employment exceeding an aggregate of 6 months.

The Department, in compiling the Register checks three items:-

(a) The Department's traffic conviction records which can exclude an applicant.

(b) The records of ownership of taxis.

(c) The taxi-drivers' licence applications over 15 years.

It is this latter condition which is the key to persons getting onto the register. Each of the licence applications have a place on it upon which the applicant indicates the hours he has worked and the owners for whom he has worked and this is signed (as verification) by one of the owners in question.

From the complaints received by this Office and the admissions made by Senior Departmental staff it is clear that:-

(1) The statements as to hours worked made by applicants are not verifiable by the Department.

(2) Where more than one owner is involved, a single 'verifying' signature is likely to be inadequate and not based on actual knowledge.

(3) It is, at least in principle, possible for a non-driver to have acquired a plate. These statements are not made on oath.

(4) There could be many reasons (e.g. tax) why a driver might not correctly complete the forms, especially early in his career.

Notwithstanding the existence of an appeal procedure established at the instance of the previous Ombudsman the present procedure seems open to abuse and inequitable.

The register is presently the subject of a review, along with other matters, being undertaken by the Department into the administration of the taxi industry. It is to be hoped that the complaints investigated by this Office will be considered in that review.

CASE NO. 18

MUSIC EXAMINATIONS ADVISORY BOARD

Deniai of Natural Justice

The complainant was removed from the panel of examiners without warning, without an opportunity to defend herself and subsequently was unable to obtain a clear statement of the reasons for her removal.

By way of explanation it was said that the Board was concerned at "the consistency of standards being applied by the complainant" and that the then Chairman had been asked to discuss the matter with her in 1978 and that at an annual review in 1980, her performance as an examiner was again raised.

The complainant said she had responded to all complaints put to her and that the Board have never indicated that they were not satisfied with her explanations, although the Board claimed this did not imply that it *was* satisfied.

The decision was explained as follows:-

"In taking the action it did the Board paid particular attention to (the complainant's) examining performance in the two years since the Chairman had occasion to speak to her . . ., it had before it various letters of complaint and (the complainant's) responses

and the record of examinations conducted. From this material the Board exercised a professional judgement on the performance of an examiner and determined that, in the interests of students, it should not continue her name on the list of eligible examiners."

Answers were sought to the following questions:-

1. Did the complainant receive any warning prior to her removal that such a possibility was being considered?
2. Did the complainant have an opportunity to put her case to the Board?
3. Did she receive a detailed statement of reasons for her removal?

The replies were:-

1. As the Chairman of the Board had retired they were unable to ascertain whether he specifically warned the complainant in 1978 that an annual review could lead to the removal of her name from the panel, although a 1977 circular warned that examiners would be engaged only if they had demonstrated appropriate capacity.
2. The complainant was not invited to address the Board on the subject of her consistency of standards.
3. The complainant was not given an itemised list of each individual case where her marking varied from what, on the basis of other evidence, might have reasonably been expected.

An assurance was given that the complainant's performance "was assessed most carefully by her peers".

The conduct of the Board was found to be wrong in terms of the Ombudsman Act in that the complainant was denied natural justice in the following respects:-

(a) She was not warned that she was likely to be removed from the list of examiners;

(b) She was not given an opportunity to argue her case before she was removed from the list;

(c) She was not given a detailed explanation of the decision, where one could be expected.

It was recommended that the complainant be given details of the case against her and an opportunity to put her case to the Board, and that in future examiners be warned of the possibility of exclusion and opportunity, where this is proposed, to dispute the case put against them.

A draft report to the above effect was given to the Ministry of Education in November, 1982. By June 1983 the Board was moving to implement the recommendations of the Ombudsman.

CASE NO. 19

NATIONAL PARKS AND WILDLIFE SERVICE

Delay in Replying to Correspondence

Mr Jordan, Executive Director of the Associated Country Sawmillers of New South Wales complained to the Ombudsman that he had written to the Director of the National Parks and Wildlife Service on 18 December, 1981, 3 February, 1982, and 9 March, 1982, but had received no replies to his correspondence. Mr Jordan was of the opinion that his requests to the Director for information were reasonable and he sought the Ombudsman's help in expediting a reply.

Telephone enquiries were made and this Office was informed that a reply had been prepared and that it would go out shortly. Three weeks later the reply had not been received by Mr Jordan and he advised this Office. Further enquiries were made and a reply was received on 17 May, 1982. This reply left some of Mr Jordan's request for information unanswered. A further reply was received on the 18th May. Mr Jordan received no apology or explanation for the delay.

The matter was raised with the Director who advised that as Mr Jordan had also made representations to the Minister on related issues, it was decided not to reply to Mr Jordan's two previous letters (the Service has no record of Mr Jordan's letter of 9 March, 1982) until the result of the deputation to the Minister. The Director conceded that the replies to Mr Jordan's letters were

processed slowly but this was not the result of unwillingness to provide information but rather the need to provide accurate information consistent with sensitive matters being discussed at Ministerial and Cabinet level. As well there was a lot of pressure on staff members due to staff limitations operating in the Service and the cuts imposed in staff establishment.

Mr Jordan disputed the Director's assertion that the delay had been caused because his questions concerned matters of policy. He advised that his questions were more about departmental procedures and that the provision of a photostat document by the Service substantiated this point. He said that the deputation to the Minister was not concerned with the departmental procedures which were the subject of the correspondence to the Service.

It was found that the delay was unreasonable and that the receipt of Mr Jordan's letter should have been acknowledged at least, and that those questions which were matters of fact, should have been answered. Although the information supplied by the Service helped explain the cause for the delay, it did not excuse it.

It was recommended by the Ombudsman that:

(i) an acknowledgement system be introduced;

(ii) "that a review system be set up to ensure that all letters receive replies other than acknowledgements, within three months of their first being received";

(iii) "that if any letter has not been answered fully within three months, the reply, when sent, should contain a courteous apology for the delay and briefly set out the reasons for it."

The Director advised:

"I am concerned at the situation which has developed and will be looking at ways to improve the position. Accepting that there will be no practical way to eliminate delays, I would certainly be amenable to issue of an instruction along the lines of recommendation (iii) . . .

In the majority of cases I understand that apologies for delays would already be included in late replies as a matter of course. It is most unfortunate that this was not done in the letters to Mr Jordan."

At a later date the Ombudsman was advised by the Director that "arising from the recommendations made in your report procedural changes are being introduced and will be promulgated in the Service's February Monthly Circular to all staff". These included:

(a) "All staff are expected to use discretion to see that acknowledgements are sent to letters which will clearly take some time to answer or where some special factor suggests that good public relations plainly will be aided by an acknowledgement."

(b) "Staff must make every effort to see that letters are replied to within three months."

(c) "In the event that a letter is not answered or fully answered within three months of receipt, the reply must contain a courteous apology for the delay and briefly set out the reasons for it."

It is expected that the instructions issued by the Director to deal with future correspondence should help overcome the problems highlighted by Mr Jordan's complaint.

Case No. 20

STATE ELECTORAL OFFICE

Army Reserve Member's Excuse for Failure to Vote

A complaint was received from Mr A, a member of the Army Reserve, that he faced a fine for failing to vote despite having sent a written excuse to the Electoral Commissioner. His excuse was found insufficient, and he could not understand why. He explained in his letter to the Ombudsman that on the polling day concerned he was at a camp with the Army Reserve. He said:

"When preparing to attend this camp we were advised by officers that we would be transported to the election booths to vote. But as it happened I was out on an exercise and injured my leg; another commando who was also injured and myself were then left to

look after the gear at our campsite on the mountain. When the men returned to the camp at approximately 6.30-7 pm we were told the other men had been taken to Gosford to vote, they had forgotten about us. We were told 'it's too late now — don't worry about it'."

Mr A. felt he had answered honestly the Electoral Commissioner's question as to why he failed to vote, and did not know why he had received a notification that his reason was held not to be a valid and sufficient excuse.

Enquiries to the State Electoral Office revealed that the excuse given by Mr A. on his non-voter's notice was far less informative than the letter quoted above. It consisted of one sentence declaring he was on an Army Reserve Camp at Mt White and was unable to get access to voting facilities.

This excuse was found insufficient in view of the fact that special arrangements had been made by the Electoral Office for Army Reserve members to register absentee votes at the nearest polling booth or make arrangements for postal or pre-poll voting.

After considering the full story of Mr A's injury and consequent inability to vote, the Principal Returning Officer exonerated him and said no further action would be taken.

The Investigation Officer was able to tell Mr A. he would not be fined.

Mr A's case illustrates the wisdom of telling the full story in the first place when seeking special consideration from an official body.

CASE NO. 21

STATE RAIL AUTHORITY OF NEW SOUTH WALES

Confusion over Travel Concessions for Pensioners

Mr N., a pensioner living in Tweed Heads, New South Wales, and in receipt of a Service Pension issued by the Brisbane office of the Department of Veterans' Affairs, wrote to the State Rail Authority of New South Wales requesting information on Pensioner Travel Concessions. The State Rail Authority unfortunately overlooked the fact that Mr and Mrs N. were residents of New South Wales and wrote in terms of their being Queensland pensioners visiting New South Wales. The State Rail Authority advised "that the NSW Government has approved the issue of temporary NSW Transport Concession Fare Certificate to visiting pensioners from Queensland provided their temporary residence will be of a duration of two months or more and that they are in receipt of one of the qualifying pensions."

Some telephone enquiries were made in an attempt to clarify the matter and from the information supplied by the State Rail Authority it appeared that because Mr N's Australian pension was processed in Queensland he could not receive the benefits normally available to residents in New South Wales even though he resided permanently in this State. Additionally, because he was a resident of New South Wales, he could not receive the benefits normally available to visitors from Queensland (despite the State Rail Authority's suggestion in its letter that he could obtain temporary New South Wales Transport Concession Fare Certificates). In other words, due to the administrative accident of having had his pension processed in Brisbane, Mr N. appeared to be deprived of benefits to which he would otherwise be entitled.

This information raised the perplexing issue of what could be done for Mr N. and other pensioners living in border towns of New South Wales who, for administrative reasons and convenience, apply to the relevant pension Head Office closest to their town but in another State for the processing of their pension and as well, for pensioners who received their pension whilst residing in another State and then moved to New South Wales.

The State Rail Authority explained that "so far as pensioners who receive benefits administered by the Commonwealth Department of Social Security are concerned, they are not permitted to register in a State other than the one in which they reside, irrespective of whether they live in a border town or not. However, the situation with the Commonwealth Department of Veterans' Affairs is different in that pensioners registered with that Department may elect to use the most convenient capital city as their centre of administration for medical treatment and payment of pensions, etc., even though this may be another State."

Furthermore, this Office was advised, if pensioners moved to New South Wales from another State the system of issuing a temporary New South Wales Transport Concession Fare Certificate to eligible pensioners overcame the problem of transferring residence from one State to another. Once residence was taken up, a permanent NSW Concession Fare Certificate would be issued.

The State Rail Authority contacted the Department of Veterans' Affairs and arranged for Mr N's entitlement to be sorted out. The Brisbane office of the Department of Veterans' Affairs subsequently issued Mr N. with his NSW 1983 Concession Cards and Rail Travel Vouchers resolving the matter to Mr N's satisfaction.

CASE NO. 22

STATE RAIL AUTHORITY OF NEW SOUTH WALES

Delay in supplying information

Mr K. had contracted to purchase a block of land in a subdivision, the approval of which was being delayed by Coffs Harbour Shire Council pending formal advice from the State Rail Authority that it had no objections to certain drainage proposals involved in the subdivision. The State Rail Authority approval was necessary as the proposed subdivision adjoined railway property and any flood overflow would affect railway land. The request for advice had been made by the developer's consulting engineers on 3rd May, 1982. Mr K. complained to this Office and advised that he could not begin building a home until the matter was resolved and that his neighbour was in a similar position. Mr K. had established through his own enquiries that the State Rail Authority was responsible for the delay and wrote to this Office in an attempt to get the matter resolved.

Enquiries revealed that the developer had submitted a development application to Coffs Harbour Shire Council on 11th August 1980. The application had been approved subject to compliance with certain conditions imposed by Council. Although verbal agreement had been obtained from the State Rail Authority on 3rd May 1982 as the result of an on-site inspection, Council had advised the developer's consulting engineers that it would be necessary for the State Rail Authority to agree in writing before Council approval could be issued.

The consulting engineers wrote to the State Rail Authority office at Grafton on 3rd May 1982 supplying necessary calculations and requesting written confirmation, as the Council would not release their approval or otherwise until such advice was received. An amended letter was sent to the State Rail Authority on 18th June 1982 advising that no changes were now proposed and reiterated that Council still required them to produce written advice. An early reply was requested.

Numerous requests for comments were made by this Office to the State Rail Authority over a three month period. However, these attempts were unsuccessful until a formal inquiry which required the attendance of three senior officers at the Ombudsman's Office was instituted. An explanation for the delay in responding to the complainant and this Office was sought.

The inquiry revealed the sequence of events to be as follows:

(i) On 15th June 1982 the Grafton Office sent to the Chief Civil Engineer at Head Office a request for advice regarding an "application . . . to provide flood overflow on Railway Land." A further submission was sent on 22nd June 1982. The Grafton Office advised that it had no objections to the proposed scheme and requested Head Office to advise Council as soon as possible.

(ii Both these submissions were incorrectly directed to the Design Section. On 30th June 1982 they were then rightly forwarded to the Track Production Section where they sat in a pigeonhole until 26th November 1982.

(iii) A request for the matter to be expedited was made by the Grafton Office on 29th September 1982. Previous correspondence was requested by the Track Production Section but none could be located and the Grafton reminder also sat in a pigeonhole or a loose papers in-tray.

(iv) The Grafton Office's submissions of June were later located and sent to Records on 26th November 1982 for a file to be created. These papers were later consolidated with the reminder and marked to the attention of the Principal Surveyor on 16th December 1982.

(v) Although Mr K.'s complaint had been raised with the Authority by this Office on 27th October 1982, the Chief Civil Engineer advised that he had not learnt of the complaint until approximately 12th January 1983.

(vi) A letter was sent to the consulting engineers on 24th January 1983 and negotiations with Council regarding the subdivision were able to proceed.

The inquiry disclosed that no substantial action had been taken on the matter between 30th June 1982 and 16th December 1982. One of the senior officers questioned made this revealing comment to the Ombudsman:

> "Look, if you saw some of the things that happen down at our place, Mr Masterman, nothing is extraordinary to be quite honest. Strange things happen — this is a crook one".

A specific employee of the State Rail Authority was, according to the senior officers, to blame for the failure to provide replies to the Ombudsman's Office as well as the delay in general. The person in question had, it was explained, been experiencing trouble coping with the job for some time but had held the position for about 18 months following a promotion.

The following conclusions were reached:

1. The State Rail Authority has a moral obligation to deal with requests for information such as that made by the consulting engineers, within a reasonable period of time.
2. The Head Office, Way and Works Branch, was negligent in dealing with this complaint. The submissions from the Division Engineer, Grafton, a complaint by the owner to his local Member, a complaint by a concerned resident affected by the delay and a complaint by Mr K. through the Ombudsman's Office should have been sufficient to alert that Branch to the fact that there was some sort of problem in the area. Yet as late as 8th February 1983, a letter was sent by the Head Office employee in question to Grafton requesting immediate action on the matter despite the fact it had been awaiting attention in Head Office for seven (7) months in his own section.
3. There was inordinate delay by the Track Production Section in processing the consulting engineer's request for information and in locating the cause for the inaction. This delay persisted despite follow-ups from the Grafton Office by letter and telephone, despite complaints from affected persons and despite the intervention of this Office. The papers were not located and a file created until 26th November 1982, and then the file was not acted upon, other than referral to the Principal Surveyor, until January 1983.
4. The investigation of complaints raised by this Office also leaves a lot to be desired. In this instance a complaint about the efficiency of the Way and Works Branch was given to the Way and Works Branch to investigate, and the officer nominated as being at fault in the matter and responsible for the delay was given charge of the "investigation", for want of a better word.
5. A serious communication problem would appear to exist between Head Office and its District Officers if, despite reminders and other follow-up procedures, no action is taken. Some decentralization of responsibility could be of value.

The conduct of the State Rail Authority was found to be wrong in terms of the Ombudsman Act as:

(i) The Authority failed within a reasonable period of time to give its approval or disapproval to proposed changes in piping requirements in respect of a subdivision application which adjoined railway land.

(ii) There was inordinate delay in dealing with the request for information within the Way and Works Branch in Head Office. Such delay, given the facts disclosed by the investigation, was unreasonable.

(iii) There was further inordinate delay in ascertaining the actual situation and source of the problem following receipt of complaints from the developer's local Member, a concerned resident and this Office.

It was recommended, among other things, that:

> "A management review of the administrative procedures involved in the processing of such requests for information be carried out and that consideration be given to the drawing up of guidelines specifying what can be handled at a district level and what must be referred to Head Office."

A Section 26 Report was prepared and forwarded to the Minister for Transport. A consultation was held with the Minister and he indicated that he felt one employee of the State Rail Authority had been unfairly saddled with the blame when the system would appear at fault. The Minister agreed with the recommendations and was appreciative that the Report had brought this matter to his attention.

CASE NO. 23

WATER RESOURCES COMMISSION

Delay in processing a licence application

At the time Mr D. complained to this Office, New South Wales was experiencing the worst drought in recent history and delay in the processing of a licence application to pump water had serious repercussions for those dependent on such licences.

Mr D. had made application for an irrigation licence on behalf of the D. Partnership on 3rd August 1981. On 7th September Mr D. wrote to the Ombudsman to confirm that the application had been received as he had not heard from the Commission. He was advised that his application was being processed and particulars would be advertised as required by the Water Act, as soon as possible. If no objections were received during the allowed period of 28 days an inspection would be arranged "and the licence could normally be expected to be issued shortly after the inspection". He wrote again on 20th October, 1982 requesting information from the Commission as to progress, as more than a year had passed since he'd lodged his application.

When Mr D. wrote to the Ombudsman on 8th December 1982, 16 months after applying for the licence he had still not received any explanation from the Commission for delay. He advised that the application was advertised in December 1981 and that there were no objections. He requested the Ombudsman's assistance as a delay of over twelve months seemed unreasonable, "it may be that the Commission has decided against issuing new licences until the drought breaks. If so, we feel that at least we should be informed that this is the reason for delay".

The Commission gave the following reasons for the delay:

> ". . . is common with other Government Departments and instrumentalities (the Commission) has been operating within restrictive budgetary and manpower limits. Unfortunately, this has resulted in backlogs and delays in processing licence applications in some cases. In addition, because of the very severe Statewide drought, Licensing Officers have had to be increasingly occupied with investigating and follow-up complaints of water shortages, which has further exacerbated the position", and advised that the "licence will now be issued without delay."

Enquiries revealed that five years ago the expected processing period was seven or eight months, but at the time of the investigation 18 months' delay was quite common. Licence applications understandably increase drastically during a drought but and due to budgetary restrictions Commission Staff had decreased. Some delay is necessary, as two statutory 28 day periods for lodging of objections are required and each licence application necessitates an inspection. The Commission policy is to wait until a number of applications have been received for a specific area and then an inspection is arranged. However, the D.'s were given no indication as to the likely period of delay. In fact the Board's reply to Mr D. in September 1981 suggested the licence would be "issued shortly" rather than 17 months later.

No attempt had been made by the Commission to keep the applicant informed about progress or lack of, on his application despite his requests for information it is unlikely that Mr D. would have received any explanation of the delay if he had not complained to this Office.

It was found that there had been inordinate delay by the Commission in the issuing of a licence under the Water Act 1912 and that such delay was inexcusable and unreasonable. The fact that there had been no attempt to keep Mr D. informed of the position in respect of the application, nor to notify him of the reasons for delay in dealing with the application, despite his request for information, was unreasonable.

It was recommended that:

1. "A management review of the administrative procedures involved in the processing of applications be carried out.
2. The following changes be considered for immediate implementation:
   (i) all applicants for licences be made aware that there is likely to be delay, be told the likely period of such delay and be given reasons for this delay;
   (ii) all mail be acknowledged as soon as practicable after receipt; and
   (iii) all licence applications over six months old be reviewed with a view to expediting any outstanding applications and supplying progress reports where necessary to the applicants if further delay is expected".

The Chief Commissioner advised the Ombudsman in April 1983 that:

"Some three months ago I directed that a review of the Commission's Licensing Branch be undertaken by an efficiency review group and in fact some reports have been made by that group".

"I am extremely hopeful that the efficiency review will achieve my aims of reducing the issue time for licences to six months and ensuring the liaison with applicants is more effective".

As a result of the Ombudsman's enquiry into Mr D.'s complaint, it is expected that errors and delay as experienced by Mr D. will not recur and that licence applications will be processed more expeditiously in future.

Case No. 24

DEPARTMENT OF YOUTH AND COMMUNITY SERVICES

Assault allegations — residents' rights

A complaint was received from Mr P., a resident at Mt. Penang Training School, which highlighted the need for development of effective means for residents to be told of their rights with respect to assaults.

Mr P. complained that a particular youth worker employed at Mt. Penang Training School, Mr Brummell had engaged in practices that involved assault, which he described as "swat-the-fly". The incident consisted of residents of 3 Company being required to stand by their beds while a number of the residents ran past them. Those standing were directed to strike those running with the end of their belts which had been removed for this purpose. Residents commented that the boys were hitting as hard as they could, and that one boy had been hit in the face.

Following receipt of a letter from the Ombudsman's Office, departmental reports were obtained and the matter was later referred to the Public Service Board for a disciplinary enquiry under the Public Service Act. The Board found that the evidence showed that:

"(1) Mr Brummell and other boys selected other boys to take part in being 'swatted' in a game of 'swat the fly', rather like 'running the gauntlet'.
(2) The boys selected had been disruptive earlier in the morning.
(3) The fact that the 'game' was to be played was deliberately hidden from a supervising senior officer.
(4) The game was not a genuine group decision, but a decision of a small number. Although a boy could have pulled out, no open option to that effect was given and moral pressure meant that everyone would play.

The Board found Mr Brummell guilty of misconduct and administered a Reprimand".

It is relevant to note that the incident occurred in 3 Company. The residents of that Company were described in the year plan for 1980 as being unsophisticated students who have limited institution or court histories. Many of them entered the school with a history of school failure, unemployment, family breakdown and rejection of social norms.

The Director-General commented that the conduct of Mr Brummell was quite unacceptable, and that disciplinary action would be taken on such conduct when evidence could be advanced to support legal action for breach either of the Child Welfare Act or the Public Service Act.

It was found that there was wrong conduct in terms of the Ombudsman Act on the part of Mr Brummell in that he organised and supervised the 'swat-the-fly' incident.

Perhaps the most critical factor observed from investigation of this complaint was the reluctance on the part of the residents to report or comment on the incident. It was especially significant that Mr P. did not lodge his complaint until just before his discharge from the institution. The most probable reason for the matter not being immediately reported was the risk of repercussions from the residents' immediate officer, Mr Brummell.

For this reason, the report prepared after the investigation recommended that the Director-General of the Department of Youth and Community Services provide advice to residents and staff of all Institutions as to their personal rights in connection with alleged assaults.

In accordance with the recommendations contained in a draft report, the Director-General issued a circular saying:

> "Following a complaint to the Office of the Ombudsman by a resident at Mt. Penang the Ombudsman has asked that a number of matters be brought to the attention of all Superintendents.
>
> Accordingly Superintendents are directed that they:
>
> (a) inform all staff that breaches of rules involved in assaults of residents upon one another and the aiding and abetting of such behaviour by staff could be a breach of Criminal Law and the disciplinary measures that can be taken under the Public Service Act, 1979;
>
> (b) inform all residents that assaults on one another amount to an offence and of the serious consequences that can flow from such actions;
>
> (c) inform all residents when they are first admitted to the Unit of the serious view taken of assaults of residents upon one another and the consequences of such actions. They also should be informed that they have a responsibility to report such happenings to the superintendent;
>
> (d) explain to all residents when they are first admitted to the Unit that they have the right to convey information to the police and/or to the Office of the Ombudsman, particularly if they believe that an officer or the Superintendent does not deal with the matter.
>
> Further, all Superintendents are reminded to check the procedure to be followed in such matters as laid down by the Child Welfare Act and the document titled 'Control and Discipline of Young Offenders'. These requirements need also to be brought to the attention of all staff.
>
> While it is understood that each of the above requirements is usually carried out, they have again been drawn to attention because of a request from the office of the Ombudsman."

The final report recommended that the Department follow this matter up within each of its training institutions for boys and girls. It must make sure that all new residents and new staff are informed of the matters set out in this circular.

The Minister for Youth and Community Services sought reports from Superintendents and Regional Directors setting out the procedures developed for informing new residents and staff of rights with respect to assault. Each institution for boys and girls supplied these details which were conveyed to the Ombudsman, and found satisfactory.

In general, residents are interviewed on arrival at the various institutions and told of their rights under the Ombudsman Act and the method of access. The legal position with respect to assaults is normally explained, along with the responsibility to report any such incidents. New staff members are advised of the legal implications of assaults, and these issues are generally reiterated at regular staff meetings.

CASE NO. 25

BELLINGEN SHIRE COUNCIL

Failure to Repair Bridge

The complainant, one of 32 members of an "alternative society" farming co-operative, said that the Council had refused to repair a bridge on the public road giving access to the Co-operative's property. The bridge had collapsed, but upon approaching Council the complainant was told that Council did not maintain the road and would not repair the bridge. Members of the Co-operative carried out temporary repairs to the bridge to enable continued access to their property.

Investigation by the Office revealed:-

(a) Council's policy "of long standing" was to not maintain dedicated public roads past the entry boundary of the last habitated property on such roads. In this case, Council maintained that the last habitated property on the road was at a mill site approximately 2½ kilometres from the closest entrance to the co-operative's property. The bridge concerned was approximately 2.25 kilometres from the mill site referred to by Council.

(b) The co-operative had been developed without Council's consent.

(c) A number of habitated properties existed on the road at approximately distances of ¼ kilometre, 1¾ kilometres and 2 kilometres beyond the sawmill.

(d) Council had decided, without proper investigation, that properties beyond the sawmill were not habitated.

(e) In terms of its own "long standing" policy, Council would normally maintain the road (including the bridge concerned) to the closest entrance to the Co-operative's property.

(f) Council's consideration of the bridge repair question had been clouded by the position in which it found itself with regard to multiple occupancy development of the Co-operative's property which was a quite separate issue.

(g) Council, during the investigation, decided to repair the bridge provided the co-operative contributed to the cost.

A draft report was prepared finding Council's conduct wrong in failing to repair the collapsed bridge when, in terms of its own policy, it ought to have done so. It was recommended in the draft report that Council repair the bridge at its own cost and notify this Office within six weeks of any action taken or proposed in consequence of the report.

Shortly afterwards the Council had its workmen completely rebuild the bridge at its own cost.

Whilst a final report of wrong conduct was made and sent to, inter alia, the Minister, as the Council had repaired the bridge, no recommendation was made in the final report.

CASE NO. 26

GOSFORD CITY COUNCIL

Delay in responding to Application to operate Mobile Food Van

Mr S. complained to this Office on 6th October, 1982 that Council had failed to consider or reply to his letter of application to establish a mobile food van on a public reserve on Brisbane Water Drive between Koolewong and Tascott.

Mr S. had lodged his application by hand with Council on 13th January, 1982. He rang the Council seven times between the 2nd February and 19th March when he at last heard that an inspection had been done and a report would be given to the Council Engineer on Wednesday, 29th March. The engineer would decide and then write to him.

Having heard nothing by 3rd May, 1982 Mr S. then approached Mr F. Miller, Member for Bligh, to intercede with Council on his behalf. Despite these efforts Mr S. had not had any response from Council at the time of his complaint on 6th October.

A Council officer informed this Office that Mr S.'s letter had been referred to Council's Parks and Gardens Department. While some action within the Council had been taken in inspecting the site for the proposed van, the matter should have been referred to Council's Design Office. Instead, the application remained in the Parks and Gardens Department without a decision being made and without any explanation for the delay being provided to Mr S.

Only after representations from Mr Miller, was the application retrieved from Parks and Gardens and, ultimately, brought before Council for consideration. Council offered no apology to Mr S. for the eleven month delay.

Because Council's delay was inordinately long, and because Council failed to give any reasons for the delay or any apology to Mr S., the Ombudsman found Council's conduct wrong in failing to deal promptly with Mr S.'s application. But for Mr S.'s persistence, it may even have been that the application would never have reached Council meeting for consideration. It was also disturbing that Council, despite letters from Mr Miller to the Town Clerk on 23rd August and 5th October, still took so long to deal with matters.

Following a draft recommendation that Council write a letter of apology to Mr S. for the delay, Council did so. This Office also recommended that Council establish a system for monitoring delays in reply to correspondence to ensure no repetition of this occurrence. Following regular inspection of the Council's books by the Department of Local Government and Lands, Council has now a register in which written complaints relating to lack of acknowledgement or inaction by Council in dealing with a matter are recorded and drawn to the attention of the appropriate department. However, this Office remained concerned that this system must be triggered by a letter of complaint; and that Mr S.'s phone calls were insufficient.

CASE NO. 27

HORNSBY SHIRE COUNCIL

Incomplete Public Exhibition of Draft Local Environmental Plan

In mid-1982 Hornsby Shire Council advertised in the local press that a draft local environmental plan was available for public inspection at the Council Chambers along with the accompanying environmental study and plans of a proposed development. The draft local environmental plan proposed to rezone an area of Pennant Hills to enable the Pennant Hills Baby Health Centre to be rebuilt to provide a full area health service.

There was at the time some local opposition to this proposal, as it meant that the new buildings would encroach substantially on the "village green" adjoining the existing baby health centre.

The basis of the complaint, however, was that the Council failed to observe the mandatory requirements of the Environmental Planning and Assessment Act 1979 concerning the exhibition of the Draft Local Environmental Plan in that not all the advertised documentation was available for public scrutiny.

The investigation of this matter revealed that at least two members of the public were informed that only the plan itself was available for inspection when they went to the Council office due to a misapprehension by a Council officer handling their enquiry.

It is unknown how many other enquirers and potential objectors to the plan were also presented with an incomplete set of documents.

The Shire President, on being advised of this mishap, offered to again submit to the full Council the objections received from the public together with consideration of the conclusions of the environmental study as a remedy. Such a remedy was not considered to be reasonable by this Office as it was clear that some of the objections and submissions received by Council must have been based on the consideration of incomplete facts and therefore constitute less informed views than are generally desirable in such procedures.

Accordingly, on being satisfied that the exhibition was marred and the conduct of the Council in relation to the exhibition was wrong, it was recommended that the Draft Local Environmental Plan be publicly re-exhibited pursuant to Section 66 of the Environmental Planning and Assessment Act 1979.

Shortly after receiving the final report on the investigation, the Shire Clerk notified the Ombudsman's Office that the Council had agreed to re-exhibit the plan together with the relevant review of environmental effects and plans of the proposed development.

CASE NO. 28

KOGARAH MUNICIPAL COUNCIL

Double-charging for Garbage Service

A pensioner complained that Kogarah Muncipal Council had incorrectly charged him for a "double" garbage service in 1970; and he said he had unwittingly paid this charge for twelve years.

The complainant first became aware of and queried the extra garbage charge in 1982. As a result of his approaches to Council, charges for 1981 were adjusted to a single service, however, Council said it was unable to make adjustments beyond January 1981 because a 1980 survey, carried out by Council's garbage contractors, showed that extra garbage had been removed from the complainant's house.

The complainant claimed that he had only ever received one service and provided a statutory declaration to that effect.

Following enquiries by this Office, Council re-examined the situation and decided the complainant should be given the benefit of the doubt which this re-examination cast on the accuracy of the records kept by the garbage contractors. As a consequence, the complainant received a refund of $318 for the payment of an extra service between 1970 and 1980.

CASE NO. 29

MAITLAND CITY COUNCIL

Failure to implement Council resolution

The complainants had been issued with an allegedly incorrect Certificate of Compliance under Section 317A of the Local Government Act. In December 1981 they asked whether Council was prepared to consider the question of compensation. After obtaining legal advice, the Council resolved in May 1982 that the complainants be advised that Council did not consider it had any liability in respect of the claim, and that a copy of the legal opinion be made available to them.

The complaint to this Office was that the Council had failed to answer their initial letter. Following the lodging of the complaint in August 1982, the Mayor replied to our initial inquiries and said that he had personally withheld the reply as he considered the legal opinion should not be made public since litigation could be pending.

The investigation revealed that no attempt was made to rescind Council's resolution in the matter, however, and the Mayor's withholding of the reply caused an unreasonable delay from May to October 1982. The conduct of the Mayor, Alderman Walsh, was found to be wrong in the circumstances and it was recommended that the Council's May 1982 resolution be implemented forthwith.

In response to the draft report on the matter, the Mayor advised in November 1982 that the recommendation had been complied with.

CASE NO. 30

MARRICKVILLE MUNICIPAL COUNCIL

Failure to give reasons for applying a retrospective excess garbage levy charge

The complaint was by the owner of a residential flat block in Marrickville. He complained that the Marrickville Municipal Council had unfairly removed an excess garbage levy rebate on that block of flats without giving reasons and had demanded payment of the rate in retrospect.

The block in question comprised 45 units and was constructed by the complainant's company in 1962. An incinerator was installed to burn the residents' rubbish at the then Council's suggestion with the attraction being a rebate of half the excess garbage levy; the rebate had been enjoyed since the completion of the building.

In April 1981 the Company paid the normal annual fee of half of $2,464.00 for the excess garbage ($1,232.00). Then, the first indication received that the garbage levy rebate for 1981 had been removed was a brief notice from Council, 'Garbage Service Account', dated 23rd November, 1981, in the sum of $2,464.00. A typed note on the bottom of the account simply stated "less paid 22/4/81". No covering explanation was included or other details of what the account related to. The complainant claimed that on receiving the notice he telephoned the Rates Department at Council to inform them that he had paid the $1,232.00 following receipt of the Annual Garbage Levy in April, 1981, and that he couldn't understand the meaning of the November account. He stated he had been verbally advised by the Officer he spoke to that "if he had paid it then he should ignore the statement". However, he did not know the officer's name. He did not pay the account and subsequently on 7th December, 1981 received a Final Notice concerning the charge and threatening legal action if the account was not paid within 7 days. He said that in view of the verbal advice he had previously received he also ignored that notice from Council.

On 22nd February, 1982 after receiving his 1982 notice which showed that the garbage levy rebate for 1982 had been removed, he wrote to Council pointing out the error and requesting an amended rate notice allowing the garbage levy rebate both for 1981 and 1982.

The Town Clerk on 9th March, 1982 replied advising that the Health Inspector had inspected the incinerator in October 1981, and found it did not comply with the Council standards to qualify for the rebate of an excess garbage charge. The letter also mentioned further charges for 1982.

On 15th March the complainant met with Council officers to discuss the matter and on 18th March he received a further letter from the Town Clerk referring to the condition of the incinerator.

After receiving his complaint in this Office inquiries were made at Council. On 13th July, 1982 Council advised that the rebate matter was a "policy" issue which had been first adopted in 1939. Following the introduction of the Clean Air Act, 1961 a number of properties had been informed to stop using the incinerators and the rebate had been removed.

The reply from Council pointed out that it was not requiring the building to comply with the Clean Air Act but simply was using a standard set by that Act to establish guidelines for its Inspectors. The letter went on to say "compliance with the Clean Air Act was optional as far as the owner of the building was concerned, as was the giving of the rebate optional as far as Council was concerned; there being no legal requirement for Council to allow the rebate".

Subsequently Council advised on 11th October, 1982 that it considered that it was its prerogative to discourage the owner from using the incinerator rather than encouraging its use, by refusing to allow the rebate.

As part of the investigation, Council's files were examined and it was noted that no report from the Health Inspector, involved, who had inspected the incinerator in October 1981, was contained on the files.

Further enquiries were made at Council regarding the complaint generally and it was established that 29 residential flat buildings in the Municipality with incinerators had been inspected. The owners had been notified that such incinerators were not acceptable and they had been verbally advised that in 1983 the rebate previously enjoyed would not be forthcoming. Arrangement had been made for amended rate notices to be issued from 1st January, 1983.

As the question of whether or not an excess garbage levy rebate was made is a policy decision of the Council, that aspect was not pursued in relation to the 1982 and subsequent charges.

However, in the complainant's case if he had been aware early in 1981 of Council's policy and that his incinerator did not meet its standards then he could have terminated the employment of the person who maintained the incinerator and directed his tenants to place their individual garbage bins (forty-four) out for collection by the Council. As it was, on receipt of the account in November, 1981 the complainant in good faith accepted that he had paid the full charge for that year and as no explanation was provided to the contrary he, on the verbal advice of a Council officer, did not pay the outstanding balance.

A point of concern was that when the notice of 23rd November, 1981 was sent it contained no explanation as to why the rebate was removed and in fact contained little relevant information. In addition, the follow up notice in December also failed to give the required details for the removal of the rebate and for the retrospective charge of $1,232.00 for 1981.

A wrong conduct report was prepared and sent to the Mayor, Town Clerk and complainant for comment.

Following a consideration of the draft report and its recommendations Council advised that at its December 1982 meeting it had taken a decision to write off the outstanding debt for 1981 in the sum of $1,232.00. Also that its 1939 Policy allowing excess garbage rebates of half the excess garbage charges due on residential flat buildings, which have an efficient system of incineration installed, if such system is certified by Council's Inspector to be satisfactory, no longer applied and was cancelled.

Council's conduct in this matter was found to be wrong in terms of the Ombudsman Act for failing to give reasons for the cancellation of the excess garbage levy rebate until 9th March, 1982 and for levying a charge in retrospect.

It was also recommended further that a proportionate excess garbage levy rebate be allowed by Council, if necessary as an act of grace, for the period 1/1/82 and 9/3/82. That is, until the date when the complainant was formally notified of the removal of the concession.

The Minister indicated he did not wish to consult on the findings and recommendations of the report and on 8th February, 1983 it was published.

Subsequently on 18th March, 1983 Council advised that it had agreed to the further recommendation and made an additional refund of $295.10 to the complainant.

CASE NO. 31

NORTHERN RIVERS COUNTY COUNCIL

Unreasonable connection costs for electricity

Our complainant was the owner of a partly constructed home at Byron Bay. The basis of his complaint was that he was being asked to pay the cost of connecting electrical mains to his home. The complainant alleged this cost was unreasonable as he believed the cost of capital works should be borne by the body which received the remuneration from the power consumed.

Preliminary inquiries of the Northern Rivers County Council revealed that the Council was prepared to extend overhead mains to give supply to the complainant's residence at nil contribution. The complainant had been asked to pay a contribution because Byron Shire Council was endeavouring to have the mains in the area installed underground.

In a letter to this Office the County Clerk of Northern Rivers County Council stated:

> "The unfortunate position for (the Complainant) is brought about by the indecision of the Byron Shire, as the Shire has not been able to make a final decision as to whether or not they are prepared to pay this Council the added cost of installing underground mains. The original developer of the subdivision paid for the overhead reticulation and this is the course of action that this Council would follow if it was not for the request from the Byron Shire that they wish to delay proceedings until such time as they have exhausted all avenues of exploration in regard to having the mains installed underground."

Inquiries of Byron Shire Council revealed that when the land was originally subdivided it was a requirement of the Council that arrangements be made, by the developer, with the Mullumbimby Municipal Council, the then power supply authority, for the installation of underground power. This was done for the balance of the subdivision but not for the area including our complainant's block.

Following amalgamation of Mullumbimby Municipal Council and the handing over of their control of power supply to the Northern Rivers County Council, a dispute arose concerning liability for the additional costs of providing underground power.

To resolve the matter, Byron Shire Council had proposed a joint scheme with the landowners contributing half the cost. This was the cost which our complainant regarded as unreasonable.

This scheme did not receive the support of all the parties involved so Byron Shire Council resolved to meet the full cost of the work and to have their solicitors investigate whether it had recourse against the developer of the Estate for the payment of the costs which Council would incur.

The matter was thus concluded to our complainant's satisfaction.

CASE NO. 32

NORTH SYDNEY MUNICIPAL COUNCIL

Obstructions removed from footpaths after blind man's complaint

Mr T., a blind pensioner, contacted the Office regarding the failure of the North Sydney Municipal Council to take action against shopkeepers who placed signs and goods on public footpaths which obstructed access for handicapped people.

Mr T. said it was necessary for blind people to follow a guide when going regularly from one place to another. He explained that this could be done by following the edge of the footpath, the building alignment or wall. However, due to the placement of obstacles on the footpaths by local shopkeepers, he experienced considerable difficulty in manoeuvring himself along the streets and, as a result was being subjected to continual verbal abuse by other people who bumped into him. He had also suffered some severe falls.

Mr T., over a period of some two years, had made various representations to Council to try and alleviate the problem, but to no avail. He approached this Office, he said, as a last resort.

The Council was asked to comment about the complaint and the Town Clerk replied:-

> "In April 1981, Council resolved to allow the display of signs and goods on public footways subject to guidelines which were implemented as a Council policy. Council further resolved that the policy and guidelines be reviewed after a period of twelve (12) months.
>
> At the present time this policy is being reviewed by Council and it has been awaiting legal opinion regarding Council's legal liabilities in relation to its policy and guidelines. Legal advice is now to hand and the matter is due for further consideration by Council at its meeting on 26th October, 1982. You will be further advised when a decision has been reached by Council in regard to this matter".

Shortly after, the Town Clerk wrote again and indicated that Council, at its meeting held on 26th October, 1982 had resolved that the policy to allow the display of signs and goods on public footpaths be discontinued and that the proprietors of business premises then displaying items on public footpaths be instructed in writing to remove all items from the footpaths and to cease this practice. Council also resolved that its officers strictly enforce the policy of no goods or signs being allowed on the footpaths.

The Town Clerk said that Council's action should eliminate problems that may have been experienced by handicapped persons using the public footpaths in the Municipality.

One of my officers then telephoned Mr T. and informed him of developments. He expressed great pleasure at the result of this Office's investigation. To ensure the situation had improved, Mr T. was again contacted a few weeks later and he indicated that no further problems were being experienced. In view of this, the investigation was discontinued.

CASE NO. 33

PARRAMATTA CITY COUNCIL

Unsatisfactory responses to letters requesting information

A good deal of publicity over the past few years has been given to efforts of the Friends of Parramatta Park and other groups and individuals in opposing the construction of a sports stadium in Parramatta Park. The State Government at one stage passed legislation to enable the stadium to be constructed conditional upon the observance of the usual procedures with respect to securing development consent from the local Council. That consent was eventually gained, although the consent was overturned on appeal following a successful intervention to the Land and Environment Court by an office bearer of the Friends of Parramatta Park.

During this controversial public debate, the Friends of Parramatta Park complained to the Ombudsman that the Parramatta City Council had failed to properly reply to seven letters written to the Council over the latter half of 1981 which sought information which they considered to be of a public nature.

In each case, the letters had been acknowledged and the Friends informed that Council had resolved that their letters be "received and noted".

When the Town Clerk was questioned on the meaning of these words, he said that in Parramatta City Council they indicated firstly that the Council acknowledged receipt; secondly that the contents had been noted; and, thirdly, that in effect, it had directed that no action was to be taken thereon. The Alderman who proposed or seconded the Council resolutions in reply to six of the letters was of the belief that the expression meant a polite 'no' or polite refusal, but that the matter was not dead.

He further informed this Office that each of the relevant items went through Council in about ten seconds and that the votes according to his memory were unanimous. His explanation of the use of the expression in relation to letters from the Friends of Parramatta Park was that he believed the matters were sub judice.

It was not demonstrated during the course of the investigation that the information requested from the Council by the Friends of Parramatta Park was in any way related to the Court proceedings that were held out as making the matters sub judice. Even so, the Ombudsman believed the appropriate course of action, considering the particular circumstances of the bodies involved at that particular time, was to seek legal advice on the issue and where there was no legal reason to withhold the requested information, to provide it.

Despite the fact that the requested information was supplied to this Office as a result of the initial enquiries made to Council, the Council's conduct in using the expression "received and noted" in replying to the letters from the Friends of Parramatta Park was found to be wrong in terms of the Ombudsman Act in that it was unreasonable.

The recommendation that the expression be used with caution in Council business and that it not be used when a more informative reply is able to be given without unreasonable effort and there are no other circumstances that would prevent or make it unwise of Council to provide information was adopted by Parramatta City Council following the Ombudsman's final report.

CASE NO. 34

PENRITH CITY COUNCIL

Minimum Habitable Floor Level

The complainant, Mr H., alleged that due to Penrith City Council's failure to specify the required minimum habitable floor level on his Building Permit, and also due to Council's alleged incorrect advice as to that level, the floor level of his house was built below the minimum level required by Council. Further, that on this basis Council refused to give final approval to the house.

The matter was investigated by this Office and on the basis of the information available it was found that the complainant and his builder had taken all reasonable steps to obtain information about flood and floor levels and to obtain Council's approval for the details of the erection of the complainant's dwelling. In the circumstances, it would have been reasonable for the complainant and his builder to assume that all relevant Council requirements had been included on the Building Permit and to proceed as they did to construct the dwelling in accordance with that Permit.

In his Report on this complaint the Ombudsman found that due to Council's failure to include a notification on the Building Permit of its required minimum habitable floor level, the complainant's dwelling was constructed below this level. This placed the complainant at a disadvantage in relation:

(i) the insurability of his dwelling;

(ii) the risk of damage or dislocation from flooding;

(iii) the likelihood that Council would approve the rebuilding or repair of the building should it be damaged by flooding at some future date;

(iv) the resale of the property; and

(v) the finalisation of a mortgage on the property prior to the house complying with Council requirements.

In all the circumstances of the case, the Ombudsman recommended that the Council agree to bear the costs of raising the complainant's dwelling so that the floor level would be at or above the Council's required minimum habitable floor level.

In response to the Ombudsman's Report in this matter, the Council took the view that it was not liable for the cost of raising the complainant's dwelling on the basis that:

". . . the dwelling does, in fact, comply with Council's requirements."

Council's reply went on to say:

"Although it is true that Council initially expressed a preference that the minimum habitable floor level of the dwelling be 500 mm above its adopted flood level, in this particular case, Council has agreed to allow the dwelling to remain as erected in view of the fact that the minimum habitable floor level is not below Council's adopted flood level."

It would appear that Council's stand in this matter was based on advice from the Government Insurance Office's Solicitor which quoted a statement from a report by R. J. Givens & Co as follows:

". . . It will be seen therefore that the habitable floor level of Mr H.'s dwelling is in fact 14.8 metres and thus may be regarded as being at Council's adopted flood level."

The relevance of the above statement was somewhat obscure as the whole issue revolved around the fact that the floor level of the complainant's dwelling was constructed at a level which was 500 mm below Council's *minimum required habitable floor level*. In this regard Council had previously required the complainant to raise the floor level of the building, and at all previous times had treated the "subject minimum habitable floor level" as being non-negotiable.

This raised a further matter of concern relating to the almost "Catch-22" situation in which the complainant found himself. On the one hand the Government Insurance Office had advised the Council that the complainant did *not* have a valid claim, on which advice the Council based its stand in the matter at that time. On the other hand, the complainant had been verbally advised that the Government Insurance Office would *not* insure his home against the risk of damage occasioned by flooding.

After these considerations were raised with the Hon. A. R. L. Gordon MP, Minister for Local Government and Lands and with the Council, the complainant advised this Office that the Government Insurance Office had agreed to provide sufficient money to allow him to satisfactorily resolve the problem.

CASE NO. 35

RANDWICK MUNICIPAL COUNCIL

Failure to enforce conditions of approval

A complaint was received alleging that Randwick Municipal Council had failed to enforce conditions of building approval, relating to drainage requirements, in respect to a dwelling which was under construction. The complaint was later extended to include Council's failure to include conditions of approval to mitigate likely adverse effects on the drainage of adjacent properties.

The complaint was investigated by this Office through correspondence, perusal of the relevant Council files, a formal enquiry under Section 19 of the Ombudsman Act, and an inspection of the site.

During the Ombudsman's inspection of the subject properties it was noted that:-

(i) given the steep slope of the land and the level of fill placed on the subject property, it would have been foreseeable by Council that stability and drainage problems would arise during and after the construction of the proposed dwelling;

(ii) there were obvious signs of scouring of the neighbour's land due to run-off from the subject property and it was apparent that a significant amount of fill material had been washed onto the neighbour's property;

(iii) the bank around the area of fill located on the subject property had collapsed towards the neighbour's property;

(iv) no attempt had been made to erect a retaining wall around the area of fill; and

(v) the temporary drainage ditch which was located adjacent to the building being erected had no apparent constructed outlet and would, in the normal course of events, overflow onto the neighbour's property after heavy rain.

Under the provisions of Section 313 of the Local Government Act 1919, Councils are required to take several factors into consideration prior to determining any application for approval for the erection of a building. These factors include:

(i) the drainage of the building;

(ii) "whether the site is or probably will be subject to subsidence or slip"; and

(iii) "whether the erection of the building adversely affects the drainage of adjoining sites".

On the basis of this Office's investigation, the Ombudsman was of the opinion that at the time of Council's consideration of the application to erect the subject building, it would have been foreseeable that the erection of the building would adversely affect the drainage of the adjoining property. Further, that the area of fill on the subject site would be subject to subsidence or slip unless properly retained.

Perusal of the building approvals issued by Council on 2 April 1981 and on 6 August 1981 indicated that *no* conditions were included relating to:

(i) the provision of a retaining wall around the area of fill. In this regard the Council advised that it was not aware of any power contained in the Local Government Act which would allow it to require the construction of a retaining wall. However, Council had obviously overlooked the provisions of Section 314 of the Local Government Act, and Clauses 4.2(1) and 31.3 of Ordinance 70. As mentioned above, at the time of consideration of the amended Building Application, it would have been foreseeable that the area of fill would be subject to subsidence or slip unless properly retained. The appropriate course of action would have been for Council to have included such a requirement in the conditions attached to the Building Approval issued on 6 August 1981.

(ii) the prevention of adverse drainage affects adjoining sites during the erection of the building; and

(iii) the proper drainage of the subject land. In this regard, the Council advised that ". . . building when erected would not adversely affect the adjoining premises. There is less water on the site because of the roof catchment of the building", and that the matters mentioned in points (i), (ii) and (iii) above, ". . . will all be fully covered on the completion of the building and that is the usual time to carry out such work. The usual thing done during building operations is the provision of temporary drainage".

Whilst the Ombudsman had no argument with the "provision of temporary drainage", he was convinced that Council did not adequately consider the foreseeable drainage problems and did not include conditions in the Building Approval requiring the builder to ensure that the drainage of adjoining sites was not adversely affected during the *erection* of the building. This is a matter which council is required to consider by the provisions of Section 313 (1) (m) of the Local Government Act.

A full review of all the information available indicates that the drainage problems experienced by the complainants were significantly exacerbated by Council's failure to take action to enforce the drainage requirement incorporated in the conditions attached to the approval.

Under the provisions of Clause 8.1 (3) (d) of Ordinance 70 to the Local Government Act, a "general plan" of a building (which must be lodged with a Building Application) shall:

"(d) show the levels of the lowest floor and of any yard or unbuilt open area belonging thereto and the levels of adjacent ground";

Perusal of all the Building Application plans lodged with the Council in respect of the subject site indicated that the information required by Clause 8.1 (3) (d) was not supplied. Bearing in mind the geography of the area, the characteristics of the surrounding development and the obvious possibility of drainage problems and obstruction of views, the failure by Council to require the applicant to supply original and finished ground levels was significant, and (from the point of view of the complainant) unfortunate.

In a report on this matter, the Ombudsman recommended that:

(a) Council take urgent action to ensure the immediate construction of a retaining wall around the area of fill;

(b) Council take urgent action to require the immediate connection of the rear down pipe (on the premises under construction) to the street gutter or to an inter-allotment drain;

(c) Council consider the making of an ex-gratia payment to the neighbour Mr W. . . to cover the costs of all damage and nuisance arising out of the drainage problems caused by the filling of land and the construction works;

(d) Council instruct its servants to require strict compliance with the provisions of Clause 8.1 (3) (d) of Ordinance 70 in situations where it is likely that original and finished ground levels could be significant to Council's deliberations on a Building Application;

(e) Council comply with the provisions of Section 313 of the Local Government Act, and in particular subsection (1) (m), in the consideration of all Building Applications.

(f) Council instruct its servants to ensure that accurate information is furnished to the Council (and the Health and Building Committee of Council) in respect to applications for approval to erect buildings.

A copy of the Report was forwarded to the Mayor of Randwick Municipal Council, Alderman J. F. Ford, who later advised that action was being taken in respect to most of the recommendations with the exception of recommendation (c) that:

> "Council consider the making of an ex-gratia payment to Mr W . . . to cover the costs of all damage and nuisance arising out of the drainage problems caused by the filling of land and construction works . . ."

In this regard, Alderman Ford advised that Council had taken its Solicitors' advice in this respect and would not make any payment to Mr W. . . The advice furnished to Council by its Solicitors was, inter alia:

> ". . . it appears that the Ombudsman is relying for his suggestion that Council reconsider its previous decision in relation to any ex-gratia payment to the fact that in his view Council is enjoined pursuant to the provisions of Section 313(1)(m) of the Local Government Act 1919 to give consideration to the likely effect of building works on one site to its effect on adjoining sites during the carrying out of the erection of the first mentioned site.
>
> With great respect we do not agree that the wording of the sub-section can have this extended meaning. To do so would require the Council in dealing with an application for approval of the erection of the building in sub-clause 1 to be vested with insight as well as hindsight for every combination of circumstances whether caused by the Builder, naturally or other extraneous forces on the building itself.
>
> In our opinion sub-section M means what it says namely that it is directed to the affectation of 'the drainage of adjoining sites by the erection of the building i.e. when erected and not the affectation of adjoining sites by anything emanating from the building site'.
>
> Accordingly we are of the opinion that Council was correct in considering that any claim by Mr R. W. . . of . . . arising out of water and silt damage to his property was against the owner/builder S . . . arising out of a private nuisance."

Section 313(1)(m) of the Local Government Act enjoins a Council, prior to determining an application for approval for the erection of a building, to take into consideration:

> "Whether the erection of the building adversely affects the drainage of adjoining sites."

The background to this matter is that in 1980 the provisions of Section 313 of the Local Government Act 1919 were amended by the inclusion of sub-section (m) in response to a recommendation made by the former Ombudsman, Mr K. Smithers. As outlined in the former

Ombudsman's 1979 Report, this recommendation arose out of an investigation in which the former Ombudsman pursued the following question:

> ". . . whether a Council, in imposing conditions on a building approval, should have regard to problems that fulfilment of such conditions might cause an adjoining land owner."

The former Ombudsman put forward his views in the following terms:

> "I was firmly of the view that a Council should take such matters into account and, if necessary, impose additional conditions to require the person seeking approval to take whatever action might be needed to remove or alleviate the problems that might be caused to his neighbour."

In February 1979 the former Ombudsman wrote to the then Minister for Local Government about this matter and received the following reply inter alia:

> ". . . to resolve the matter I am prepared to recommend to Cabinet an amendment of the Act to specifically empower councils when considering building applications to take into consideration measures to prevent development adversely affecting the drainage of adjoining property."

After considering the aims of Section 313 and in particular sub-section (m), the Ombudsman was of the opinion that the correct interpretation of the sub-section must include the foreseeable effects of building works undertaken during the erection of a building, as well as any affectation that could foreseeably occur once the erection of such a building had been completed. In the circumstances, any other interpretation would be inconsistent with the aims of the sub-section.

Case No. 36

STRATHFIELD MUNICIPAL COUNCIL

Inaction over unauthorized use of residentially zoned land

The complaint alleged that commercial premises in Parramatta Road, Homebush, were 'creeping' onto properties in adjoining Powell Street in contravention of zoning regulations and that the Council had ignored these irregularities.

The investigation revealed that the development of the Western Distributor which runs down the northern side of Powell Street and the commercial use of two properties for car parks had affected the amenity of the area. Further, the investigation revealed that:-

- from as early as 1974 the Council considered it desirable to rezone Powell Street for commercial purposes.
- that Council was aware from as early as 1980 of the unauthorized use of one of the properties as a car park
- that Council had commenced and then abandoned injunction action to prevent the unauthorized use of this property
- that the Council had delayed the consideration of the need to rezone Powell Street east of Underwood Road for a considerable time.

The conduct of the Council in failing to take effective action to find a solution to the obvious planning problem affecting Powell Street east in that it delayed proper investigation and consideration of the matter, and in doing so, effectively condoned and encouraged unauthorized use of the land in Powell Street, was found to be wrong in terms of the Ombudsman Act. It was found to be unreasonable, unjust and improperly discriminatory to ratepayers in Powell Street.

It was recommended that Council act to resolve the problem once an investigation and report on the zoning of the street was completed. At the time of writing, Council had commissioned planning consultants to study the area and prepare a local environmental plan for this purpose.

CASE NO. 37

WINGECARRIBEE SHIRE COUNCIL

Proposal to use Community Theatrette as office space

The "Save the Theatrette Group" and two other residents of Moss Vale wrote to the Ombudsman complaining that the Moss Vale Theatrette, a hall built by and for the community, had been appropriated by resolution of Wingecarribee Shire Council for use as office space without consulting the people of Moss Vale. The complainants were questioning the right of the Council to take such action. Due to the complications of reconversion should the refurbishing be commenced, the Council was requested to refrain from converting the Theatrette for office space until the Ombudsman's enquiries were completed. This request was complied with.

A history of the Theatrette was obtained and information supplied by both Council and the complainants showed that certain lands had been donated to the Trustees of the Moss Vale Community Centre in 1945 "to organise, establish and carry on a community centre for the advancement and benefit generally of the residents of Moss Vale". In 1946 these assets were transferred by resolution to the Wingecarribee Shire Council. Various fund-raising activities were held and Council continued to accept donations over the intervening years which were receipted and acknowledged as going toward "a public hall". The Civic Centre and Theatrette were finished in 1970 and occupied in 1971.

On 26th November 1981 the Council made the decision to appropriate the Theatrette. The decision was made in a closed meeting without community participation despite the fact that it had been a community project. It had taken the people of Moss Vale from 1946 to 1971 to acquire a suitable hall for community use and they had contributed significantly to the raising of the necessary finance, yet their views were not sought. The Council decision had been made despite the fact that the Theatrette was the only small theatre in Moss Vale and that its closure would leave Moss Vale without a public hall of any sort.

From information available it would appear that when the Trustees transferred the assets and liabilities of the Moss Vale Community Centre to the Wingecarribee Shire Council the Trustees believed that Council would ensure that the intentions and aims of the Trustees would be ongoing. It was questionable whether having Council office staff in the Theatrette could be said to be or shown to be for the advancement and benefit generally of the residents of Moss Vale.

The Ombudsman was of the opinion that "Sections 477 and 482 (amongst others) of the Local Government Act give Council wide powers and it is probable (I have not specifically considered it) that the appropriation of the Theatrette by Council for office space was a legal action. However, it clearly appears that Council's proposed action was not in accord with the intention and the spirit of the resolution which originally entrusted Council with the mission of providing a Community Centre for the people of Moss Vale. I believe Council had a moral responsibility to consider the views of the people it is representing particularly where a decision it makes is concerned with an issue or matter in which the people were originally very much involved. Council, subsequently, may choose not to implement those views but, then, its decision is one for which Council must take responsibility and accept any consequences which may flow therefrom, particularly at the ballot box."

An interested observer expressed a similar opinion in a letter to the Wingecarribee Post (17.2.82):

> ". . . It is always mildly amusing that one's representatives who care so much for the opinion of the people at election time appear to show so little concern for their constituents mid term."

When a Report by the Ombudsman finding wrong conduct on the part of Council was imminent, a resolution was passed by Council to leave the Theatrette untouched and to exercise some other option as far as the accommodation problem was concerned.

The conduct of the Wingecarribee Shire Council was found to be wrong in terms of the Ombudsman Act for the following reasons:

(i) The Moss Vale Theatrette has a long history of public participation dating back over 30 years. Despite this, when the question of the Theatrette's use for a non-public purpose arose, the public was not consulted nor was it informed in any way. The enquiries have revealed a ground swell of opposition to Council's decision which might have been avoided. From a moral point of view it would have been manifestly fairer if the Council had gained the support rather than the antagonism of the community in the resolution of its staff accommodation problems, or, at least, had made, and had been seen to make, some effort to do so.

(ii) The Moss Vale Theatrette was a product of community involvement and public donation intended for community use. The Council by appropriating the Theatrette for its own use may have been acting perfectly legally but it appears to have failed to consider the intentions of the original Trustees and its own obligations in this regard when it considered the options available. This was an unreasonable and improper act in view of the Theatrette's past.

The Ombudsman recommended that, should a similar situation again arise, Council give serious consideration to utilising the provisions of Section 81 (1) of the Local Government Act to ascertain the views of the local community for Council's information and guidance before making any decision.

CASE NO. 38

WOLLONGONG CITY COUNCIL

Failure to take action against an unauthorised fishing business

This complaint was from a neighbour (Mr. W.) of a fisherman (Mr. K.) who worked from his mother's home which was across a lane from the complainant and on the shores of Lake Illawarra.

The fisherman moored his boats at the bottom of his mother's back garden and each evening went with his partners to net fish and prawns in the lake, returning in the early hours of the morning to sort and cook the catch.

The area was zoned Residential 'A' and the use of the premises for commercial fishing was unauthorised.

There had been a long history of complaints to the Council, Police and other authorities concerning the noise from the operation in the early hours of the morning as well as offensive smells from the cooking of prawns. Altercations over parking of vehicles in the lane and other incidents with the neighbour's son and his customers had also been reported to the authorities.

As part of the investigation, Council's files revealed that the complainant had first complained in December, 1979, and a report on the matter had been submitted to Council by the Chief Health Surveyor in January, 1980. The report was prepared following a request by the Town Clerk (contained in a memorandum of 14th January, 1980), which stated:-

> "... I would appreciate it if you would make sure that a report is available to the meeting of the Health and Building Committee on the 21st of January, 1980, proposing a definite course of action for Council to take. If the business is in fact illegal in that area then it surely should be closed. Mr. W. asserts that it has only been operating for 2 years and should this be true existing use rights would not apply."

The Report to Council advised that the licensed fisherman in question had been interviewed and that he had admitted employing three men and owning the premises he operated from at 88 Lakeview Parade.

The substance of the complaints initially put before Council included:

— Parking of vehicles in the laneway and in the street in front of the complainants' home (by customers and employees of the fisherman).

— The mooring of an excess number of fishing boats in the lake near their property.

— The arrival and departure of people in the early hours of the morning with associated noise.

— The alleged conducting of a fishing business including the direct sale of fish and prawns from the premises.

Council officers had advised the complainants that the parking of vehicles was in order provided the vehicles did not obstruct traffic; that Council had no jurisdiction over the number of boats moored, which was a matter for the Maritime Services Board; that they could seek a Nosie Abatement Order about the early morning noise; that the direct sale of fish, etc. was a matter for State Fisheries; and, finally, that the allegations about the conducting of an illegal business in a residential area would be the subject of a report to Council for its decision.

The report to Council also advised that the fisherman involved had been interviewed and had informed the Health Surveyor that his routine was to collect his boats about 4 or 5 pm and either take them south on trailers by road or launch them onto the lake from his mother's home depending on the proposed fishing grounds. On return in the early hours of the morning the catch was off-loaded and any prawns were cooked in an outbuilding at the rear of the property. The catch was then reloaded onto trucks and sent to market with no part of it being sold from the premises.

The fisherman also informed the officer that in close proximity of his property, several other fishermen carried out similar operations. This statement was checked by the City Health Surveyor who reported that it was true, particularly around the Berkeley area where a number of fishing operations were carried out.

The fisherman also claimed that there was a longstanding feud between the two families over the use of the laneway between the properties. This was verified from the Council's files.

Council's Town Planning Department had advised that the operation was in breach of the Illawarra Planning Scheme Ordinance but there was some doubt in the matter and suggested legal advice be sought. It was also pointed out that if a breach was occurring that in order that justice be done all similar fishing operations be investigated and if breaches were detected in those cases that legal action should follow.

The recommendation to Council was that its solicitor be requested to submit an opinion as to whether the operations constituted a breach under the provisions of the Illawarra Planning Scheme Ordinance, and if it was, that he provide written advice as to what evidence should be obtained so as legal proceedings could be instigated.

Another recommendation was that should the solicitor's opinion be that a breach was occurring, investigations be carried out on all similar fishing operations to determine whether legal action should be instigated in those cases.

The legal advice subsequently received from Council's Solicitor was that proceedings were possible.

Council apparently took no further action on the matter and in November, 1980, Mr. W. wrote again in the form of a statement setting out his grievances.

On 17th March, 1981, the City Health and Building Surveyor prepared another report for Council, with the heading "Legal Proceedings — Breach of Section 76(3) Environmental Planning and Assessment Act, Mr. K."

The report advised that legal proceeedings were then currently in train against the fisherman in question and went on to outline the history of the feud between the two families.

The report said that the land was "zoned Residential 'A' and there is no question that Mr. K. is in fact conducting a business from the premises. He had admitted to employing other people and the conducting of a business in this zone is a prohibited use". The report went on to say that existing use rights cannot be applied as the operation had only been in existence for 13 years.

The City Health Surveyor commented in his report that as other residents in the area were apparently not affected by the operation of the fishing business and as many other similar fishing operations were conducted on the shores of the lake that the breach was of a "technical nature". He pointed out Council had previously resolved that "if a prosecution was successful, investigations be carried out of all similar fishing operations to determine whether legal action should be instigated against other illegal operators".

The report went on as follows:

> "In an endeavour to resolve the matter, it would seem the best course of events is to allow the Court action to proceed on 27th March, 1981, and that Council's Solicitors be instructed to advise the magistrate that it is a technical breach only and that the matter could be dealt with under Section 556A of the Crimes Act so that no conviction is recorded.
>
> Should Council decide to withdraw the current legal proceedings, it could be criticised by the complainants for failing to exercise its duty under the provisions of the Act and *it is therefore recommended* that Council's Solicitor be instructed to advise the magistrate that the breach is a technical one only and seek for the matter to be dealt with under Section 556A of the Crimes Act so that no conviction is recorded against Mr. K."

At this stage by internal memo the Deputy Town Clerk on 18th March, 1981, wrote to the Chief Clerk as follows:-

"This would be in conflict with instruction issued — depending on date that legal action was implemented. Please advise me of import of last para i.e. Section 556A and 'breach is a technical one only'.

i.e. What is going to be the outcome if Council is successful — does he get fined and carry on or is he to stop activities?"

The reply from the Chief Clerk on 19th March, 1981, state in part:

" This is a case of a breach of the Environmental Planning Instrument only because Mr. K. (the fisherman) employs 3 men. If he worked alone it would be OK as a 'Home Occupation'."

The recommendation of the City Health Surveyor was subsequently adopted by Council on 30th March, 1981.

The case went on to Court on 27th March, 1981.

Subsequently the complainant wrote to this Office concerning the hearing as follows:

" judge found no evidence against the accused because the Council didn't produce my statement in Court. I wasn't asked to be present in Court to give evidence, so the case was dismissed. I ask you how could judgement be made without my evidence being used. It's all a big joke."

Information was subsequently sought from Council as to why this had happened and requesting at the same time a copy of the Solicitor's advice given to Council and also a copy of the instructions given to Council's Solicitor regarding the handling of the case.

The Mayor in reply advised that Council's Solicitors gave the Prosecuting Officer oral advice that a prima facie case existed and instructed him to take proceedings under Section 76(3) of the Environmental Planning and Assessment Act. The Solicitor was advised by Council prior to the hearing of Council's adoption of the report on 17th March, 1981, and was orally instructed accordingly. That is, the matter be dealt with under Section 556A of the Crimes Act. The letter from the Mayor to this Office also stated that under 75B of the Justices Act there is no provision for the discontented neighbour to be called when the matter came before Court, and his attendance was not necessary to have the matter dealt with under that Section.

During the course of this Office's investigation, the complainant provided photographic evidence of clearly labelled fish supply trucks backed up to the adjoining property, apparently having supplies of sea foods being loaded.

Mr. W. also claimed that the Mayor of Wollongong was a friend of the family in question and that before the beginning of the feud when the two families had been friendly and before the fishing business had intensified its activities, he had attended the fisherman's wedding where the Mayor had been a guest and made a speech. Also that the fisherman's wife was employed by the Council and as a consequence Council was more disposed to favour the fisherman and to ignore his repeated complaints against the illegal fishing business.

In May, 1981, the Mayor in reply to Mr. W. advised that he was "fairly conversant with the situation of people living on the shores of Lake Illawarra".

The reply from the Mayor went on as follows:

"As you are no doubt aware, many fishermen operate from Primbee and other suburban areas adjacent to the shores of the Lake and have been so doing for many, many years. My enquiries indicate that there have been no other complaints from other residents in connection with these types of operations.

Council, as you know, did institute legal proceedings for a breach of the Environmental Planning and Assessment Act, however, the matter was dismissed when it came before the Court.

Further enquiries lead me to believe that this is a type of matter which could be classed as a neighbour's dispute and would perhaps be better handled by you approaching the Community Justice Centre, an organisation which has been established to help people such as you in these situations.

> I am confident that Council and its staff have thoroughly investigated this matter and have taken the appropriate course of action and under the circumstances, consider little more can be done through these avenues."

Mr. W. was not happy with the Mayor's reply. While Mr. W. could have taken his own legal action against Council under Section 123 of the Environmental Planning and Assessment Act to restrain the unauthorised fishing business, it was considered that Council had an obligation to regularise this and other similar situations that existed within its area of control.

Accordingly, council was asked in March, 1982, what action if any it had taken to rezone the property in question from Residential to Commercial to regularise the situation. No answer was received to this question; however, on 21st April, 1982, the question was again put to Council together with a series of other questions relating to the other properties being used in a similar fashion.

On 29th July, 1982, Council replied that there were 5 other properties in the immediate area apparently being used for similar fishing activities, although not of a commercial nature. Other similar activities on the Lake shore occur at Windang, Primbee, Warrawong, Berkeley and Koonawarra.

The Town Planner's advice was that "no other action was being taken against the unauthorised use of the properties and that Council was not considering amending the zoning of the land to make the current use permissible with Council's consent in Residential 'A' zones on the Lake foreshores".

Further enquiries were made at Council to check that any similar activities in the Municipality were being undertaken on legitimate bases and by letter of 1st October, 1982, Council advised that a survey had been conducted around the shores of Lake Illawarra to establish where licenced fishermen were operating a fishing industry from their premises similar to the one in question. The information obtained was checked against the files held by the Fisheries Inspector at Shellharbour to establish if each person occupying the premises recorded actually held a Professional Fishing Licence. The survey showed that there were at least 35 similar fishing activities around the lake on the Wollongong side. Thirty-three actually held Professional Fisherman's Licences but that during the fishing season it was considered that this figure could be expanded to three or four times the number for concentrated fishing.

Various questions were then put to Council concerning the various licensed fishermen and the possible existing use rights and zonings.

Council replied that it was not considering amending the zoning of the various properties concerned to make the current use permissible with Council's consent. It considered that this use was similar to other small private business occupations within the whole area of the City of Wollongong.

As a result of the investigations the Council's conduct was found to be wrong in terms of the Ombudsman Act in that it did not take any positive action to alleviate the situation for the complainant and failed to take action over the zoning of the property in question.

In concluding the report it was recommended that Council take immediate steps to regularise all fishing activities in Residential areas by amending the respective zonings, after completing the necessary preliminary procedures of advertising, calling for objections, etc.

As to the noise suffered by the complainant, it was suggested to him that he take action against his neighbour in terms of Section 52 of the Noise Control Act. It was also pointed out to him that once Council took its action to regularise the zoning of the land he would have the opportunity to lodge his objections to the proposal when it was advertised.

Council subsequently advised that it was:

> "...taking steps to regularise all situations where lands were being used by fishermen, through pursuing amendments to the Illawarra Planning Scheme Ordinance to permit such usage within existing zonings."

CASE NO. 39

DEPARTMENT OF CORRECTIVE SERVICES

Changes to Prisoners' Diet

In April, 1982, a new menu came into operation throughout the NSW prison system. One aim of the menu was to cut back on the wastage of food by basing catering arrangements not on the traditional rations scale as set down by the Prisons Regulations, but rather on calorific and nutritional standards determined by the Health Commission.

The change in itself was a reasonable one, designed to improve prisoner nutrition. However, a number of problems were associated with its introduction. The major problems, which surfaced in a particularly acute form at the large Central Industrial Prison, Long Bay, was that the quantity of food provided to each Wing was to be precisely calculated to meet the requirements of the number of prisoners to be fed, with nothing left over. This meant that if there was an error in the number of prisoners to be fed, or if there were any errors in the precision with which meals were dished up (errors which would almost inevitably arise in dishing up for a large group of people), or if lax supervision of the dishing up permitted some prisoners to obtain more than their share, there would be insufficient food to feed those prisoners at the end of the line.

This Office received a very large number of complaints from inmates of the CIP at the time, and made several unannounced inspections as a result.

These confirmed the existence of the problem, as did a report prepared by an officer of the Establishments Division. In due course the situation was resolved by a stricter supervision of dishing up, and also by ensuring that additional food could be speedily obtained from the kitchen for any prisoners who missed out. However, for some time after the introduction of the new menus, this was not happening, and as a result a considerable number of prisoners missed out on entire meals — sometimes on several meals in a row — and were obliged to go hungry.

Not surprisingly, the prisoners concerned (and also many prison officers) were most unhappy, and the situation was exacerbated because the Department had not taken the trouble to explain the new menu either to prisoners or to staff.

On 21 June, 1982, between ten and twenty prisoners on 3 Wing missed out on their evening meal, apparently because insufficient food was provided from the kitchen. No extra food could be obtained for them from the kitchen, although the wing officer indicated he was sorry about the situation and suggested they apply to the Superintendent.

One of the prisoners concerned was Raymond John Denning, well known as a vocal prison activist. After the meal was over he spoke to a number of prisoners in other wings, and was told that many of them had also missed out because insufficient food was provided. As a result of the general dissatisfaction with this, prisoners held what was described as an "ordinary and orderly" meeting in the yard, and one prisoner from each of the five wings was nominated to take the matter up with the Superintendent. It should be noted that the Central Industrial Prison does not have a prisoner grievance committee or any formal procedure by which inmate grievances or problems can be raised with the prison authorities.

The delegation went directly to the Superintendent's office and discussed the situation with him. There is a conflict in the evidence put forward by the two sides as to what happened at the meeting. The Superintendent says that the prisoners refused to give their names, and that two were very abusive, with one saying "Get off your arse or we'll burn the gaol down". However, he acknowledged that Mr. Denning was not particularly vocal. The prisoners, on the other hand, claimed the meeting was orderly, although it got off to a bad start when Mr. Glenn did not allow the delegates into his Office or come out to talk to them, but instead insisted that the conversation be conducted through a window in the Deputy Superintendent's Office.

They said that Mr. Glenn began the conversation by saying:

> "I was just about to call the squad (referring to the Malabar Emergency Unit) in to disperse you (referring to the meeting of prisoners which had just been held)."

It was acknowledged that one of the five delegates, annoyed at this, said "If it's confrontation you wanted, we would have been ready", a comment which visibly antagonised Mr. Glenn. However, the other prisoners were unanimous in saying that, apart from this exchange, the discussion was orderly, with the prisoners emphasising that they were there about a genuine grievance and not trying to cause trouble. All said that Mr. Glenn then became more conciliatory, and gave an assurance that the matters they raised would be investigated.

It is evident that Mr. Glenn took the grievances seriously. As a result of the meeting he telephoned the Chief Superintendent of Long Bay, Mr. Quarmby, and also submitted a report to the Chairman of the Corrective Services Commission.

The report expressed concern about the apparent menu changes and the situation which they were causing in the gaol and recommended that the overall ration scales be investigated by the catering supervisor with a view to resolving the problem. As a result of this report an officer of the Establishments Division was despatched to investigate the situation.

It has already been noted that the Report which he prepared confirmed the existence of a problem, although it was clearly deficient in a number of important respects. For example, it made the assertion that "there has been no reduction in the ration scale or issue", even though the new menu introduced on 5 April had provided for a reduction in calories, a cutback in the bread ration to avoid wastage, and a more precise tailoring of the amount of food provided to the number of prisoners in each wing. It was these changes which caused the problems which had already been noted. It is disturbing that an investigation by the Establishments Division was unable even to establish that a menu change had taken place. Nevertheless, the report acknowledged that there was a problem, and recommended that there be better supervision of the "dishing up" procedure. By the time the report was issued the problem had been substiantially resolved.

It is thus evident that the prisoners had genuine grievances with relation to the food, and there can be no question that they were entitled to make these known to the responsible authorities. Indeed it was as a result of their complaints that the problem was ultimately rectified. Despite this, the day after the meeting with Mr. Glenn, three of the five prisoner delegates who had attended the meeting were transferred without warning ("shanghaied") to other gaols. In addition, a transfer order was executed in respect of Mr. Denning, although this was not immediately executed.

Mr. Quarmby and Mr. Glenn subsequently defended these orders on the grounds that they believed a "riotous situation" existed in the gaols. The only evidence cited to support this belief was that the prisoners, in meeting to discuss the food, had deliberately held an illegal meeting.

When questioned by this Office, all the delegates took the view that the meeting was legal and indeed ordinary, and were surprised when Mr. Glenn advised them that he considered it improper. (When a subsequent meeting was held after Mr. Glenn's view was known, permission was sought and granted.) Prisoners with experience in the gaols said that similar meetings had been held in the past without there being any suggestion that permission was required.

Neither the Prisons Act nor the regulations and rules made under it make any reference to prisoners wishing to hold a meeting being required to obtain permission from the Superintendent. Nor is there any reference to such a requirement in the information on local rules and procedures made available to prisoners on arrival at the CIP, or in notices displayed in the prison.

When asked for the source of the supposed rule, Mr. Glenn first advised this office that it was "Departmental policy". When informed that this was not so, he referred the Ombudsman's Office to a copy of a memo from the then Acting Commissioner for Corrective Services, Mr. K. L. Downs. A copy of this document was obtained and it turned out to be a memo dated 14 April 1978. It prohibited "peaceful protests or sit-ins" suggesting that such protests were "contrary to prison rules and in particular to Regulation 60". However, on a fair construction of the document, it could not be read as prohibiting an orderly and peaceful meeting called to discuss a particular issue such as food as occurred here. In relation to regulation 60, which refers to institutional routine, it appears no breach of the regulation was involved as the meeting occurred in the yard during the prisoners' free time between the meal time and muster, and did not cause any disruption at all to routine.

Even if the document could be construed to prohibit such a meeting of prisoners, the fact remains that none of the prisoners involved had any means of discovering its existence. There was no reason for them or anyone else to expect that a peaceful and orderly meeting called when they were at liberty in the yard for the purpose of discussing a legitimate grievance was at all illegal or objectionable.

As a result, the Assistant Ombudsman determined that the transfer of the three prison delegates was made without reasonable justification and therefore amounted to wrong conduct within the terms of the Ombudsman Act.

The transfer order made in respect of Mr. Denning, however, was not executed immediately, and he remained at the CIP unaware of its existence. Mr. Denning was angered at the transfers of his fellow delegates and wrote to this Office lodging a complaint. He stated that he and the other remaining delegate, Mr. M...., went to see Mr. Glenn to ask why the transfers were necessary, and was told: "it's got nothing to do with you". Having been told that the previous meeting was considered illegal, Mr. Denning asked for permission to hold a further meeting of inmates to discuss their grievances. Permission was granted, and this meeting occurred on the following day, 23 June.

Also on that day, Mr. Denning apparently made a tape recording in which he expressed his concern that there would be trouble in the gaols if the communication breakdown between inmates and prison authorities was not corrected. He claimed that a prison officer sympathetic to the grievances of the prisoners, took the tape out of the gaol for him. The tape was played on radio 2GB on 24 June, 1982.

On 26 June, Mr. Denning was transferred and placed on segregation in the Goulburn High Security Unit, the harshest prison environment in NSW.

Asked about the reasons for Mr. Denning's transfer and segregation, Mr. Glenn cited an incident in which a routine search of Mr. Denning, prior to a legal visit, found two letters addressed to media figures. These were impounded under regulation 81. Two days earlier, Mr. Glenn had warned Mr. Denning to refrain from placing "illegal and provocative" notices on prison buildings, after an officer had reported Mr. Denning for objecting to his removing a notice which urged all prisoners in Mr. Denning's wing to submit complaints about the lack of food to this Office and to the Minister for Corrective Services. Mr. Glenn said Mr. Denning was moved because he was considered responsibile for the notices and for "generally instigating trouble" in the gaol. Mr. Glenn stated that he had "no idea" why Mr. Denning was segregated at the High Security Unit.

Mr. Quarmby advised the Special Officer of the Ombudsman on 9 July, 1982,, that Mr. Denning was moved at the direction of the Chairman of the Corrective Services Commission after the release of the tape he made to the media. Mr. Quarmby confirmed this in a subsequent interview on 21 July saying that Mr. Denning had been warned by Mr. Glenn that he was not to place the notices up again, and that he had defied this warning. He said that Mr. Denning had threatened Mr. Glenn, saying that there would be consequences "if he didn't get what he wanted", and that he had started agitating in the gaol after the other delegates had been transferred.

Asked why the Goulburn High Security Unit had been selected, Mr. Quarmby said that there was "not much difference in segregation areas", and that Goulburn had been chosen "to keep him away from getting to the media".

Mr, Quarmby added that he had recommended to the Chairman of the Corrective Services Commission that Mr. Denning be charged with "open incitement to mutiny". However, the Department's legal officer, Mr. F. Morrin, stated in his view no charge could be sustained because:

* the reports submitted by prison officers indicated that in fact no one saw Mr. Denning place the notices on the notice boards — in apparent contradiction to Mr. Quarmby's statement that he was observed; and

* the tape which Mr. Denning made was directed to the public not to prisoners, and in the opinion of the legal officer concerned could not be said to have "promoted a state of discord" in the prison. In addition, there was no evidence that it was Mr. Denning who called the meeting, nor was there any evidence as to what was said at that meeting.

The conduct of Mr. Denning in smuggling the tape out of the gaol was clearly questionable, regardless of whether or not he had the co-operation of a sympathetic officer. However, he was not charged with any offence in relation to this, and the breach of rules has never been suggested as the justification for the transfer and segregation.

There were also two separate incidents in which two letters addressed to media representatives were confiscated from Mr. Denning on 25 June, and contraband in the form of $65 in notes and a dictaphone was found in Mr. Denning's cell on 27 June, 1982. However, the second of these incidents was detected after Mr. Denning had been transferred to Goulburn.

As to the segretation order itself, there is a further contradiction in Mr. Glenn's statements to this Office. The order was signed by Mr. Glenn and dated 26 June, 1982. The fact that the order was signed by Mr. Glenn on this date conflicts with Mr. Glenn's advice on 9 July to the Ombudsman's Investigation Officer that he had "no idea" why Mr. Denning was segregated, and that he was not even on duty on the day his segregation was ordered.

The Assistant Ombudsman concluded that the segregation order against Mr. Denning was made without reasonable justification and amounted to wrong conduct within the terms of the Ombudsman Act. She concluded:

> "The (Prisons) Act does not authorise the segregation of a prisoner in one of the harshest N.S.W. gaols "to keep him away from the media". If Mr. Denning has breached regulations by smuggling to the media a tape alerting the public to what he sees as problems in the gaols, he can and should be charged with that offence. If it is alleged that Mr. Denning acted abusively towards Mr. Glenn, he can also be charged with that offence. If there is evidence that Mr. Denning was inciting prisoners to rebel against the administration, he can and should be so charged. However, no charges have been laid

with respect to any of Mr. Denning's activities prior to his transfer and segregation (the contraband in his cell was discovered only after the transfer and segregation)."

"It is my view that Mr. Denning was transferred and segregated for what he saw, and this Office sees, as his role in endeavouring to rectify what he considered a legitimate grievance on the part of prisoners."

The conclusions and recommendations which the Assistant Ombudsman made in respect of this complaint are set out below:

"I find that the segregation of Mr. Denning was made without reasonable justification and therefore amounts to wrong conduct in terms of the Ombudsman Act.

This complaint clearly raises the question of what rights inmates have to bring legitimate problems to the attention of the authorities and to act as spokespeople on behalf of their fellow prisoners. It is important that prisoners have such rights, yet it is obvious that prisoners will be reluctant to take on such a role if they believe they will be victimised for doing so. In his report on N.S.W. Prisons, Mr. Justice Nagle noted that "prisoners must be allowed to voice their complaints according to a procedure which inspires their confidence". More specifically the Commission's report concluded:

'The Commission considers that prisoner committees have a real role to play in handling prisoner grievances and thus reducing tensions which otherwise build up in gaols through prisoners not having a voice which can be heard. But unless grievance mechanisms gain the credibility of both prison officers and inmates, they will not work and will be viewed with suspicion, if not hostility, by both.

Prisoner Committees should be given official status and, so far as possible, should properly represent the prisoner community. Prisoners should register their complaints with committee members, either verbally or by placing them in a complaints box which should be locked but readily accessible to prisoners. Regular meetings should be held, at least once a month. A prison officer selected by the Chief Superintendent should be chairman, but have no voting rights. The committee should draw up an agenda before meeting, and full minutes should be kept. The minutes should be sent to the Superintendent who, within three days, should inform the committee of his decisions. Any complaints he has not the power to handle should be sent to Head Office and the committee should be informed of this without delay. Complaints sent to Head Office should be answered within fourteen days. The Superintendent should then pass the answers on to the committee.'

Although Committees were set up at all gaols after the release of the Nagle Report, it is noteworthy that no such Committee now exists at the CIP, nor at many of the State's other gaols. Had such a Committee existed, it is likely that the problems described in this Report would not have arisen. This Office notes with concern the comments of Messrs Pulley and Holley to the effect that prisoners have been deterred from establishing such a Committee because candidates for membership are likely to be transferred to another gaol.

It is noted that the Corrective Services Commission has now endeavoured to overcome some of the problems raised in this Report by requiring the establishment of *some* formal process to deal with prisoner grievances, even if falling short of a prisoners Grievance Committee, and by endeavouring to control the unjustified transfers of prisoner spokespeople. Circular 82/59 dated 9 November, 1982, advises Superintendents that they are:

"required to satisfy the Commission that there is some *formal* process whereby they can show at all times that they are in touch with views of prisoners in their gaols concerning issues which affect the welfare and management of prisoners. Whether this is via a Problems and Needs Committee or some other similar method is the prerogative of individual superintendents."

This Office understands that the Executive Officer of the Department's Establishments Division is collating information from the State's gaols as to the grievance mechanisms operating within each institution, and proposes to prepare a report for the Commission on the methods adopted by each Superintendent in complying with the requirement.

The circular further states:

"It has come to the attention of the Commission that the efficient functioning of a number of Prisoners' Problems and Needs committees has been disrupted at times by transfer of one or more of their members to other institutions. The Commission cannot countenance any transfers of prisoners simply because they are performing the function required of them as representatives, namely presenting grievances on behalf of other prisoners. Whilst the Commission does not intend to formulate a blanket policy

precluding committee members from being transferred to other institutions, it will be necessary in future to fully document the reasons for such transfers."

This Office applauds the Commission for its initiative in taking action to resolve the problems identified in this Report. This Office will contrive to monitor compliance with the Circular, and in that respect is concerned that from our contact with the complainants in this case, and with other prisoners, it is clear that some Superintendents have in fact not complied with a further directive in the Circular to the effect that 'Superintendents are requested to arrange for copies to be brought to the notice of all prisoners by display on the prisoner's notice board'.

However, in view of the fact that Circular 82/59 has now been issued, general recommendations on those matters are considered unnecessary provided that the terms of the Circular are properly enforced by the Commission.

In relation to the wrongful detention of Mr. Denning segregation in the Goulburn High Security Unit it is recommended that the Department of Corrective Services pay to him an appropriate ex gratia compensation according to a per diem rate for the time he was so held. Consideration could be given to the rate being fixed at a level equivalent to that at which unpaid fines are discharged through imprisonment.

Finally, it is noteworthy that no specific rules and regulations exist governing contact between prisoners and representatives of the media. Presumably correspondence from a prisoner to the media is dealt with under the ordinary prison regulations — i.e. it is not read or censored unless the Superindendent or an officer authorised to censor mail, forms the view that it may contain "matter that is likely to adversely affect the security, discipline or good order of the prison ...". In such a case, the prisoner may be required to open the letter in the officer's presence, and it may be impounded if found to contain such material. Generally similar rules apply to incoming mail, although this need not be opened in the prisoner's presence.

It does not seem unreasonable that prisoners should be afforded some access to the media for the purpose of ensuring that major problems within the prison system are brought to public attention. Accordingly, it is recommended that the Department of Corrective Services give consideration to the preparation of guidelines governing such access.

CASE NO. 40

DEPARTMENT OF CORRECTIVE SERVICES

Wrongful use of segregation

In May, 1982, a man complained that his son, Mr. S. had been assaulted by a prison officer while a patient in the Department of Corrective Services' Prince Henry Hospital Annexe and that he had then been unjustly transferred to the Circle (Segregation Cells) at Parramatta Gaol. At the time of the assault the prisoner was in the Hospital Annexe for observation and treatment following a severe asthma attack.

On the basis of reports from the three prison officers present at the time who all alleged that Mr. S. had assaulted a prison officer, the Chief Superintendent of Long Bay immediately transferred Mr. S. to the segregation area at Parramatta Gaol, one of the harshest prison environments in NSW.

It would appear that Mr. S. was transferred on the basis of what has been described as the normal Departmental practice to transfer and segregate prisoners who are alleged to have committed an assault on a prison officer. This occurred even though the Chief Superintendent was aware that an independent eye witness, a nurse in the Annexe, had made a statement to the effect that the prisoner was in fact the victim, and not the perpetrator, of the assault.

On the day after he was placed on segregation at Parramatta Gaol, Mr. S. suffered a further severe asthma attack and was treated by the gaol nurse, who noted on his medical file that this treatment resulted in no improvement. Mr. S. was not transferred from the Circle back to hospital, where he could receive the medical attention that was necessary. On the day after his asthma attack he swallowed a quantity of razor blades. As a result of this he was transferred to the Prince Henry Hospital where an operation was performed to remove the blades.

Following his discharge from the Prince Henry Hospital Annexe, a week after the operation to remove the razor blades, the prisoner was discharged from hospital and from there he returned to the MRP. From there he was immediately transferred to Parramatta Gaol, to be placed on segregation once again. It would appear that this happened because the original segregation order made out on the day of the assault had not been rescinded, even though by that stage it was accepted by the prison authorities that the account of the incident given by the nurse was correct, and Mr. S. was the victim not the perpetrator of the assault.

In fact, the prisoner was not returned to the Circle on this second occasion as it was noticed on his arrival at Parramatta, that his stitches were weeping. As there is no 24 hour nursing care at Parramatta Gaol, he was therefore sent back to Long Bay with his papers marked "unsuitable for return to Parramatta until medically suitable".

On both occasions, when the prisoner was discharged from Prince Henry Hospital, the Hospital authorities were under the impression that he would be transferred to the MRP Hospital and not to a segregation area. The Acting Director of the Prison Medical Service has advised this Office that as there were no discharge or treatment notes on Mr. S.'s file relating to his admission to the Hospital Annexe, it would appear that he was transferred to Parramatta Gaol in the absence of any consultation with medical staff at the MRP Hospital. No medical instructions were therefore available for the Parramatta authorities and treatment for the prisoner's asthma attack which occurred at Parramatta gaol was conducted without any knowledge of his medical or treatment antecedents. The Acting Director described this situation as being "highly dangerous" for the prisoner.

The question must be asked as to how a prisoner who had only that morning been medically discharged after being hospitalised for the treatment of asthma, and who according to an independent eye witness, had that day been the victim of a serious assault by a prison officer, could be transferred to one of the bleakest and physically harshest punishment environments in any of the gaols in NSW, the conditions of which led him to swallow razor blades in an effort to escape them.

Even if the prisoner's behaviour had warranted segregation, it is a matter of concern that not one responsible officer of the Corrective Services Department addressed the question of whether or not the segregation area at Parramatta Gaol was an appropriate location for a prisoner in such poor physical condition.

The Department of Corrective Services obviously has an obligation to protect the health and welfare of prisoners under its control, and should not transfer them to situations which may seriously damage their physical condition.

It is acknowledged that the Chief Superintendent, who signed the order transferring the prisoner, was faced with unanimous reports from three prison officers involved and that he had taken immediate steps to institute a proper inquiry through the Establishments Division. Accordingly, no criticism is levelled on this basis. However, this case is a good illustration of a fact that the procedures adopted by the Commission in relation to segregation orders are entirely inadequate.

A major problem is that no adequate written report as to why a prisoner has been placed on segregation is put on his file. In this case, and in most cases with which this Office is familiar, all that appears on the file is a standard sheet, signed by the Superintendent, which lists the following standard reasons for placing a prisoner on segregation:

(i) for the personal safety of other prisoners;
(ii) for the personal safety of a prison officer;
(iii) for the security of the prison;
(iv) for the preservation of good order and discipline within the prison.

The Superintendent issuing the order is expected simply to cross out those reasons which do not apply. However, this gives no guidance at all to the Superintendent of any other Gaol, to which that prisoner is then transferred as to whether or not the order should be terminated, for example after a period of good behaviour.

The problem is compounded by the fact that there is no proper procedure for ensuring that a segregation order, once made, is removed where the circumstances justifying its original imposition have changed.

The Chief Superintendent of Long Bay Gaol has informed this Office that it was up to the Superintendent of the Gaol to which the prisoner is transferred to rescind a segregation order, if he considers that the security considerations which justified imposing it in the first place have ceased to

apply. It was contended that in this case, it would therefore have been up to the Superintendent of Parramatta Gaol to rescind the order if he considered that Mr. S.'s condition made it inappropriate for him to be held in the Circle, as circumstances indicated that he was no longer a threat to security.

The Superintendent of Parramatta Gaol, on the other hand, advised that it would not be appropriate for him to review an order made by another Superintendent, until after some time had elapsed in order for him to form a judgement as to a prisoner's behaviour, no matter how inappropriate he considered any particular segregation order to be. The Superintendent made the point that he is normally not aware of the circumstances which led to segregation orders being imposed outside Parramatta Gaol, and therefore cannot take it upon himself to rescind them without at least consultation with the Superintendent who imposed the order; and without the elapse of sufficient time for the prisoner's behaviour to be monitored and appropriately reviewed.

This case demonstrated the need for revised procedures to ensure:

(i) *That responsibility for terminating a segregation order which ceases to be appropriate or necessary is clearly fixed with a particular officer.*
The practicalities of the situation would suggest that this must be the Superintendent in charge of the institution where the prisoner is located at that time.

(ii) *That full reasons are given to justify the making of the segregation order, and that these are placed on the prisoner's file for the information of any Superintendent under whose authority the prisoner subsequently comes.*
In this case, and in most others with which this Office has had contact, no reasons for the imposition of the order are placed on the file.

In a Report on this matter prepared under the provisions of section 26 of the Ombudsman Act, the following recommendations were made:

(a) Procedures relating to the issue and termination of segregation orders should be revised so that:

* All information justifying a segregation order is available immediately in writing to any Superintendent under whose authority a segregated prisoner subsequently comes;

* Responsibility for the termination of a segregation order is clearly vested in the Superintendent in charge of the institution to which a prisoner subsequently is confined;

* Review of such orders is conducted by the appropriate Superintendent at frequent intervals during the period for which each order remains in force so that such orders continue at all times to remain appropriate.

(b) Transfer procedures should be reviewed to ensure that the physical health of inmates is adequately taken into account when transfers are contemplated, particularly in relation to prisoners who have recently been released from the Prince Henry Annexe or the Metropolitan Reception Prison Hospital.

(c) Transfer procedures should also be reviewed to ensure that prisoners are properly discharged by medical authorities at the Metropolitan Reception Hospital before being transferred from that facility, and all notes and instructions relating to the ongoing medical management of a prisoner should accompany him or her at all times. Any departure from this procedure by custodial staff should also be made after consultation with the director of the Prison Medical Service prior to transfer of the prisoner.

(d) Procedures within the Establishments Division should be reviewed to ensure that where internal or police enquiries subsequently establish that a prisoner is falsely accused or charged with an offence, and has been segregated on that account, appropriate action is taken by the director of that Division to review the prisoner's segregation.

In February, 1983, the Chairman of the Corrective Services Commission advised this Office that he was:

> "of the opinion that recommendation (a) to (d) do have some merit. Accordingly, I have arranged for these recommendations to be discussed at the Superintendent's conference to be held during March, 1983."

Moreover, in November, 1982, a number of points raised in these recommendations were taken up by the Department in the issuing of Circular No. 82/60, which has the effect of requiring closer scrutiny of prisoners made the subject of segregation orders. The Department is to be commended for its initiative in making these changes.

PART IV
STATISTICAL SUMMARY OF COMPLAINTS UNDER OMBUDSMAN ACT

1st July, 1982 to 30th June, 1983

KEY TO STATISTICAL CATEGORIES

No Jurisdiction

"Not Public Authority" — private companies, individuals, etc.

"Conduct is of a class described in The Schedule" — S.12(1)(a) — specifically excluded from jurisdiction in Schedule attached to Ombudsman Act.

"Conduct or complaint out of time" — S.12(1)(b)(c)(d) — action complained of occurred before commencement of Ombudsman Act, etc.

Declined

General discretion — S.13(4)(a).

Insufficient interest of complainant; vexatious or frivolous complaint; trivial subject matter; trading or commercial function; alternative means of redress, etc. — S.13.(4)(b).

Local Government authority where complainant has right of appeal or review — S.13(5).

Discontinued

(1) Resolved completely

(2) Resolved partially

(3) Withdrawn by complainant

(4) Other reason

Wrong Conduct

'Wrong conduct' as defined by Ombudsman Act.

No Wrong Conduct

'No wrong conduct' as defined by Ombudsman Act.

Public Authority (Departments)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)	No Wrong Conduct	Wrong Conduct	(1)	(2)	(3)	(4)	Under Investigation as at 30th June, 1983	Total
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading-commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Agriculture Department	. .	. .	. .	2	1	. .	2	. .	. .	. .	. .	. .	2	7
Albury-Wodonga Development Corporation of NSW	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1	2
Ambulance Service of NSW	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	1	1
Apprenticeship Directorate	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	4	6
Argentine Ant Eradication Committee	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1
Art Gallery of NSW	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Attorney-General and Justice Department	1	9	. .	6	1	. .	3	1	4	1	. .	3	1	30
Auburn District Hospital	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Australian Gas Light Company	1	. .	. .	6	4	. .	1	. .	6	. .	. .	1	3	22
Australian Museum	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	1
Bankstown District Hospital	. .	. .	. .	1	. .	. .	. .	. .	1	. .	. .	. .	. .	2
Bathurst Orange Development Corporation	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1
Board of Fire Commissioners	. .	. .	. .	3	. .	. .	1	. .	. .	. .	. .	. .	1	5
Board of Senior School Studies	. .	. .	. .	1	. .	. .	1	. .	. .	1	. .	1	. .	4
Board of Tick Control	. .	1	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	2
Builders Licensing Board	1	1	. .	9	8	. .	11	1	5	3	. .	6	11	56
Bursary Endowment Board	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1	. .	2
Camperdown Children's Hospital	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	1
Campbelltown Technical College	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Central Mapping Authority	. .	. .	. .	1	. .	. .	2	. .	. .	. .	. .	. .	. .	3
Chiropractic Registration Board	. .	. .	. .	4	. .	. .	. .	9	. .	. .	. .	. .	. .	13
Clerk of the Peace	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Coal and Oil Shale Mine Workers Superannuation and Long Service Leave Branch	. .	3	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	4
Consumer Affairs Department	. .	1	. .	4	4	. .	5	1	1	. .	. .	. .	7	23
Consumer Claims Tribunal	. .	11	1	3	. .	. .	. .	. .	. .	. .	. .	3	. .	18
Co-operative Societies Department	. .	1	. .	1	1	. .	2	. .	1	. .	. .	2	. .	8

Public Authority (Departments)	No Jurisdiction			Declined			No Wrong Conduct	Wrong Conduct	Discontinued				Under Investigation as at 30th June, 1983	Total
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Corrective Services Department	9	18	..	52	3	..	73	57	108	46	14	301	164	845
Corporate Affairs Commission	..	1	..	3	..	..	1	..	9	3	..	1	6	24
Council of Auctioneers and Agents	..	2	..	3	..	..	..	1	1	..	..	..	3	9
Counsellor for Equal Opportunity	..	..	..	..	..	..	1	..	..	..	..	..	..	1
Crown Lands Office	..	2	..	..	1	..	..	..	..	..	..	..	..	1
Crown Solicitors Office	..	..	..	..	..	..	..	..	..	..	..	..	..	2
Crown Street Women's Hospital	..	..	7	..	..	..	..	..	..	..	..	..	..	7
Cumberland College of Health Sciences	..	..	..	1	..	..	..	..	..	..	..	..	..	1
Dairy Industry Marketing Authority	..	..	..	5	4	..	1	..	..	..	..	..	5	15
Dental Technicians Registration Board of NSW	..	..	..	..	..	..	2	..	..	..	..	..	..	2
Dental Hospital	..	..	..	..	..	..	..	..	2	..	..	1	1	4
Dubbo Base Hospital	..	..	..	..	..	..	..	..	..	..	..	..	1	1
Education Department	2	16	..	22	1	..	13	1	9	3	1	9	23	100
Electricity Commission of NSW	..	..	..	171	4	..	4	4	2	1	..	..	6	192
Energy Authority	..	2	..	1	..	..	2	..	1	..	..	1	2	7
Environment and Planning Department	..	..	..	6	1	..	11	2	3	3	..	9	10	47
Finance Department	..	1	..	1	1	..	5	..	..	2	..	3	2	13
Forestry Commission of NSW	..	..	..	..	..	..	..	..	..	..	..	..	1	1
Geographic Names Board	..	1	..	7	33	..	..	..	8	2	..	..	6	57
Government Insurance Office of NSW	..	..	..	..	..	..	..	..	..	1	..	..	2	3
Government Printing Office	1	..	..	..	..	..	..	..	..	..	..	..	..	1
Government Services Co-Op Building Society	..	..	..	1	..	..	..	..	..	..	..	..	..	2
Granville Technical College	..	..	..	..	2	..	..	..	..	..	..	..	..	2
Hawkesbury Agricultural College	8	5	2	15	5	..	6	3	..	..	..	..	15	66
Health Department	..	..	..	..	..	..	2	2	5	3	..	7	4	22
Health Department (Prison Medical Service)	..	..	..	..	..	..	3	2	..	1	..	6	1	7
Heritage Council of NSW	..	..	..	..	..	..								

Public Authority (Departments)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b)(c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other	Under Investigation as at 30th June, 1983	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Higher Education Board									1					1
Housing Commission of NSW				26	2		16		4	2		8	17	75
Hunter District Water Board				70			3	1	2	1		4	2	83
Industrial Development and Decentralisation Department									1					1
Industrial Relations Department	1	2		4			3		9	2		2	8	31
Institute of Early Childhood Studies				7										7
Institute of Technology									1					1
Kempsey District Hospital				1										1
Ku-Ring-Gai College of Advanced Education				1										1
Land and Environment Court		1												1
Land Board Office		1		4	6		2		2	1	1	4	6	27
Land Commission of NSW				3	2		1	1	1			1		8
Land Tax Office				4	2		6		3				1	16
Law Society of NSW	1													1
Legal Services Commission of NSW		3		4	1		6	1	2	1		7	4	28
Leisure Sport and Tourism Department							1			1			1	3
Licenses Reduction Board		1					1							2
Lidcombe Hospital							1							1
Liverpool Hospital							1							1
Local Government Boundaries Commission	1												1	2
Local Government and Lands Department		1	1	7	2		7	1	3	1	1	1	9	32
Local Government Superannuation Board			1	1			4							7
Long Service Payments Corporation				2			1		1	1		1	5	11
Lord Howe Island Board				1			1						1	3
Macquarie Hospital				1									1	3
Macquarie University							1					1		2
Main Roads Department				9	7		3	1	3	1	1	7	8	39

Public Authority (Departments)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other	Under Investigation as at 30th June, 1983	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Maritime Services Board	..	..	..	6	2	..	7	1	1	..	..	1	12	30
Meat Industry Authority	..	..	..	1	..	..	..	..	..	..	..	..	..	1
Medical Board of NSW	2	6	..	..	..	..	..	..	..	..	..	..	..	8
Metropolitan Waste Disposal Authority	..	..	..	1	..	..	..	..	..	..	..	..	..	1
Metropolitan Water Sewerage and Drainage Board	..	..	..	31	16	..	11	2	34	18	..	10	26	148
Mineral Resources Department	2	..	..	..	..	..	1	..	..	..	..	..	..	3
Ministry of Aboriginal Affairs	..	1	..	..	..	..	..	..	..	..	..	..	..	1
Minister for Police	..	..	..	..	..	..	..	..	..	..	..	..	1	1
Ministry of Housing	..	..	..	1	..	..	..	..	..	..	..	..	..	1
Ministry of Transport	1	..	..	..	..	..	..	..	..	..	..	..	..	1
Mitchell College of Advanced Education	..	..	..	..	..	..	..	..	1	..	..	..	1	1
Morisset Hospital	..	..	..	..	..	..	..	..	..	..	..	..	..	1
Motor Transport Department	..	2	..	19	2	..	17	3	24	5	3	4	15	94
Motor Vehicle Repair Industry Council	..	..	..	..	..	..	..	..	2	1	1	1	5	10
Museum of Applied Arts and Sciences	..	..	..	1	..	..	..	..	..	..	..	..	..	1
Music Examinations Advisory Board	1	..	..	..	..	..	1	..	..	1	..	..	..	3
National Parks and Wildlife Service	..	..	..	2	2	..	4	1	3	3	..	4	6	25
Nepean College of Advanced Education	..	..	..	..	1	..	..	..	..	..	..	..	..	1
Newcastle College of Advanced Education	..	..	..	..	..	..	1	2	1	..	..	..	1	3
Newcastle Conservatorium of Music	..	1	..	..	..	..	..	..	..	..	..	..	..	1
North Sydney Technical College	..	..	..	1	..	..	..	..	..	..	..	1	..	1
Nurses Education Board	..	..	..	..	..	..	..	..	..	..	..	..	..	1
Nurses Registration Board	..	..	..	..	1	..	..	..	..	..	..	..	..	1
Parole Board	..	3	..	..	..	..	1	..	..	..	1	1	2	8
Parramatta Psychiatric Hospital	..	..	..	..	..	..	1	..	..	..	..	1	..	2
Pastures Protection Board	..	..	..	2	1	..	1	4	1	2	..	..	5	12
Payroll Tax Office	..	..	..	..	1	..	..	..	..	..	..	..	..	1

Public Authority (Departments)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other	Under Investigation as at 30th June, 1983	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Plumbers Gasfitters and Drainers Board	. .	. .	. .	1	1	. .	. .	. .	. .	. .	. .	. .	. .	2
Police Citizens Boys Club	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1
Police Department	2	2	. .	12	1	. .	5	7	8	1	. .	13	23	74
Premier's Department	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	1	. .	2
Prices Commission	. .	2	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	2
Prince of Wales Hospital	. .	. .	. .	2	. .	. .	2	. .	. .	. .	. .	. .	. .	4
Privacy Committee	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Protective Office	. .	4	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	4
Public Accountants Registration Board	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	1	2
Public Service Board	. .	4	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	5
Public Solicitor	. .	1	. .	. .	. .	. .	1	. .	1	. .	. .	. .	1	4
Public Trust Office	13	2	. .	3	. .	. .	5	. .	2	. .	. .	4	1	30
Public Works Department	. .	1	. .	3	1	. .	4	. .	2	1	. .	2	7	21
Real Estate Valuers Registration Board	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	1
Registrar Generals Department	. .	. .	1	2	1	. .	. .	. .	3	1	2	3	1	14
Registry of Births, Deaths and Marriages	. .	. .	. .	1	. .	. .	. .	. .	2	. .	1	. .	3	7
Rental Bond Board	1	. .	. .	2	. .	. .	2	. .	2	. .	. .	2	2	11
Rent Control Office	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	1
Retirement Board of NSW	. .	. .	. .	3	. .	. .	. .	. .	1	. .	. .	. .	. .	4
Royal Alexandra Hospital	. .	. .	. .	. .	. .	. .	. .	. .	2	. .	. .	. .	. .	2
Royal North Shore Hospital	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	1	2
Rural Assistance Board	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	1	. .	1
Services Department	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	1
Sheriffs Office	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Singleton District Hospital	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	1
Snowy Mountains Hydro Electricity Authority	2	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	2
Soil Conservation Service	. .	. .	. .	2	. .	. .	. .	. .	. .	. .	. .	. .	. .	2

Public Authority (Departments)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other	Under Investigation as at 30th June, 1983	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Stamp Duties Office	. .	1	. .	5	6	. .	5	. .	3	2	. .	4	6	32
State Bank	. .	1	. .	. .	5	. .	1	1	2	1	. .	. .	1	11
State Contracts Control Board	. .	. .	. .	1	1	. .	. .	1	. .	. .	. .	. .	. .	2
State Election Funding Authority	. .	. .	. .	. .	1	. .	1	. .	. .	1	. .	. .	. .	3
State Electoral Office	. .	. .	. .	. .	1	. .	1	. .	1	. .	. .	. .	3	6
State Emergency Services and Civil Defence	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	1
State Fisheries Department	. .	. .	. .	. .	. .	. .	5	1	. .	. .	. .	. .	1	7
State Library of NSW	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1
State Lotteries Office	. .	. .	. .	1	4	. .	2	. .	. .	. .	. .	. .	2	9
State Pollution Control Commission	1	. .	. .	5	1	. .	1	1	3	3	. .	3	6	23
State Rail Authority of NSW	. .	1	. .	33	12	. .	13	1	12	7	2	25	14	119
State Superannuation Board	. .	1	1	4	1	. .	3	. .	. .	. .	. .	2	. .	12
Statutory Remuneration Tribunal	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Strata Titles Board	1	4	. .	2	1	. .	4	. .	. .	1	. .	. .	. .	13
Supreme Court	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Sydney Cove Redevelopment Authority	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	1
Sydney Cricket and Sports Ground Trust	. .	1	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	2
Sydney Farm Produce Market Authority	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	1
Sydney Opera House	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1
Sydney Teachers College	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	1
Sydney Technical College	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	6	7
Teacher Housing Authority	. .	. .	. .	. .	. .	. .	2	. .	1	. .	. .	. .	. .	3
Technical and Further Education	. .	. .	. .	3	. .	. .	2	1	2	. .	. .	1	3	12
Totalizator Agency Board	. .	1	. .	1	2	. .	. .	. .	. .	. .	1	. .	2	7
Traffic Authority of NSW	. .	. .	. .	2	. .	. .	. .	. .	. .	. .	. .	. .	4	6
Travel Agents Registration Board	. .	. .	. .	1	. .	. .	. .	. .	. .	1	. .	. .	. .	2
Treasury	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	1

Public Authority (Departments)	No Jurisdiction			Declined			No Wrong Conduct	Wrong Conduct	Discontinued				Under Investigation as at 30th June, 1983	Total
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Trotting Authority of NSW	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	1
University of New England	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
University of New South Wales	1	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	6	8
University of Sydney	. .	1	. .	3	1	. .	. .	. .	. .	. .	. .	1	. .	6
University of Wollongong	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	1
Urban Transit Authority	. .	. .	. .	6	1	. .	. .	. .	3	1	. .	4	1	16
Valuer Generals Department	. .	. .	. .	. .	20	. .	1	1	. .	. .	. .	. .	3	24
Water Resources Commission	1	1	. .	2	. .	. .	8	1	. .	. .	. .	3	9	25
Western Lands Commission	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	2
Westmead Hospital	. .	. .	. .	2	. .	. .	. .	. .	2	. .	. .	. .	. .	4
Women's Advisory Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1
Workers' Compensation Commission	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Youth and Community Services Department	. .	4	. .	17	3	. .	20	3	15	18	3	85	28	196
Zoological Parks Board of NSW	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	1	1
Total	57	133	15	666	188	. .	350	108	335	150	35	572	564	3173

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Public Authority (Departments)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other	Under Investigation as at 30th June, 1983	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Unscheduled Bodies (Outside Jurisdiction)														105
Australian Government Departments	115													115
Employer-Employee	66													66
Private Organisations and Individuals	252													252 638
	490	133	15	666	188	0	350	108	335	150	35	572	564	3606
Local Government Authorities	20	3	2	369	84	3	207	21	98	74	10	102	240	1273
Total from all sources	510	136	17	1035	272	3	557	129	433	224	45	674	804	4879
Less under investigation as at 30/6/82														997
Total Received for year ended 30/6/83														3882
	554	141	4	676	307	95	260	124	401	225	63	783	783	

Public Authority (Councils)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other	Under Investigation as at 30th June, 1983	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Aberdare County Council	..	..	..	2	..	..	..	..	1	1	..	..	1	1
Albury City Council	..	..	..	..	..	..	3	..	..	..	..	..	..	4
Armidale City Council	..	..	..	1	1	..	3	..	..	..	..	..	1	3
Ashfield Municipal Council	..	..	..	2	2	..	1	..	..	..	..	1	..	6
Auburn Municipal Council	..	..	..	1	..	..	3	..	..	..	..	2	..	6
Ballina Shire Council	..	..	..	..	..	..	..	..	..	..	..	..	..	1
Balranald Shire Council	..	..	..	4	1	..	3	..	..	..	..	1	3	13
Bankstown City Council	..	..	..	..	2	..	3	..	..	..	..	2	1	7
Bathurst City Council	..	..	1	25	4	2	2	..	2	1	..	1	1	38
Baulkham Hills Shire Council	..	..	..	..	..	..	..	..	1	..	..	..	2	3
Bega Valley Shire Council	..	..	..	8	1	..	1	1	..	1	..	..	..	13
Bellingen Shire Council	..	..	..	..	..	..	1	..	..	..	..	..	..	1
Berrigan Shire Council	..	..	..	1	..	1	2	..	2	..	..	1	2	9
Blacktown City Council	..	..	..	10	1	2	6	..	4	3	..	1	2	29
Blue Mountains City Council	..	..	..	..	..	..	..	..	..	..	..	..	1	1
Bombala Shire Council	..	..	..	..	..	..	..	..	..	1	..	..	1	5
Botany Municipal Council	..	..	..	..	..	..	..	..	..	..	..	3	..	1
Broken Hill Municipal Council	..	..	..	1	..	..	1	..	1	..	..	..	1	6
Burwood Municipal Council	..	..	..	2	..	1	1	..	1	1	..	..	1	7
Byron Shire Council	1	..	..	1	..	..	..	..	..	..	..	..	1	5
Cabonne Shire Council	1	..	..	..	..	1	..	..	..	..	..	..	1	3
Camden Municipal Council	..	..	..	2	..	..	3	..	2	1	..	1	1	12
Campbelltown City Council	..	..	..	2	1	1	4	..	1	1	..	1	2	11
Canterbury Municipal Council	..	..	..	1	..	..	..	..	..	..	..	..	..	1
Central Darling Shire Council	..	..	..	..	..	..	..	..	..	..	..	..	1	2
Central Tablelands County Council	..	..	..	..	..	..	..	..	..	..	..	..	..	2
Central West County Council	..	..	..	1	..	..	..	..	..	..	..	..	..	1

Public Authority (Councils)	No Jurisdiction			Declined			No Wrong Conduct	Wrong Conduct	Discontinued				Under Investigation as at 30th June, 1983	Total
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Cessnock City Council	..	..	..	1	..	..	1	..	..	..	..	..	..	2
Coffs Harbour Shire Council	1	..	..	7	1	..	1	..	..	1	..	1	3	15
Concord Municipal Council	..	..	..	2	1	..	..	..	..	..	..	..	1	4
Cooma-Monaro Shire Council	..	..	..	1	..	..	..	..	..	..	..	..	..	1
Coonabarabran Shire Council	..	..	..	1	..	..	..	..	..	..	..	..	1	2
Cowra Shire Council	..	..	..	..	..	..	..	..	1	..	1	..	..	2
Crookwell Shire Council	..	..	..	..	..	..	..	..	..	..	..	1	..	1
Deniliquin Municipal Council	..	..	..	2	..	..	..	..	1	1	..	..	..	2
Drummoyne Municipal Council	1	..	..	2	..	1	..	..	..	..	..	..	..	4
Dubbo City Council	..	..	..	3	..	..	3	..	..	..	..	..	..	6
Eurobadalla Shire Council	1	..	..	7	2	1	1	..	..	..	1	3	1	17
Evans Shire Council	..	..	..	1	..	1	..	..	..	..	..	..	..	2
Fairfield City Council	..	..	1	4	3	..	1	..	1	..	1	..	4	15
Far North Coast County Council	..	..	..	..	..	..	1	..	1	1	..	..	..	3
Forbes Shire Council	..	..	..	..	..	..	1	..	..	..	..	..	..	1
Gilgandra Shire Council	..	..	..	1	..	..	..	..	..	..	..	..	..	1
Glen Innes Municipal Council	..	..	..	..	1	..	..	..	..	..	..	..	1	2
Gloucester Shire Council	..	..	..	..	..	..	..	..	..	..	..	..	1	1
Gosford City Council	..	..	..	7	1	1	1	3	4	5	1	4	6	33
Goulburn City Council	..	..	..	3	..	..	..	..	..	..	..	1	..	4
Grafton City Council	..	..	..	1	..	..	..	..	1	..	..	..	1	3
Great Lakes Shire Council	..	..	..	4	1	2	..	..	1	2	..	2	..	13
Greater Cessnock City Council	..	..	..	1	..	..	..	..	1	..	..	..	1	4
Greater Lithgow City Council	..	..	..	..	..	..	..	..	..	..	..	..	..	1
Greater Taree City Council	1	..	..	3	..	..	..	1	..	..	..	..	..	5
Griffith Shire Council	..	..	..	..	..	..	..	..	..	..	..	..	1	1
Gunning Shire Council	..	..	..	..	..	..	..	..	..	..	..	..	1	1

Public Authority (Councils)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other	Under Investigation as at 30th June, 1983	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Harden Shire Council										1				1
Hastings Municipal Council		1		7	2	2	3	1	1				5	22
Hawkesbury Shire Council				2			1		1				2	6
Holroyd Municipal Council				1	1		2							4
Hornsby Shire Council				5	2		3	1	2	3		1	5	22
Hume Shire Council							2					2		4
Hunters Hill Municipal Council				3			3						1	7
Hurstville Municipal Council				1	2		2						2	7
Illawarra County Council	3			6			2		1		1	1	3	16
Inverell Shire Council				1					1					5
Jerilderie Shire Council					1									1
Junee Shire Council										1		2		3
Kempsey Shire Council				5	1			1	1	2		1	1	12
Kiama Municipal Council							2					2		4
Kogarah Municipal Council				5					2			1		8
Ku-Ring-Gai Municipal Council				3	1		1			2	1	4	2	13
Lake Macquarie Municipal Council		1		10	4		8		3	4	1	1	13	45
Lane Cove Municipal Council	1			3									1	5
Leichhardt Municipal Council				7	1		3			3		3	2	19
Lismore City Council				1	1	1	5					1	3	12
Liverpool City Council				4		1	3			1		3	3	15
Lockhart Shire Council				1										1
Maclean Shire Council				1			1							2
Maitland City Council							2	1					1	4
Manly Municipal Council							3		1					4
Marrickville Municipal Council				1	1			1	3	3		1	5	15
Merriwa Shire Council													2	2

Public Authority (Councils)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b) (c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other	Under Investigation as at 30th June, 1983	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Moree Plains Shire Council	. .	. .	. .	. .	. .	. .	1	. .	2	. .	. .	. .	. .	3
Mosman Municipal Council	. .	. .	. .	1	1	. .	1	. .	. .	. .	. .	. .	. .	3
Mudgee Shire Council	. .	. .	. .	1	. .	. .	1	. .	. .	. .	. .	. .	2	4
Mulwaree Shire Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	2
Murray River County Council	. .	. .	. .	1	1	. .	2	. .	1	. .	1	. .	. .	6
Murray Shire Council	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	1
Murrumbidgee Shire Council	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	1	2
Murrurundi Shire Council	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Muswellbrook Shire Council	. .	. .	. .	1	. .	. .	3	. .	. .	. .	. .	. .	. .	4
Nambucca Shire Council	. .	. .	. .	1	1	. .	1	. .	1	. .	. .	1	2	7
Namoi Valley County Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	1	2
Narrabri Shire Council	. .	. .	. .	3	. .	2	. .	. .	. .	. .	. .	. .	1	6
Newcastle City Council	. .	. .	. .	12	1	2	5	. .	2	1	. .	2	5	30
New England County Council	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Northern Riverina County Council	. .	. .	. .	3	. .	. .	1	. .	. .	. .	. .	. .	3	7
Northern Rivers County Council	. .	. .	. .	5	2	. .	4	. .	1	. .	1	1	2	16
North Sydney Municipal Council	. .	. .	. .	. .	. .	1	5	. .	2	1	. .	2	7	18
North West County Council	. .	. .	. .	. .	. .	. .	1	. .	. .	1	. .	1	1	4
Orange City Council	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Oxley County Council	. .	. .	. .	. .	2	. .	1	. .	1	. .	. .	. .	1	5
Parkes Shire Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	1
Parramatta City Council	. .	. .	. .	5	2	1	4	1	3	1	. .	. .	3	20
Parry Shire Council	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	1
Peel Cunningham County Council	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Penrith City Council	. .	. .	. .	3	1	2	2	. .	4	1	. .	2	6	21
Port Stephens Shire Council	2	. .	. .	3	1	2	2	. .	4	1	. .	. .	9	24
Prospect County Council	1	. .	. .	11	2	. .	5	. .	2	2	. .	5	1	29

Public Authority (Councils)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b)(c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading, commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Resolved Completely	Resolved Partially	Withdrawn by Complainant	Other	Under Investigation as at 30th June, 1983	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Queanbeyan City Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1
Quirinidi Shire Council	. .	. .	. .	1	2	. .	. .	. .	. .	. .	. .	. .	. .	3
Randwick Municipal Council	. .	. .	. .	4	. .	. .	4	. .	1	. .	. .	4	3	16
Rockdale Municipal Council	. .	. .	. .	1	. .	. .	3	. .	. .	. .	. .	1	. .	5
Ryde Municipal Council	. .	. .	. .	2	. .	. .	. .	. .	. .	1	. .	1	2	6
Rylstone Shire Council	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Scone Shire Council	. .	. .	. .	1	2	. .	1	. .	. .	. .	. .	. .	. .	4
Shellharbour Municipal Council	. .	. .	. .	3	. .	. .	1	. .	. .	. .	. .	. .	1	5
Shoalhaven City Council	4	. .	. .	13	2	3	5	1	1	2	. .	1	5	37
Shortland County Council	. .	. .	. .	3	2	. .	5	. .	4	. .	. .	3	3	17
Singleton Shire Council	. .	. .	. .	. .	. .	1	1	. .	. .	. .	. .	3	. .	5
Southern Mitchell County Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	1
Southern Riverina County Council	. .	. .	. .	. .	. .	. .	2	. .	. .	. .	. .	. .	. .	2
Southern Tablelands County Council	. .	. .	. .	1	. .	. .	1	. .	. .	. .	. .	. .	. .	2
Strathfield Municipal Council	. .	. .	. .	1	. .	. .	. .	1	. .	. .	. .	. .	. .	2
Sutherland Shire Council	. .	. .	. .	12	2	. .	3	1	2	3	. .	2	6	31
Sydney City Council	. .	. .	. .	14	1	. .	7	1	. .	3	. .	5	25	56
Sydney County Council	2	. .	. .	14	5	. .	12	. .	9	7	1	1	12	63
Tamworth City Council	. .	. .	. .	2	. .	1	. .	. .	1	. .	. .	1	2	7
Tenterfield Shire Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	1
Tumbarumba Shire Council	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	1
Tumut River County Council	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	1	. .	2
Tumut Shire Council	. .	. .	. .	2	1	. .	. .	. .	. .	. .	. .	1	. .	4
Tweed Shire Council	. .	. .	. .	6	1	. .	. .	. .	1	. .	. .	. .	. .	8
Ulan County Council	. .	. .	. .	. .	. .	. .	. .	1	. .	1	. .	. .	. .	1
Ulmara Shire Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	1
Uralla Shire Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	1

Public Authority (Councils)	No Jurisdiction			Declined					Discontinued					
	Sec. 12	Sec. 12 (1)(a)	Sec. 12 (1)(b)(c)(d)	Sec. 13 (4)(a)	Sec. 13 (4)(b)	Sec. 13 (5)			(1)	(2)	(3)	(4)		
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	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Wagga Wagga City Council	1	. .	. .	1	. .	. .	1	1	2	1	. .	. .	. .	7
Wakool Shire Council	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1
Warringah Shire Council	. .	. .	. .	8	3	3	3	. .	2	. .	. .	1	12	32
Waverley Municipal Council	. .	. .	. .	4	1	. .	4	. .	2	2	. .	2	5	20
Wentworth Shire Council	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	1
Willoughby Municipal Council	. .	. .	. .	5	. .	. .	. .	. .	. .	. .	. .	2	4	11
Wingecarribee Shire Council	. .	. .	. .	7	. .	2	1	1	1	. .	. .	. .	2	14
Wollondilly Shire Council	. .	. .	. .	3	2	1	1	. .	3	. .	1	. .	1	12
Wollongong City Council	. .	1	. .	7	1	. .	3	1	. .	. .	. .	. .	4	17
Woollahra Municipal Council	. .	. .	. .	8	3	1	3	1	1	1	. .	2	3	23
Wyong Shire Council	. .	. .	. .	4	1	1	5	1	2	4	. .	6	. .	24
Yallaroi Shire Council	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	1	2
Yass Shire Council	. .	. .	. .	. .	. .	. .	2	. .	. .	. .	. .	. .	1	3
Young Shire Council	. .	. .	. .	1	. .	1	. .	. .	. .	. .	. .	. .	. .	2
	20	3	2	369	84	43	207	21	98	74	10	102	240	1273
Under Investigation as at 30th June 1982														215
Received														1058

PART V

SUMMARY OF REPORT OF N.S.W. OMBUDSMAN 1982/83

Role of the Ombudsman

The Ombudsman is an independent official whose task is to investigate citizens' complaints about N.S.W. government departments, authorities, local councils and members of the police force, and to report any findings of wrong conduct. The Ombudsman's Office thus ensures a greater concern for individual circumstances in the administration of government departments. The current office bearers are:-

Ombudsman	G. G. Masterman, QC
Deputy Ombudsman	Dr Brian Jinks
Assistant Ombudsman	Susan Armstrong
Principal Investigation Officer	Gordon Smith

Complaints received

The number of complaints received and investigated has increased by nearly 20% over the past year (see table below).

Written Complaints by Major Categories

	1981-82	1982-83
OMBUDSMAN ACT		
(a) Departments and Authorities	3,032	3,606
(b) Local Councils	860	1,058
POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT	1,121	1,349
	5,013	6,013

Information for Complainants

The Office is situated on the 14th Floor, 175 Pitt Street, Sydney, and is open from 9 am to 5 pm.

Interviewing officers are available during those hours, or may be telephoned on (02) 235-4000.

Investigation of Complaints

When a complaint is received, the Ombudsman's first step is usually to ask the public service for its explanation of what happened. If a mistake has been made, it can often be fixed at this stage.

When he investigates complaints, the Ombudsman has wide powers. He can demand Departmental records, enter and inspect Government premises, and question the public servants concerned.

If the Ombudsman finds there has been wrong conduct by the public authority, he can recommend action to overcome the problem and ensure it does not happen again. If he is not satisfied with the steps taken as a result of his recommendations, he can report to Parliament.

Reports to Parliament During 1982-83

The Ombudsman made 11 reports to Parliament during the past year. They included reports on:

- — Unsatisfactory police investigation of allegations of a tow-truck racket involving some police officers as well as tow-truck operators.
- — Inadequate offers of money to be paid for private land acquired for public use by the Department of Planning and Environment.
- — The unreasonable use by police officers of the power to arrest people on minor charges, where it would have been possible to proceed by summons.

Secrecy Provisions of Ombudsman Act

Provisions in the NSW Ombudsman Act prevent the Ombudsman from holding an inquiry in public, or making public his findings on complaints investigated. Final reports can be made available only to the responsible Minister, the head of the public authority involved, and the complainant. The Ombudsman has criticised these provisions, claiming that he should, like Ombudsmen in other States and countries, have the right to publish information in the public interest. At present, the only reports that become public are those presented to Parliament (well under 1% of cases).

Limits to the Ombudsman's Powers

The Ombudsman cannot investigate:-

— decisions of a Cabinet Minister

— decisions of a Court

— employer-employee relationships

— matters concerned with private companies

— some other matters excluded in the Ombudsman Act.

"Own Motion" Investigations

The Ombudsman can investigate a matter of public interest on his own initiative. He does not have to wait until a complaint is received.

Electricity Power Stations

In December 1982 the Ombudsman published a report on alleged inadequate maintenance at Liddell and other electricity power stations. A press report described the report as "a model of how to conduct an effective, productive and relatively expeditious inquiry into the operation of a semi-government authority".

Juvenile Institutions

Investigation officers make regular visits to institutions run for juveniles by the Department of Youth and Community Services. Many complaints from the young inmates can be solved through discussions on the spot with supervising staff.

Brothels in Darlinghurst/Kings Cross

The Ombudsman investigated whether the Sydney City Council could exercise more control over brothels in the Darlinghurst area. A number of recommendations were made.

Prisons

Each year many written and oral complaints are received from prisoners. In 1982-83, there were 845 written complaints and 189 oral complaints. The Ombudsman examined the issues of wrongful transfer, segregation, the medical service provided for prisoners, and allegations that officers were involved in drug distribution. Regular visits are made to gaols throughout NSW in the course of these investigations.

Complaints Against the Police

In 1982-83, 1349 complaints were received about alleged wrong conduct by police. The Ombudsman explained that because, under the Police Regulation (Allegations of Misconduct) Act, 1978, he lacked the power to investigate matters himself, and had to rely on police investigations, in many complaints he found he was "unable to determine" whether or not the complaint was sustained. Following a court decision in favour of the Ombudsman, new legislation has been foreshadowed by the N.S.W. Government.

The particular issues discussed in the 1982-83 Annual Report included:

— Anonymous complaints

— Allegations of police involvement in the tow-truck rackets

— Deferrals of investigations pending court proceedings

— Misconduct by highway patrol officers.

Case Notes from the Ombudsman's 1982-83 Annual Report — Summaries

* A complaint was received that a bill for water consumption was sent to a consumer whose property was not connected to water supplies. The Water Board found that its records for the property and the adjoining one had been confused. The accounts were redirected and apologies made to both proprietors.

* A young woman who lost her job as an apprentice complained that her employment would have been secure if the Apprenticeship Directorate (Department of Industrial Relations) had processed her indenture papers faster. Inquiries revealed a big backlog of paperwork in the section. The Directorate was about five months behind in dealaing with some matters. The Under Secretary of the Department later informed the Ombudsman that new procedures involving the use of new technology had been introduced to avoid similar delays in the future.

* A member of the army reserve failed to vote because on polling day he injured his leg while on an army exercise. He complained that the State Electoral Office intended to fine him although he gave an excuse for not voting. The Ombudsman's Office learnt that the Electoral Office had made special arrangements for army reserve members to vote, and therefore regarded the complainant's excuse that he was on an exercise was insufficient. The explanation given in the complaint was much fuller than the one given on the form received by the Electoral Office. On learning of the voter's injury, the Principal Returning Officer exonerated him and said he would not face a fine.

* A blind man complained that his local council had allowed shopkeepers to place signs and goods on the footpaths. These obstructed handicapped people who needed to follow a definite route. He had had some severe falls. He approached the council several times about the problem. Following enquiries from the Ombudsman's Office and the consideration of legal advice, the Council ceased allowing goods and signs on footpaths.

* A group of Moss Vale residents formed a 'Save the Theatrette' group when Wingecarribee Shire Council decided to use a community hall as office space. The Theatrette had been built partly as a result of fundraising and donations from local residents. It was the only public entertainment venue in the town. The Ombudsman's report found the Council's proposal to be wrong conduct. When the Council resolved to leave the Theatrette untouched and find some other solution to the accommodation shortage, several Moss Vale residents wrote letters of thanks to the Ombudsman.

* A householder complained to the Ombudsman that the Education Department had placed demountable classrooms for a neighbouring high school too close to her back fence. She said the Department had failed to make the best use of its available space or to consult neighbours. A regional officer of the Department stressed its legal and moral right to place the classrooms there. Investigation revealed the principal of the school had decided where to place the classrooms, without consulting other authorities or neighbouring householders. After receiving the Ombudsman's report, the Minister for Education visited the site and spoke to the complainant. As a result the classrooms were moved and procedures for consulting neighbours were set up.

* A motorist who was interested in buying a second hand Chrysler checked with the Department of Motor Transport that the car was not stolen. He was told that it wasn't. Four months later the car was impounded by the police as a stolen vehicle. A detailed investigation by the Ombudsman's Office showed that a faulty checking system in the motor registry had allowed a car thief to pass the car off as a lawfully registered Victorian car. Following the investigation of this complaint, the Department tightened up its information systems to avoid similar mistakes in the future. The motorist concerned received $1,200 from the Department.

30468C 11.83