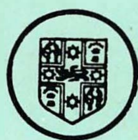

Annual Report

Ombudsman of New South Wales

Year ended 30th June, 1984

THE OMBUDSMAN OF NEW SOUTH WALES

NINTH ANNUAL REPORT

(1st July, 1983 - 30th June, 1984)

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THE OMBUDSMAN OF NEW SOUTH WALES

NINTH ANNUAL REPORT

(1st July, 1983 - 30th June, 1984)

Introduction

This is the ninth Annual Report of the Ombudsman of New South Wales. It is submitted to the Premier for presentation to Parliament in accordance with section 30 of the Ombudsman Act. It contains an account of the work of the Office of the Ombudsman in the twelve months ending 30th June, 1984. Functions under both the Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act are included in the report.

The Ombudsman, G.G. Masterman, Q.C., was appointed in June 1981, making this his third Annual Report. As in the past two reports, some important issues current at the time of writing (September 1984) have been mentioned where there is merit in bringing material up to date. A brief summary of the report is attached as an appendix.

1983-84 has been a year of significant change for the Office of the Ombudsman. There have been legislative amendments to both the Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act, the latter leading to new procedures for investigating complaints against police. There were administrative changes, too, with the Office gazetted an Administrative Office under the Public Service Act, thus achieving greater autonomy.

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
Case Notes

Part V
Summary

Written Complaints by Major Categories

The number of complaints received during the year is shown in the following table:

	1983-84
OMBUDSMAN ACT	
(a) Departments and Authorities (other than Corrective Services)	1930
(b) Local Councils	1272
(c) Department of Corrective Services	818
POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT	1550
Outside Jurisdiction (Commonwealth authorities private companies etc.)	534
	6104

Oral Complaints and Inquiries

Three interviewing officers spend a great deal of their time answering questions from members of the public by telephone and in personal interviews. An average of 24 telephone calls is received each day.

Many people telephone or come in with problems and complaints which are outside the jurisdiction of the Ombudsman. Interviewing officers do their best to make appropriate referrals to other agencies.

They also assist some complainants who have language or literacy problems in preparing their complaints. Records are kept of the most frequently asked questions so that our information systems can be kept up to date.

During 1983-84 approximately 1156 interviews were conducted at our Office apart from those held as part of our country outreach campaign.

PART I

SECTION A: OMBUDSMAN ACT: GENERAL AREA

1. Role of the Ombudsman

The Ombudsman is an independent statutory officer appointed by the Government to investigate citizens' complaints about public authorities. The New South Wales Ombudsman is appointed under the Ombudsman Act 1974. The Police Regulation (Allegations of Misconduct) Act 1978, and amendments to that Act of 1983, also confer powers on the Ombudsman in relation to complaints against police. The Ombudsman concept, in the past few decades, has spread far beyond Scandinavia where it originated. Despite minor differences from one jurisdiction to another, the concept of an impartial investigator of maladministration remains constant.

The most emphasised characteristics are, on the one hand, impartial independence from government and bureaucracy and, on the other hand, direct accountability to Parliament as an agent of Parliament. In his closing remarks on the Commonwealth Ombudsman Amendment Bill in October '83, the Commonwealth Attorney-General, Senator Gareth Evans paid tribute to the Commonwealth Ombudsman for "a vigorous and robust approach to his job of keeping governments and public servants who work for them honest and sensitive to public interest considerations".

By international standards, the N.S.W. Ombudsman's Office receives a high volume of complaints. Serving a population of approximately five million, it received 6104 complaints in 1983-84. In comparison, the Ombudsman of Denmark, a country with a similar population, receives only

about 1500 complaints per year. The contrast would be even sharper if one were to add the complaints received by the Commonwealth Ombudsman from residents of New South Wales.

While the Ombudsman's primary task must be impartial investigation of complaints, other functions flow naturally from that task. These include recommending administrative improvements, and providing information and advice about government services to complainants and other members of the public.

Individual citizens sometimes feel bewildered by complex government systems. On many occasions, would-be complainants are satisfied with an explanation of the administrative procedures applied to their cases.

Outreach campaigns to increase the Office's accessibility and the need for greater freedom to publicise the work of the Office are discussed later in this Report.

2. New South Wales Ombudsman Constituted Administrative Office

In the last Annual Report concern was expressed by the Ombudsman about the provisions of the Public Service Act which subjected the Office of the Ombudsman to the control of the Secretary of the Premier's Department. It was recommended that independence was necessary to ensure the vigorous, effective and independent investigation of complaints against the bureaucracy. One means of achieving this was by declaring the Office of the Ombudsman an "Administrative Office" under the Public Service Act.

By the Government Gazette of Friday, 24th February, 1984 the Governor, Air Marshal Sir James Anthony Rowland, proclaimed the necessary amendment to Part 1 of Schedule 2 of the Public Service Act. The Act was amended by inserting in Part 1 of Schedule 2, after the matter relating to the National Parks and Wildlife Service, the following:

(a) Under Column 1, "Body, group or organisation" was added the "Ombudsman's Office".

(b) Under Column 2, "Person exercising functions of Department Head" was added the "Ombudsman".

This proclamation gave the Office of the Ombudsman statutory independence as an "Administrative Office" and placed the Office on the same footing as the offices of the Auditor-General and State Electoral Commissioner. The Ombudsman, rather than the Permanent Head of the Premier's Department, is now the person exercising the functions under section 46(2) of the Public Service Act. These functions include control and management of accounts, personnel, the equal employment opportunity management plan, and staff development and training.

The amendment to Schedule 2 of the Public Service Act has remedied an anomalous and undesirable situation. Prior to the amendment, the Ombudsman in New South Wales was subject, in important administrative areas, to one of the leading members of the bureaucracy. It is important that the Office of the Ombudsman should be seen by the public to be free from any possibility of influence by any Department it may be called upon to investigate. The amendment has gone some

distance towards bringing New South Wales into line with the widely held view that the two essential features of the Ombudsman are his direct responsibility to Parliament and the corresponding need for independence from the bureaucracy.

The Ombudsman welcomes the response by the Government to the recommendation made in the Annual Report for 1982/83. The remaining issue is whether the Ombudsman should be outside the Public Service Act altogether. In Victoria, Queensland, and Tasmania, and many overseas countries including New Zealand, both the Ombudsman and his staff are independent of the Public Service Board and Public Service Act. Whether a change in this area is also desirable in New South Wales depends on the extent to which the Public Service Board recognises the fundamental principle that the Ombudsman is independent and responsible to Parliament, and not to any public service authority.

3. Suggested Guidelines for Selection Committees for Positions of Deputy Ombudsman and Assistant Ombudsman

All definitions of the concept of the Ombudsman emphasise the essential independence of the Ombudsman from the bureaucracy. Accordingly, it is highly desirable that the influence of the senior members of the bureaucracy in the appointment of the Deputy Ombudsman and the Assistant Ombudsman should be minimised or eliminated.

The present practice is for the statutory positions of Deputy Ombudsman and Assistant Ombudsman to be made by Cabinet on the advice of selection committees. On the basis of his experience, the Ombudsman believes changes should be made in the selection and composition of these committees. He puts forward the following proposals.

(1) The advisory selection committees for Deputy Ombudsman and Assistant Ombudsman should consist of

  (a) the Ombudsman

  (b) a Public Service officer senior to the position under consideration (as suggested for ordinary Public Service selection committees)

  (c) a person outside the Public Service.

(2) One at least of the committee should be a woman with a commitment to equal opportunity.

(3) The members of the advisory committee should be chosen by the Ombudsman or, if this is not acceptable, the Premier (without Public Service advice).

So far as the appointment of the Ombudsman is concerned, there is a good case for appointment by a bi-partisan parliamentary committee formed for the purpose as occurs in a number of other countries. This would emphasise the concept of the Ombudsman as an agent of Parliament rather than of the Government or the Public Service.

4. Secrecy

Need for Legislative Amendment

This subject has been referred to by the present Ombudsman in his last two annual reports. The problems created for the administration and effectiveness of the office by the secrecy provisions of the Ombudsman Act continued over the year under review.

On the 17 September, 1984, the Ombudsman submitted to the Premier a report to Parliament under section 31 of the Ombudsman Act entitled "Secrecy Provisions (need to amend N.S.W. Ombudsman Act to introduce section 35A of the Commonwealth Act)". That report detailed the history of the introduction by the Commonwealth Government in October 1983 of section 35A which empowered the Commonwealth Ombudsman to disclose information and make statements where he believed it was in the public interest so to do. The Report to Parliament argued strongly the case for the introduction of similar provisions in the N.S.W. Ombudsman Act. The final section of the Special Report to Parliament was in the following terms:

"**Recommendations**

The Ombudsman recommends that as soon as possible the N.S.W. Parliament introduce the following provision into the N.S.W. Ombudsman Act:-

"34A. (1) Nothing in this Act shall be taken to preclude the Ombudsman from disclosing information, or making a statement, to any person or to the public or a section of the public with respect to the performance of the functions of, or an investigation by, the Ombudsman under this Act if, in the opinion of the Ombudsman, it is in the interests of any Department, prescribed authority or person, or is otherwise in the public interest, so to disclose that information or to make that statement.

(2) The Ombudsman shall not disclose information or make a statement under sub-section (1) with respect to a particular investigation where the disclosure of that information, or the making of that statement, is likely to interfere with the carrying out of that or any other investigation or the making of a report under this Act.

(3) The Ombudsman shall not, in disclosing information or making a statement under sub-section (1) with respect to a particular investigation -

(a) set out opinions that are, either expressly or impliedly, critical of a Department, prescribed authority or person unless the Ombudsman has complied with section 24 in relation to the investigation; or

(b) disclose the name of the complainant or any other matter that would enable a complainant to be identified unless it is fair and reasonable in all the circumstances to do so.

> (4) This section has effect notwithstanding section 17 and section 34 but does not affect the operation of section 22."

> This suggested section is identical with Section 35A of the Commonwealth Act except for changes referring to differently numbered provisions of the N.S.W. Act. The suggested section includes similar safeguards to those present in the Commonwealth Act."

This report was tabled in Parliament on 18th September, 1984. It is to be hoped that Parliament will support the proposal.

5. The Ombudsman and Freedom of Information Legislation

Late in 1983, the Premier introduced into Parliament the New South Wales Freedom of Information Bill. The Bill was tabled for public comment prior to debate. The Premier has more recently stated that Freedom of Information legislation based on the 1983 Bill will be re-introduced into the Legislative Assembly during the 1984 Budget Session of Parliament.

Under the original 1983 Bill, it appears that the Ombudsman would have jurisdiction to investigate decisions of authorities on freedom of information applications, in cases where applicants do not have a right of review to an agency's principal officer or where the decision is not already the subject of review under the legislation.

The Bill contains provision for the exemption of certain bodies from the legislation. By memo dated 5th January, 1984, the Premier sought the Ombudsman's advice on whether the Ombudsman's Office should be exempted from the provisions of the proposed legislation.

The Ombudsman's reply to the Secretary of the Premier's Department stated:

> "I would like to support wholeheartedly any steps taken by the Government towards freedom of information. On this basis, I do not believe that the Ombudsman's Office should be excluded from the operation of the proposed legislation."

6. The Ombudsman (Amendment) Act 1983

A number of amendments to the Ombudsman Act, generally increasing both the jurisdiction and the power of the Ombudsman, were enacted by the Government in 1983 with the support of the Opposition.

In his speech at the second reading of the Bill in the Legislative Assembly, the Premier stated the Government's position in the following terms:

> "The proposals now before the House reflect the policy of keeping the Ombudsman Act under review to ensure that the Ombudsman's powers are kept in line with contemporary needs."

The Opposition's position was summarised in the following two opening sentences of the response by the Member for Gordon:

> "The Opposition does not oppose the bill for it will make a number of advances in the administration of the Ombudsman's jurisdiction and his office. These advances are welcome."

The major amendments are discussed below:

Expansion of Jurisdiction

The amendments brought into the Ombudsman's jurisdiction temporary employees of the Public Service (Section 5(1)(c)) and the conduct of the Public Trustee in the administration of an estate or trust (Section 5(i)). An important qualification of jurisdiction in respect of the latter is discussed elsewhere under the heading Public Trustee.

An extension of jurisdiction of perhaps greater note than the above was brought about by an amendment of Clause 2 of the Schedule to Section 12(1)(a) of the Ombudsman Act. That Clause now provides, in effect, that the conduct of a person or body (not being a Court) before whom persons may be compelled to appear and give evidence, and the conduct of any person associated with such a body or person, is now clearly within the jurisdiction of the Ombudsman provided only that the conduct does not relate to the carrying on and determination of an inquiry or any other proceeding.

This has corrected an apparently unintended exclusion of a considerable number of public authorities.

Expansion of the Powers of the Ombudsman

The insertion of Section 21A into the Act allows the Ombudsman to seek and, on the Court's decision, obtain from the Supreme Court an injunction restraining a public authority from engaging in conduct likely to prejudice or negate the effect or implementation of a recommendation which the Ombudsman may make under Section 26(2) of the Act.

This is seen by Parliament to be a most important amendment. Obviously, if the practical value of investigations under Section 13(1) of the Act is not to be vulnerable to being compromised by pre-emptive actions of public authorities, it is important that the recommendations arising from those investigations should at least be capable of being implemented when made.

It is not expected, in the light of past experience, that recourse to this provision will be necessary on other than rare occasions. However, considered in the light of past experience with local government, and plain common sense, the need for the measure is indisputable.

New Sections 10A and 10B of the Act empower the Ombudsman to delegate, with the approval of the Minister, major powers of investigation to an Ombudsman in another jurisdiction and to accept such powers as a delegate for another Ombudsman. This extends to a person who is empowered to exercise under a law of another State, the Commonwealth or a Territory of the Commonwealth, functions similar to the Ombudsman under the New South Wales legislation.

This measure has been related by the Government to difficulty experienced some time ago with a body set up as the result of a tri-partite agreement entered into by the Victorian, New South Wales, and Commonwealth Governments.

The Act has also been amended to allow the Ombudsman to seek a determination from the Supreme Court when any question arises about jurisdiction. The measure gives the same right to public authorities and the complainant involved in any investigation or proposed investigation (Section 35B).

The act as amended now also allows the Ombudsman to delegate wider powers to the Deputy Ombudsman and also now specifically provides for the appointment of Assistant Ombudsmen. The Ombudsman's power to require information and documents to be provided to him at his Office or any other stipulated place has also been clarified and confirmed.

The Act now provides (Section 35A) that no civil or criminal proceedings shall be taken against the Ombudsman or his officers without the leave of the Supreme Court, which is to be given only when substantial grounds exist for the inference that the Ombudsman or his officer has acted in bad faith.

7. Reports to Ministers

During the year 1983-84, 124 reports of wrong conduct (55 against State Departments and authorities and 69 against local councils) have been made to Ministers under section 26 of the Ombudsman Act. When reports are presented to the Minister responsible for a particular authority, the Ombudsman offers to consult with him on her or his findings and recommendations. Many Ministers accept this offer and fruitful discussions take place about possible improvements to procedures in their Departments.

The Ombudsman has the power to report on cases where his recommendations have not been complied with (or where public interest considerations arise). In the majority of cases, the recommendations of section 26 reports are complied with. Many of the subjects of reports to Ministers are discussed in this Annual Report either as topics or case notes.

The conduct of Ministers is specifically exempt from investigation by the Ombudsman in Schedule 1 of the Act. Public authorities whose conduct may be investigated are government organisations and employees.

8. Reports to Parliament

The Ombudsman has the power to make two types of reports to Parliament, apart from the Annual Report, under the Ombudsman Act. They are special reports (s31) and non-compliance reports (s27).

Reports may be made under s31 of the Ombudsman Act on any issue relating to carrying out of 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). No reports to Parliament have been made under this section this year.

The following reports have been tabled in Parliament:-

Special Reports under Section 31 of the Ombudsman Act

Report on the Overshadowing of Hyde Park (The Height of Buildings Advisory Committee and Sydney City Council)

Report on the inaction of the Department of Environment and Planning in conservation issue - Innisfallen Castle (Department of Environment and Planning)

Report on refusal to supply names of Government Contract Holders (State Contracts Control Board)

Report on misleading advertising of home sites (Department of Lands and the Land Commission)

Report on decision to sell parts of the Hermitage Reserve to Adjoining Landowners (National Parks and Wildlife Service)

Report on interviews with developers (Department of Environment and Planning and the former Planning and Environment Commission)

Report on removal of Motor Vehicle from outside residence without notification (North Sydney Municipal Council)

Non-compliance reports under Section 27 of the Ombudsman Act

Report on Darlinghurst/Kings Cross Brothels (Council of the City of Sydney)

Report on procedures for processing public liability claims (Randwick Municipal Council)

Report on procedures for processing public liability claims (Merriwa Shire Council)

Report on insufficient action taken by the Department of Health following injury to patient in Peat Island Hospital (Department of Health)

Report on failure by Dubbo Base Hospital to fairly consider application of Dr. M. Wainberg for position of Visiting Medical Officer (Dubbo Base Hospital and the Department of Health)

9. Responses of Public Authorities to Ombudsman's Investigations.

Public authorities have displayed a variety of attitudes and responses to investigations under the Ombudsman Act. Quite a number of public authorities have been very co-operative while, on the other hand, a number of public authorities have not co-operated fully in investigations conducted by the Ombudsman's Investigation Officers.

Examples of public authorities which have made a co-operative response to Ombudsman's investigations.

Some random examples are given in the following paragraphs of those public authorities who have responded co-operatively to Ombudsman investigations, in that they have, for example, supplied quick replies to correspondence; proffered access to relevant files and records; co-operated with the investigation officer concerned; provided full explanations of procedures and actions relevant to the enquiry; and where a report on their administrative conduct has been submitted, have given appropriate consideration to the findings and recommendations made. (It should be recognised that these examples relate to the degree of co-operation in responding to Ombudsman investigations, and are not intended to illustrate good or bad administration as such.)

Housing Commission

The Housing Commission generally reponds to enquiries by the Ombudsman promptly, giving full explanations, and frequently itself investigates matters complained about in order to determine what remedial action is required. In the case referred to below, the Commission took prompt action to rectify the problem. This is an extract from the Chief Executive's reply to the Ombudsman :

Complaint of failure to provide promised fence.

> "I refer to your enquiry dated 25th January, 1984 in relation to Mrs. V's concern that cut-off fencing had not been installed at her property.
>
> My enquiries have revealed that when Mr. and Mrs. V. occupied the dwelling in 1981, they were advised by the Relieving District Officer that arrangements would be made to enclose the rear yard by providing 1500mm high fencing...
>
> It is clear that the tenant's complaint is justified and I regret that the need to take some special action in this case, despite the difficulties already outlined, has apparently been overlooked by the District Officers who have managed the Commission's properties in the area.
>
> Although the Commission is still not able to proceed with a fencing programme, I have arranged for fencing to be provided to Mr. and Mrs. V's property. This work has now been undertaken.
>
> The Regional Manager is taking up, with the staff concerned, the failure to have effective action taken on this occasion.
>
> Yours sincerely,

(V.E. Helby)
Chief Executive"

Parramatta City Council

Parramatta City Council stands out among the large number of Municipal and Shire Councils about which complaints are received as an example of co-operative responses to Ombudsman investigations, in that replies to enquiries are received extremely promptly, (sometimes within a matter of days), and the responses generally include detailed information about the matter requested. Parramatta City Council has not on any occasion failed to provide full and courteous co-operation with officers of the Ombudsman in the course of their investigations.

Valuer-General

The Valuer-General has responded to the Ombudsman's enquiries with detailed accounts of the Department's actions. He has taken responsibility for problems arising in those cases where proper administrative procedures have not been followed by the Department. For example:-

Complaint re: fees charged for valuation.

"It is evident that a number of actions taken in this matter were not in accord with departmental policy.

Pending the outcome of your own investigations in the matter following Mr. F's complaint to you, the Recovery Section of the Crown Solicitor's Office has been requested, by telephone and confirmed by letter, to take no further action in the matter for the time being.

In order to assist you in your examination of this matter I have attached the departmental files concerning these applications. Their return when you have completed your actions would be appreciated.

Should you require any further information, please contact me again at your earliest convenience.

Yours faithfully,

I. Beatty
Valuer-General."

Hunter District Water Board

The former President and Chief Executive of the Hunter District Water Board, Dr. John Paterson, has provided, without fail, prompt and detailed responses to enquiries by the Ombudsman, usually sending an acknowledgement within a few days, and a clear and well-researched response within two to three weeks. The Board has co-operated fully in all aspects of enquiries by the Ombudsman's officers.

The Metropolitan Water Sewerage and Drainage Board

There has been a marked difference in the Board's responses to Ombudsman investigations during the year 1983-84. In previous years, it was not unusual for the Board to take 8 to 10 weeks to respond to the Ombudsman, and for the responses to be merely wordy accounts of the matter complained of. In 1982, the Ombudsman made a Section 26 report of wrong conduct concerning the Board's delay in replying to correspondence. Delays in this respect have been monitored by the Ombudsman's Office subsequent to that report. Since the re-structuring of the Board began, co-operation by the Board has increased markedly. Written responses have been received within the stipulated time period, and the Board's replies to enquiries by the Ombudsman's officers have frequently included a copy of a letter sent by the Board to the complainant setting out the causes of the problem, agreeing to rectify the matter where appropriate, and offering an apology to the person concerned. There are numerous examples in the office demonstrating an obvious commitment on the part of the Board and its new General Manager, Dr. Peter Crawford, to respond promptly and efficiently to matters raised by the Ombudsman.

Examples of positive responses received to Section 26 reports of wrong conduct submitted to public authorities for comment.

The following examples illustrate the responses of public authorities in cases where a report on their administrative conduct under Section 26 of the Ombudsman Act has been submitted for comment, and the public authority concerned has given appropriate consideration to the findings and recommendations made:

Department of Youth and Community Services

"Dear Mr. Masterman,

Thank you for the opportunity to reply to your draft report dated 24th November, 1983.

The draft report sets out a compelling argument ...

The report has been objectively and impartially written and I was very grateful that the authors went to some pains to faithfully reflect the notivation and concern of Mr. G. and me, which prompted us to implement the ... programme.

I thank you for the manner in which your Investigating Officers reviewed the Programme and for the early advice to my Department ...

H. Heilpern
Director-General"

National Parks and Wildlife Service

"Thank you for providing me the opportunity to comment on the accuracy of your draft report on this matter and to state my views on the conclusions drawn.

The investigation has been thorough and I consider that the report is generally quite fair and objective. I have no argument with the accuracy of the account of the order of events as set out in the draft report.

G.M. King
Acting Director"

Valuer-General's Department

"I refer to your letter concerning the subject complaint and the attached confidential draft report.

I accept the recommendations...of the report and confirm that steps have been taken to ensure that proper procedures are adhered to in the future. I have forwarded a personal letter to (the complainant) apologising for the inconvenience caused by the Department's action (copy attached)....

Yours sincerely

I. Beatty
Valuer-General."

State Rail Authority

"I refer to your letter concerning the draft report regarding your investigation into the conduct of the State Rail Authority following a complaint by Mr. K...

The draft report to be submitted to the Minister has been carefully reviewed and I find no inaccuracies in respect to the relevant facts as outlined and I am unable to dispute the conclusion reached...

Yours sincerely

Pat Johnson
Acting Chief Executive"

Lake Macquarie Municipal Council

Comments made in response to a report in which the Investigating Officer did not find wrong conduct in terms of the Ombudsman Act on the part of the Council:-

"Thank you for the opportunity of commenting on the accuracy of the matters set out in your draft report.

The report is a fair and reasonable statement of the circumstances of the case. The conclusions and findings are free from bias and just.

I take this opportunity to thank those concerned with the investigation and preparation of the report for the courtesy extended to me and my staff.

Yours faithfully,

D.T. Caldwell,
Director of Community Services"

Examples of Public Authorities whose responses to Ombudsman investigations have been unco-operative

Some public authorities have been initially slow to respond to enquiries, or have failed to provide complete information in response to initial enquiries, so that further action has been required to obtain the information requested. Some public authorities have failed to take action in respect of their obligations under the Ombudsman Act.

The following paragraphs provide some examples of public authorities whose response to investigations by officers of the Ombudsman has been unco-operative:-

Merriwa Shire Council

Following a complaint about Merriwa Shire Council's refusal to consider a boundary alteration, an investigation was commenced. Council was questioned about the number of properties affected, to which Council replied that it had no information or records which would enable it to obtain the information.

The Council was subsequently presented with a draft report containing a provisional finding that the Council's conduct was wrong in that its resolution to refuse the request for a boundary change was made with insufficient information, and was therefore unreasonable.

The draft report included a proposed recommendation that the Council reconsider the request. The Council was given every opportunity to make a submission in response to this draft report, but merely resolved to formally receive the correspondence.

The draft report was subsequently adopted with minor amendments and published as a final report. The Council was required to inform the Ombudsman of any action taken or proposed in consequence of the report. When a response was not received from the Council within the time limit set, the Shire President was reminded of Council's obligation to furnish the information.

Subsequent correspondence revealed that the Shire President had not brought the final report to the notice of Council. Such action was necessary before the Council could decide whether it would take any action in consequence of the report.

The Shire Clerk and the Shire President were informed of the Council's obligation under the Ombudsman Act and the matter was then put before the Council. Council resolved to take no action in the matter.

The Ombudsman's recommendation had simply requested the Council to reconsider the matter with a knowledge of the facts. No recommendation was made on how the proposal for a boundary change should be resolved. The fact that Council chose neither to defend nor explain its action when presented with a report from the Ombudsman's Office critical of its conduct showed a certain degree of contempt.

Government Insurance Office

The Government Insurance Office exhibits both delay and an attitude of unco-operativeness in its responses to Ombudsman enquiries.

a) The Ombudsman received a complaint from a solicitor that it took five letters to get any response at all from the GIO. The solicitor complained to the Ombudsman and the response, or lack of it, to the Ombudsman's enquiries was as follows:-

Ombudsman's letter - 18 Nov 1983	No response
Ombudsman's letter - 30 Dec 1983	No response
Telephone enquiry to Managing Director's Secretary - 20 Jan 1984	No response
Further telephone enquiry - 23 Jan 1984	No response
Further telephone enquiry - 24 Jan 1984	

As the response ultimately received on 25 January 1984 was considered unsatisfactory, the Ombudsman utilised his Royal Commission powers to hold an inquiry at his Office.

b) In a letter to the responsible Minister, Mr. Booth, enclosing copies of a report on a different matter, the Managing Director of the GIO, Mr. W. Jocelyn said:

> "Dear Mr. Booth,
>
> Attached are copies of the latest effort from the Ombudsman.
>
> You will appreciate what the Ombudsman is giving me when you read the analogy at the end of my letter."

(The analogy referred to was one about an unsewered backyard toilet with a leaking pan, and is quoted in full elsewhere in this Report).

c) In a letter to the Ombudsman following receipt of a draft report of wrong conduct under Section 26 of the Ombudsman Act, on another matter, Mr. Jocelyn said:

> "I do not intend to take any action in respect of your recommendations because:-
>
> a) They arise from an examination in isolation of a small aspect of our activities.
>
> b) The way in which we do business is receiving close examination on a "top down", all embracing approach including development of new computer and administrative approaches.
>
> c) The Public Service Board is carrying out an efficiency audit of our claim and complaint handling procedures ..."

Examples of responses made to Section 26 reports of wrong conduct submitted to Public Authorities for comment, where the Authority has included personal denigration of the Investigation Officer responsible for preparing the Report.

A small number of public authorities have responded to reports under Section 26 of the Ombudsman Act submitted to them for comment by personally denigrating the Investigation Officer who conducted the investigation, rather than concerning themselves only with the facts, conclusions and recommendations contained in the report itself.

Department of Environment and Planning

a) In a letter to the Ombudsman concerning one report of wrong conduct under Section 26 of the Ombudsman Act submitted to him, the Director of the Department, Mr. R. Smyth, referring to the report, said:

> "In my view it is not only language that can be intemperate, but that innuendo, false reasoning, emotive language and ingenuously written reports can also be regarded as being both intemperate and offensive."

The Ombudsman replied, refuting the criticism made of the Investigation Officer concerned, to which Mr. Smyth replied:

> "No personal criticism was being made of ... in my letter of the 23 January, 1984.
>
> The general reference to reports for which you are responsible was an expression of concern that the standing and confidence which your office deserves is not eroded or lost.
>
> Yours sincerely,
>
> R. B. Smyth,
> Director"

As it happened, the complainant in question was a retired New South Wales Department Head. Even though the Ombudsman's report did not go as far in its criticism of the Department of Environment and Planning as he would have liked, he accepted the report and commented that "any misgiving I may have had about pursuing that complaint has been removed by the report."

b) In response to receipt of another draft report submitted to him for comment, Mr. Smyth said:

> "the author of the draft report has an unrealistic view of public administration or is inexperienced in the workings of the public service."

He described the recommendation contained in one section of the draft as being "frankly ridiculous". He concluded his letter by saying that the draft report was:-

> "an extremely poorly thought out and researched piece of work".

In this instance, the Ombudsman took up with the Minister the matter of Mr. Smyth's personalised comments about the Investigation Officer concerned and others who had previously been criticised, deploring the comments and refuting their validity, and expressing the intention to give close consideration to such submissions put forward by the Department as are based on fact and reasonable argument. In the two instances quoted above, the Director of the Department of Environment and Planning did not restrict himself to making submissions based on fact and reasonable argument.

Government Insurance Office

The following extracts are from a report submitted to the Treasurer, Mr. K. Booth, by the Managing Director of the Government Insurance Office, Mr. W. Jocelyn, about a report under Section 26 of the Ombudsman Act in which a finding of wrong conduct on the part of the Government Insurance Office was made.

Mr. Jocelyn variously states:-

> "My intransigence on the matter has been, I believe, one of the major reasons for this rather minor matter being pursued by the Ombudsperson's office with such vigour. In fact, when originally contacted by the Ombudsperson's office (Investigation Officer's name) I was threatened with a Section 19 investigation unless I took personal interest in the case."

> "...In any event,involvement of the Managing Director of an organisation as complex as the GIO in matters of detail is a questionable practice, particularly at the whim of an Ombudsperson."

> "I find it amusing that GIO is accused of lacking initiative."

> "I can assure the Ombudsperson that the way to fix delays of this nature is not to devote scarce resources to attending to detail."

> "I do not believe that it is for the Ombudsperson to set him/her self up as an expert in Management or Administrative practices. The fact that he/she is not so expert is demonstrated by the report itself..."

> "... It seems to me that a reasonably intelligent person who was spending as much time on the matter as (Investigation Officer's name) would have connected the reference...."

> "... "Carrying on" fairly aptly describes the conduct of the Ombudsperson ..."

It is the responsibility of the head of a Department or any other public authority who has received material critical of the organisation's performance to give serious consideration to the matters contained in the report and to submit comments only about the facts and arguments put forward in the report.

The tactic of personally denigrating the Investigation Officer who has prepared a report is to be deplored. In the cases referred to in the foregoing paragraphs, there is no merit or substance to the criticisms made about the various Investigation Officers concerned.

Personal denigration of Officers has been quite unjustified in every instance, and in several cases, has been withdrawn in subsequent correspondence.

10. Time Taken in Printing of Annual Reports

The investigation of a complaint about the delay of the Government Printng Office in printing the annual report of the Ombudsman for the period ending 30th June 1982 was mentioned in the Eighth Annual Report. At the time of writing that report the investigation was not complete. As indicated in that report, 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 which showed delays in the publication of annual reports ranging from three to eight months. These delays were thought to justify investigation of the Government Printer in the production of annual reports for Government departments and instrumentalities.

In relation to the time taken to print the Seventh Annual Report of the Ombudsman, the Government Printer admitted that delays occurred in the production of annual reports. These were experienced mainly because of the large number of reports (approximately 100) received at the same time from Parliament in November, 1982.

The Government Printer pointed out, however, that there is provision for a department to advise his Office in any case where a particular report is needed quickly. A booklet explaining the procedure has been published, notices have appeared in the Public Service Board Notices, and a client liaison section has been established within the Government Printing Office to facilitate production of urgent work.

The Government Printer made the point, as was the case, that no request for urgency had been received from this Office in respect of the Seventh Annual Report and the matter was therefore not given any priority. (Such a request was made in respect of the next Annual Report (year ended 30th June, 1983) and there was a dramatic improvement in the time taken to print that report.)

The Government Printer also indicated that the production procedures have been reviewed and amended in order to decrease production times. In addition, there have been submissions to a special committee on public accounts recommending a consistent format of annual reports to avoid delays caused by customer departments requesting special features.

In view of the above the Ombudsman concluded that further resources should not be expended on the investigation. He accepted what the Government Printer had to say about notifying his officers when a matter was urgent. In view of the above, the Government Printer was notified of the decision of the Ombudsman to discontinue the investigation, indicating at the same time an intention to monitor the progress being made in respect of the initiatives the Government Printer had undertaken.

Subsequently, the Government Printer advised that an efficiency audit of the office conducted by the Public Service Board had been completed. Also two senior officers of the Board completed a project concerning the implementation of management strategies to increase efficiency. As a result of that project the Government Printer is introducing improved procedures which will generally decrease production time. A full-time Marketing Director commenced duty on February 1, 1984, and an order has been placed for computerised phototypesetting equipment.

In respect of annual reports, a publishing programme has been finalised which will act as a monitoring device to avoid delays in production. The Ombudsman's Eighth Annual Report, tabled in Parliament on the 10th November, 1983 was printed and available in the second week of February, 1984 - a satisfactory result in all the circumstances.

11. 'Own Motion' Investigations

While most of the investigations carried out by the Ombudsman's Office arise from complaints received from members of the public, some flow from the Ombudsman's 'own motion'. This means that the Ombudsman instigates the investigation without having actually received a written complaint from citizens alleging that they are the victim of some wrongdoing. 'Own motion' investigations are provided for by the NSW Ombudsman Act and are undertaken to a greater or lesser extent by most Ombudsmen in other States and in other countries.

In one recent case the Office received reliable information about a 16 year old boy who was allegedly being held in solitary confinement at the Department of Youth and Community Service's Endeavour House Training School at Tamworth. Because the citizen was not in a position to make the complaint himself the Ombudsman decided to investigate the allegations on his 'own motion'. Within hours of receiving the information the Ombudsman had sent two of his officers up to Tamworth to look into the matter. A report was produced which found the 'special containment programme' constituted 'systematic long term segregation of prisoners and was oppressive' and should be terminated. Some months later the Department advised this Office that the programme had ceased. Obviously it was difficult for the boys in question to lodge a complaint with the Office and it was only because of the vigilance of a citizen and the use by the Ombudsman of his 'own motion' powers that their plight was able to be investigated.

This power has been extensively used in investigating the practice of Councils denying liability where a citizen has been damaged by their alleged negligence. The strategy adopted has been to target certain Councils statewide where no complaint has been received by the Office and launch an 'own motion' investigation. The Office seeks information about the last three claims in which liability has been denied and assesses the reasonableness and fairness of the procedures used by the council. Other areas in which this power has been recently used range from investigations into the Metropolitan Remand Centre to the activities of the Department of Main Roads.

Monitoring the press for possible 'own motion' investigations has proved highly successful in Europe and North America. This Office has stepped up its programme in this area by assigning to one of its investigation officers the task of monitoring country and metropolitan newspapers with the aim of conducting 'own motion' investigations. This officer is looking for newspaper stories which involve alleged wrong doing on the part of government and semi-government authorities which have a sufficient public interest to justify an 'own motion' investigation. Any journalist or editor who feels they have a story which would be of interest to this Office should contact this officer and discuss the matter.

12. Royal Commission Inquiries

Section 19 of the Ombudsman Act enables the Ombudsman to hold Inquiries with the powers and protections of a Royal Commission. These powers are used primarily in investigations where there have been conflicting accounts of particular events or where unreasonable delays have occurred because of lack of co-operation by a public authority. The most important and positive benefit of a Section 19 inquiry is that the Ombudsman is able to question witnesses directly and make judgements as to whether their evidence is consistent and credible.

Inquiries and direct questioning make it much more difficult to evade a point in issue, and as a result facts are often revealed that would not come to light during a typical exchange of correspondence.

On the 10th February, 1984 Mr. W. Jocelyn, Managing Director, of the Government Insurance Office who had received ample notice of the inquiry, gave evidence during an inquiry which related to procedures for connecting correspondence received with files in the third party insurance area of the G.I.O. by the Acting Manager (Third Party) Claims.

Ombudsman: "Are you aware, for example, that shortly before this inquiry and subsequent to any correspondence that some new system was put into effect on the 7th February?

Mr. Jocelyn: Well there are a lot of new systems being put in all the time in all sorts of parts of the G.I.O. I don't know whether that system relates to third party, or whether it relates to ... I would have no knowledge of a minor new system, I don't know what that is, I don't know where that comes from. I've never seen that piece of paper before."

Ombudsman: "The position then we can state in a report is that you have, as at this time, no knowledge of it, you have not taken the trouble to read the file at all.

Mr. Jocelyn: That's right."

In June, 1984 in the course of an investigation, an inquiry was held into an alleged assault by a police officer inside a police station. During the inquiry, a Sergeant of Police gave the following evidence:-

> "I don't know what happened outside, of course I'm told certain things."

The same sergeant also volunteered the information that one of the constables present had the nickname "Punchy".

During the past year eighteen Section 19 inquiries were held. Six were the first inquiries held in relation to investigations concerning the conduct of members of the New South Wales Police Force under the new system of investigating complaints against the police. Each of these inquiries arose because of a conflict of evidence between the complainant on the one hand, and the police officers on the other. The substance of these complaints ranged from assault to the interpretation of the provisions of the Motor Traffic Act relating to the blood testing of motor vehicle accident victims.

The twelve remaining inquiries included most notably the investigation of the Height of Buildings Advisory Committee, and the investigation into the New South Wales Department of Health's Division of Forensic Medicine. Other Section 19 inquiries included the investigation of several complaints involving local councils: one concerned a questionnaire utilised by a consultant on behalf of the Sydney City Council, and another, Lake Macquarie Municipal Council's preparation of certain reports concerning the re-zoning of land within the municipality.

13. Consumer Claims Tribunal : Amendments Anticipated

It is understood that the review of the administration and operation of the Consumer Claims Tribunal referred to in the last Annual Report has been completed. The recommendations flowing from that review are yet to be considered by Cabinet but, it is believed, proposed amendments to the legislation are due to be placed before Parliament in the first parliamentary session in 1985.

Complaints received by the Ombudsman relating to the Tribunal are currently declined in accordance with the views expressed in the last Annual Report.

14. Public Trustee

In last year's Annual Report reference was made to the difficulty of determining in what range of matters, if any, the Ombudsman had jurisdiction to investigate the conduct of the Public Trustee. It was noted that seemingly different views were held by the Public Trustee, his counsel and successive Crown Solicitors.

The Ombudsman's views were expressed in the Report by way of excerpts from a letter to the Secretary of the Premier's Department dated 21st September, 1983. These views were basically that, given the conflicting authorities, it was not possible to define the scope of the Ombudsman's powers to investigate the conduct of the Public Trustee and so clarification by legislative amendment was requested. At that time it was decided by the Ombudsman that until the Government made a decision on whether it would 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 would be forwarded to the Public Trustee for comment both on the facts and on the question of jurisdiction.

This question of jurisdiction was clarified with the enactment of the Ombudsman (Amendment) Act, 1983.

Under that Act, Section 5(1) was amended to include a definition of "administration" which effectively enables this Office to now investigate the "administration of an estate or a trust whether involving the exercise of executive functions of government or the exercise of other functions". However, this jurisdiction is limited by the insertion in schedule 1 of Item 15 which specifically excludes the investigation of conduct of a public authority where the conduct referred to is

an actual "decision" made by the public authority "in the course of the administration of an estate or a trust, being a decision as to the payment or investment of money or the transfer of property".

15. Metropolitan Water Sewerage and Drainage Board

(a) Delays in responding to consumers : improvements observed

This topic has been the subject of comment in the previous two annual reports. In last year's annual report, the Ombudsman noted that the issue of delay on the part of the Board was at that time the subject of an "own motion" investigation.

In response to a report published in July, 1982, by the then Deputy Ombudsman and dealing with, among other things, delay, the Board investigated its own practices and procedures in dealing with the public. The then Minister for Energy and Water Resources instructed the Board to implement the recommendations flowing from that investigation as quickly as possible. The Board considered that the implementation of the recommendations would overcome deficiencies in the existing system of dealing with complaints and queries from members of the public.

As a result of the continued receipt by the Ombudsman's Office of a substantial number of complaints alleging excessive delay by the Board, the Office decided to monitor the situation commencing January, 1983. Monitoring continued until September, 1983.

During the monitoring period 84 complaints about the Board were received by the Office. Twenty-nine (34.5%) of these involved allegations of delay and/or failure to reply to correspondence; 55 (65.5%) complaints were about other issues.

Of the complaints about delay, 48% involved a delay factor of between 3 and 6 months; 20% involved delay of 6 to 9 months. If the complainant had not contacted the Ombudsman's Office, the delays may well have been greater.

The average delay involved in the 25 cases monitored was 6.78 months.

Responses to the Ombudsman's enquiries of the Board were also monitored. Normally, a period of 4 weeks is allowed within which to reply. In 89% of cases a response by the Board was received after the four-week period.

During the monitoring period and in response to the Ombudsman's enquiries regarding specific complaints, the Board continued to assure the Ombudsman that streamlined procedures were in the process of being implemented. Effects of such a system were not felt during the nine-month monitoring period.

In view of the results of the monitoring exercise, the Deputy Ombudsman completed a report pursuant to Section 26 of the Ombudsman Act in December 1983. The report concluded:-

i) The data collected during the monitoring period clearly demonstrates that the Board has failed to implement the recommendations made by its own officers in such a way as to minimise

administrative delay adversely affecting those members of the public who raise a query with or make a complaint to the Board.

ii) In all probability, few of the Board's dissatisfied complainants make complaints to the Ombudsman's Office, and that therefore the situation may very well be very much worse if a more comprehensive examination of the Board's performance were made.

iii) In a monopolistic situation where consumers do not have the alternative of taking their business elsewhere, it is essential that a statutory body be responsive to consumer complaints and enquiries.

Accordingly, the Deputy Ombudsman found the conduct of the Board to be wrong in that the Board failed to effectively implement administrative procedures to minimise delay in dealing with complaints made by members of the public. Recommendations designed to minimise delay were made and accepted by the Board's new General Manager.

At this stage, continued monitoring has revealed a dramatic decline in complaints about delay on the part of the Board received by the Ombudsman's Office. It may therefore be tentatively concluded that changes to the Board's administrative procedures have been effective. Monitoring will continue.

(b) Accuracy of Water Meters

From time to time this Office has received complaints regarding the alleged inaccuracy of water meters. This has drawn into question the standard and procedures adopted by water authorities to test those meters.

In the last Annual Report this Office commented that steps were being undertaken by the Standards Association to provide a nationally acceptable standard for testing these meters.

A draft standard, based on the international standard was circulated by the Association in 1982. In the public review that followed, this standard met considerable objection and a modification was drawn up for reconsideration.

The Standards Assocation has advised this Office that the proposed new standard and procedure for verifying the accuracy of water meters is expected to be in operation some time in 1985. This Office will continue to monitor those developments.

16. Juvenile Institutions and Residential Care Units

The programmes of visitation described in last year's report have been continued and, within the constraints imposed by limited resources, expanded where possible. Some reorganisation of approach in the residential care unit area was made following initial visits.

The Office identified a need for the production of a suitable pamphlet about the Ombudsman's Office for

distribution to children and adolescents in both juvenile institutions and residential care units. A freelance artist, Christine Alderton, designed a four-colour illustrated pamphlet (see item 55). The pamphlet became available in February 1984 and this Office, with the co-operation of the Director-General of Youth and Community Services, arranged for its distribution to all institutions and residential care units.

Oral Complaints Received and Dealt With - Visits to Juvenile Institutions and Residential Care Units

1st July, 1983 to 30th June, 1984

Part A - Juvenile Institutions

Nature of Complaint	Anglewood Special School, Burradoo	Bidura Remand Centre, Glebe	Cobham Remand Centre, St.Marys	Daruk Training School, Windsor	Minda Remand Centre, Lidcombe	Mt. Penang Training School, Kariong	Ormond School, Thornleigh	Reiby Training School, Campbelltown	TOTAL
Department of Youth and Community Services									
Problems with other inmates	3	1		1	1	1			7
Smoking rules	2				4		1		7
Weekend leave Day leave	1	6			2	2			11
Officers- conduct of	1	2			2				5
Restrictions on movement and rules generally	3	3			11				17
Food	1				17	6			24
Clothing	1				4	4			9
Punishment		1		1		2			4
Placement						1			1
Transfer		1		2	2				5
Telephone calls		1		1	3				5
Discharge				1	2		1		4
Failure of Ombudsman to reply to letters							1		1
Sport and recreation		7			3				10
Information re length of stay		1			1				[illegible]

Nature of Complaint	Anglewood Special School, Burradoo	Bidura Remand Centre, Glebe	Cobham Remand Centre, St.Marys	Daruk Training School, Windsor	Minda Remand Centre, Lidcombe	Mt. Penang Training School, Kariong	Ormond School, Thornleigh	Reiby Training School, Campbelltown	TOTAL
Personal property		2							2
Outings		2							2
Visits		2				1			3
Shampoo - quality of		1							1
Physical conditions		5			4				9
Programme deficiencies		2			7				9
District Officer-conduct of		1							1
Marriage-desire for			1						1
Dental problems						1			1
Medical problems					3	2			5
Letters					1				1
Lack of showers		1			1				2
Delay					1				1
Fear of absconding						1			1
Totals	12	39	1	6	69	21	3	Nil	151
Police Department									
Treatment		2	1			1			4
		2	1			1			4
Education Department									
Schooling					1				1
Segregation					2				2
Totals					3				3

Nature of Complaint	Anglewood Special School, Burradoo	Bidura Remand Centre, Glebe	Cobham Remand Centre, St.Marys	Daruk Training School, Windsor	Minda Remand Centre, Lidcombe	Mt. Penang Training School, Kariong	Ormond School, Thornleigh	Reiby Training School, Campbell-town	TOTAL
<u>Courts (No jurisdict-ion).</u>									
Appeal or related matters		3	1	2	3	1			10
Totals		3	1	2	3	1			10
Total Complaints Dealt with - Juvenile Institut-ions	12	44	3	8	75	23	3	Nil	168

Part B - Residential Care Units

Nature of Complaint	Unit		Total
	Foulas House, Guildford	Renwick Mittagong	
Department of Youth and Community Services			
Access to files		1	1
Rules/regime at Unit		1	1
Reason for return to Unit		1	1
Punishment	1	3	4
Pocket money		1	1
Problems with other residents		1	1
Officers - conduct of		1	1
Programme deficiencies	1		1
Information re family		1	1
Restoration to family		1	1
TOTALS	2	11	13

NOTE: Visits were made to other Residential Care Units during the year but no oral complaints were received during such visits.

17. Heritage Council : Relationship to Department of Environment and Planning

The 1982-1983 Annual Report of the Ombudsman gave an account of an investigation of the Heritage Council's consideration of a proposal to demolish the Rural Bank building in Martin Place. The report on that investigation noted that the Heritage Council relied on the Heritage and Conservation Branch of the Department of Environment and Planning for information and advice. A more recent investigation has disclosed problems in the relationship between the Heritage Council and the Heritage and Conservation Branch of the Department.

In June, 1983 Mr. P. James, Executive Director of the National Trust of Australia (New South Wales), and an alternate member of the Heritage Council, complained that, despite representations from the National Trust, an historic house known as Abbotsford, near Picton, had been allowed to deteriorate and had eventually burnt down.

Abbotsford was a property dating from the first quarter of the 19th Century and, according to conservation experts, had survived until the last couple of years in an extraordinarily intact condition, even though it had not been inhabited for many years.

In May, 1983 the property was classified by the National Trust. In giving reasons for the classified listing, the Trust said:

> "Abbotsford is a remarkable survival of a farm house from the early period of Australia's settlement. Except for the loss of its ceilings it is virtually unchanged since the middle years of the 19th century. It is terribly important that it survive intact."

The National Trust referred the property to the Heritage Council in October, 1978. The Heritage Council shared the National Trust's view of the significance of the building and, by recommending the making of an interim conservation order in April, 1979, commenced what was to become a long drawn out process to conserve Abbotsford.

Before any permanent conservation measures were taken, but after many recommendations for notices and orders under the Heritage Act by the Heritage Council, Abbotsford was damaged by fire in July, 1981. Mainly the roof was affected and the property was now open to the weather. Still no permanent conservation measures had been taken in April, 1983 when a second fire occurred, this time completely destroying the building.

The Heritage Council, which made the various recommendations for the preservation of Abbotsford, is a representative body which gives advice and makes recommendations to the Government about the environmental heritage. The Heritage Council comprises eleven members, but has no administrative support of its own. Rather, the Heritage and Conservation Branch of the Department of Environment and Planning acts as a servicing body to the Heritage Council.

The investigation of Mr. James' complaint was concerned with the conduct of the Heritage and Conservation Branch in its servicing role to the Council.

The Ombudsman's Report of the investigation noted that, from the time the Heritage Council recommended the making of an interim conservation order in April, 1979 until the second fire which destroyed Abbotsford in April, 1983, four years elapsed. During that time, many steps were taken in an attempt to conserve Abbottsford. However, each of those steps occurred painfully slowly and many actions were marred by errors which further delayed the progress towards conservation of the property. By the time of the second fire, still no positive action had been taken in terms of the permanent conservation of Abbotsford.

The report criticised the Environment and Conservation Branch for its failure to deal efficiently and quickly with the recommendation from the Council. The Council was in an awkward position. Since it had no administrative means of its own to monitor the progress of matters before it, monitoring action too frequently depended upon the memory of Council members and the level of their interest in an issue. Moreover, there appeared to be no formal procedure to define the ways in which the Branch was to fulfil its servicing function to the Council. The Council was advised of matters requiring its attention by the Branch Manager's report, prepared for each meeting. The Branch itself appeared to have implemented some monitoring procedures for Heritage Council agenda items and outstanding conservation instruments, but the Council did not have access to these records. In any event, monitoring procedures did not seem to be notably effective in view of the delays which occurred in the Abbotsford matter.

The then Branch Manager explained that there could be up to 50 agenda items for any one meeting, and that it would not be possible to report progress on each item. He went on to say that, as Manager, he had to make a decision as to what ought to go before Council and therefore what ought to be included in his report to Council.

There were limited resources available to the Branch, and enormous pressures on those resources. The Branch has other functions to perform in addition to its function as servicing body to the Heritage Council. It is called upon to provide advice in heritage matters to local Councils and to other Branches of the Department, and to respond to approaches from the public and from conservation interest groups. An officer of the Branch fulfils the role of Secretary to the Heritage Council, but that officer is also engaged in tasks other than those directly relating to or generated by Heritage Council business.

The delays which occurred in relation to Abbotsford might well have been caused by the limited resources available to the Branch and the multiple demands on those resources.

However, delay was not the only problem; errors and oversights further delayed the progress of work and contributed to the final impression that the "Abbotsford" matter was handled in a thoroughly inefficient manner.

The Heritage Council's effectiveness as a ministerial advisory body is to a large extent dependent on the effectiveness of its servicing body. The report on Abbotsford therefore recommended that an investigation be carried out into the possibility of setting up an administrative and servicing body under the control of the Heritage Council. In response, the Director of the Department of Environment and Planning, Mr. R.B. Smyth, maintained that the recommendation was "frankly ridiculous", apparently on the grounds that the report proposed a separation of the Environment and

Conservation Branch from the Department of Environment and Planning. No such recommendation had been made.

18. The Ombudsman and Universities: A Complaint Against Macquarie University Law School

All State Ombudsmen and the Commonwealth Ombudsmen currently have jurisdiction in respect of complaints against Universities. In those States where the Ombudsman Act defines the public authorities subject to Ombudsman scrutiny by list set out in a Schedule, the State's Universities are specifically named in that list. In the case of New South Wales "public authority" is defined in general terms under section 5. The former Ombudsman proceeded on the view that New South Wales Universities were within that definition. Following challenge, the present Ombudsman sought the opinion of Mr. A.M. Gleeson, Q.C. who advised that the University of New South Wales was a "public authority" within the New South Wales Ombudsman Act. By a parity of reasoning the same applies to the State's other Universities.

There are two main "limitations" on the investigation by the Ombudsman of complaints against universities. These are:-

1) That the conduct complained of must relate to a "matter of administration".

2) The conduct must be such that in the exercise of his discretion the Ombudsman believes investigation should take place.

In Evans v. Friemann Mr. Justice Fox of the Federal Court held that a decision by a Board of Examiners of Patent Attorneys failing a candidate for admission as a Patent Attorney was a decision of an administrative character within the meaning of the Administrative Decisions (Judicial Review) Act 1977. His Honour's reasoning suggested that the process by which a university determines the examination results and ultimately the academic performance and standing of students is of an administrative character. Further, senior counsel has advised the New South Wales Ombudsman that a complaint that the process by which the examination performance of a student was affected by bias or improper motivation would relate to a matter of administration and be capable of investigation under the Ombudsman Act. Clearly, on the other hand no Ombudsman would wish as a matter of discretion to be involved in the process of investigating complaints which merely reflect a dissatisfaction on the part of a student about the marks awarded to him or her. Accordingly, generally speaking complaints about marks are not investigated unless there is something more alleged such as bias or failure to observe fair or prescribed procedures.

Complaints against Universities provide considerable difficulties for the Ombudsman. They inevitably seem to provoke allegations of interference with academic freedom and bitterness at the intrusion of an "outsider". In the complaint referred to below, the Honours Committee of the Law School referred to the students complaint as "an excuse for government agencies to intrude on the academic judgement of the University staff in the guise of observing procedural fairplay." On the other hand the experience of the New South Wales Ombudsman is that, like all other institutions including his own, universities are not free from fault. In particular,

a not unusual situation is where departments or faculties become factionalised or personal conflicts between staff emerge. This may lead to particular students suffering in the cross-fire between different factions or personalities.

Ultimately, it is a matter for the government whether universities should remain within the scrutiny of the Ombudsman. The area is not an easy one. However, while the jurisdiction remains, it is incumbent on the Ombudsman to investigate complaints against universities which are within jurisdiction and which he believes should be investigated.

Complaint by Student against Macquarie University

In August 1983 Ms X complained to the Ombudsman that Macquarie University had failed to ensure that fair and just procedures were followed in deciding the grade awarded to her in Law 514, a subject consisting of a research paper. Completion of the subject enabled Ms X to graduate as B.A., LL.B. Had she obtained an A or B grade in Law 514 she would have graduated with Second Class Honours in Law.

The research project was examined by one internal and one external examiner. In the event of disagreement between these two examiners, the policy of the School of Law provided several options; one of these could be adopted, upon the recommendation of the student's supervisor, following the supervisor's seeing both initial examiners' reports. Under this policy a third examiner could assess the student's work, if that were required in the event of disagreement between the two initial examiners.

Ms X's research project was assessed at B grade (70%) by the internal examiner and at C grade (about 55%) by the external examiner. The Honours Committee considered the examiners' reports and recommended that the Law School adopt the grade of C. At this meeting the Honours Committee did not have the recommendation of Ms X's supervisor concerning the course of action that should be adopted, under the School's policy for resolving discrepant results.

The supervisor prepared her own recommendation that a third examiner should be consulted. However, the supervisor became ill and was unable to present it at the School meeting, which adopted the Committee's recommendation for a C grade. The supervisor lodged a rescission motion and again asked for a third examiner.

A special meeting of the Law School considered the rescission motion. Those present were given a report from the Honours Committee and several documents, including extracts from Ms X's research project. The Honours Committee noted, among other things, that:-

(a) "One member of the Committee, Gill Boehringer, undertook to read the paper thoroughly in order to form a view of its substantive quality." Mr. Boehringer prepared an "extensive" report which "reinforced" the Committee's views about the C grade.

(b) During its activities, the Committee decided that there was a "*prima facie* case of plagiarism" in Ms X's research paper.

Ms X at that time had no chance to respond to the materials presented to Law School members, including the allegation of plagiarism. The Law School resolved not to involve a third examiner, and to recommend a C grade, subject

to a report on the plagiarism allegation. Subsequently the Acting Vice Chancellor found that there was no element of dishonesty in Ms X's research paper. The University Senate then awarded Ms X a C grade, thus enabling her to graduate at pass level for the B.A., LL.B.

The Ombudsman, following consideration of submissions from the various parties, concluded that:

(a) The Honours Committee of the School of Law and the School itself had considered and recommended a grade for Ms X's research paper contrary to the School's own policy.

(b) The Honours Committee had allowed one of its members to become, in effect, a third examiner (his report was six pages long), although a different third examiner had already been appointed.

(c) The Honours Committee published an allegation of plagiarism, rather than following procedures set down by the University's Academic Senate.

(d) The School of Law could have put most of the contentious issues beyond doubt by referring the research paper to a properly nominated third examiner, but had not done so.

The Ombudsman further concluded that, while he cast no reflection upon the integrity of those concerned, the University had failed to preserve the appearance of fairness to Ms X; Mr. Boehringer's six-page report and the unchallenged allegation of plagiarism might have been interpreted as attempts to prejudice Ms X's work in the eyes of those in the School of Law who were to recommend a grade.

The Ombudsman observed, "It is evident from submissions made to me that the Law School suffers from entrenched personal or factional animosities. While I make no comment upon the fact, I believe the University as a whole should intervene if necessary to make sure that student assessment does not become a battleground for such disputes and that there is not even an appearance that such factors could have been at work".

The Ombudsman recommended that procedures in the School of Law be reviewed in order to deal with matters that had arisen during the investigation, including such things as the submission of examiners' reports and discrepant results. The Ombudsman also recommended that Ms X's research paper be assessed by the original third examiner, Dr. G.D. Woods, Q.C.

The University eventually accepted the Ombudsman's recommendations, and in May 1984 Dr. Woods recommended a B grade at 73%. However, the School of Law again recommended a grade of C. The Academic Senate "was not convinced by the arguments put forward by the School of Law", and referred the matter to a sub-committee. Upon the recommendation of the sub-committee, the School of Law then provided an eight-page statement on the assessment of Ms X's research project. Academic Senate considered this report from the School of Law in September 1984 and resolved that the grade should remain at C.

Details of the Ombudsman Investigation

Ms X's complaint was investigated, and a report was prepared, according to procedures set down in the Ombudsman

Act and refined after several years of experience, during which time advice of counsel was obtained. These procedures were noted in the Annual Report for 1982-1983 (pages 5-6).

In this instance the investigation and report proceeded as follows:-

Date	Event
5th August 1983	- Complaint received, comprising 16 pages, with 95 pages of annexures, mostly University documents.
10th August 1983	- Letter from Registrar advising that University was investigating complaint, having received a copy of Ms X's letter to the Ombudsman.
mid-August 1983	- Telephone discussions by Ombudsman investigator Dr. Michael Dunn with Registrar and Ms X.
22nd August 1983	- Letter from Ombudsman to Registrar confirming complaint; University to advise grade awarded following decision about alleged plagiarism; Ombudsman will then decide whether to begin formal investigation.
7th September 1983	- Letter from Registrar, with attachments, advising Senate decision on C grade.
9th September 1983	- Registrar advised of formal investigation.
12th-23rd September 1983	- Telephone discussions by Dr. Dunn with Ms X's supervisor and a member of Honours Committee. Discussions by Dr. Dunn with Ombudsman and Deputy Ombudsman concerning details of investigation and report.
30th September 1983	- Confidential draft report, specifying "provisional or prima facie conclusions only", sent to Vice Chancellor, Head of School of Law, Registrar, Ms X, Ms X's supervisor, Mr. Boehringer and Mr. M. Newcity, Convenor of the Honours Committee.
11th-31st October 1983	- Comments upon draft report received from Vice Chancellor, Head of School of Law, Ms X, Ms X's supervisor, Mr. C. Enright, Senior Lecturer in Law, and three members of the Law School signing together as, or on behalf of, members of the School's Honours Committee.
7th-9th November 1983	- Telephone discussion by Dr. Dunn with Ms X's supervisor and letter from her.
4th-16th November 1983	- Consideration of comments, and discussions between Ombudsman, Deputy Ombudsman and Dr. Dunn.
23rd November 1983	- Revised draft sent to Vice-Chancellor and to Minister for Education (as required by Ombudsman Act).

22nd December 1983	- Advice from Minister that he did not wish to consult, according to provisions of section 25 of the Ombudsman Act, concerning revised draft report.
4th January 1984	- Report made final and sent to Minister, Vice Chancellor and Ms X.

Following completion of the report upon Ms X's complaint, Mr. M. Newcity, a member of the Honours Committee, published a statement in which he argued that a draft report has the same status as a final report, and that persons commented upon in the draft report should be able to respond before the draft report is prepared. This argument about the status of a draft report is wrong in law. Moreover, the suggestion that comments upon a draft report should be made before the draft is written is illogical. Section 24(2) of the Ombudsman Act requires that persons commented upon in a report must have the opportunity to respond to those comments. The correct interpretation, supported by counsel, is that this requirement applies to reports, (that is, final reports) under Section 26 of the Act.

Mr. Newcity complained that persons commented upon in the report concerning Ms X's complaint were not given the opportunity to respond. The above chronology shows that those people were given, and took, the opportunity to respond; the response signed by Mr. Newcity comprised almost seven closely-typed pages. The response nevertheless made no specific suggestions for changes in the draft report.

The draft report upon Ms X's complaint was compiled after lengthy and extremely careful consideration of a considerable amount of evidence, much of which was provided at the outset by Ms X from copies of University documents. The draft report and the comments upon it received equally careful consideration. At each stage the matter was discussed by the Ombudsman and Deputy Ombudsman, each of whom carefully read the report.

The Ombudsman and the Deputy Ombudsman consider that the investigation was fully in accordance with the Ombudsman Act and that it accorded natural justice and fairness to all concerned. Mr. Newcity had and has an undoubted interest in the investigation, as a member of one of the bodies the subject of the student's complaint. If he, his colleagues or the university consider that the investigation departed from the law or natural justice they have a full opportunity to test the matter in the courts. Failing such a challenge, the Ombudsman and the Deputy Ombudsman will continue to carry out investigations in the manner indicated which is in accordance with advice from independent counsel.

19. Sydney City Council - Darlinghurst/Kings Cross Brothels

In the 1983 Annual Report, mention was made of an extensive investigation carried out by this Office into a series of complaints concerning the alleged failure of the 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.

The Ombudsman found that the Council had acted wrongly in a number of ways and made a series of recommendations including:-

- The creation of a Council task force to co-ordinate all action taken by Council in respect of brothels in the area.

- The development of a draft local environmental plan that would prohibit the use of premises for the purposes of prostitution or soliciting for prostitution in residential areas where related activities result in unreasonable disturbance to the amenity of the neighbourhood and making such other provisions for the control and regulation of such premises in other areas as to the Council seem fit.

- Liaison with the Department of Attorney General and Justice during the preparation of the draft plan.

- That Council make a submission to the Select Committee of the Legislative Assembly enquiring into prostitution.

Following publication of the Ombudsman's report, the Lord Mayor advised that Council was of the opinion that there was no prospective successful purpose in preparing a draft local environmental plan and creating a task force of its staff to police illegal brothels.

In light of the Council not taking sufficient steps as a consequence of that report, the Ombudsman subsequently made a special report to Parliament in November, 1983. In that report he stated that he believed Council's attitude represented a partial abdication of its responsibilities to residents. The report argued further that there were manifest advantages in the Council using planning control provisions to regulate the location of permissible forms of prostitution, leaving it open to the criminal law to deal with those matters associated with prostitution that are illegal.

At the present time there is a Parliamentary Committee of the N.S.W. Parliament considering the problems associated with prostitution.

In contrast to the Sydney City Council, the North Sydney Council reacted positively to the Ombudsman's report. Under the heading "Prostitution Clamp-down Must Wait", the "North Shore Times" of 12 September 1984 reported developments as follows:-

> "Moves by North Sydney Council to clamp down on prostitution have been 'frozen' by the State Government.
>
> The Government says it won't consider council's case until after the Parliamentary Committee on Prostitution reports.
>
> State Member for Willoughby, Peter Collins and committee chairman Pat Rogan returned recently from a 25-day tour of 'red light' districts in Europe and Asia.
>
> The committee will not report to the Government until next February, and a response is not expected until mid-1985.
>
> North Sydney Mayor Ted Mack said he was disappointed that council's plans to control prostitution had been delayed.

'It seems there won't be any action for at least 12 months', Ald Mack said.

Council had hoped to use planning regulations to control prostitution.

It prepared a draft local environmental plan to 'prohibit the use of any premises, land or public place for prostitution or soliciting for prostitution when unreasonable disturbance is caused to the neighborhood.'

Ald Mack said such a disturbance could include problems with car parking, and people 'coming and going in the middle of the night.'

'Council, of course, cannot outlaw prostitution as such,' he said.

'Local government is a regulatory authority, not a legislative body. We can't make laws, nor should we. It's a State affair.'

Council's latest stand followed criticism of Sydney City Council by the Ombudsman some time ago.

The Ombudsman recommended to the city council that it could control prostitution through planning regulations.

North Sydney, which had long had a problem with prostitution, then took up the Ombudsman's suggestion.

A draft local environmental plan was submitted last December, but the Department of Environment and Planning only recently replied."

20. Innisfallen Castle

In May 1984 a report was made to Parliament under Sections 27 and 31(1) of the Ombudsman Act on the failure of the Department of Environment and Planning to remedy action criticised in a report on a conservation issue prepared by the former Ombudsman, Mr. K. Smithers.

The Department's predecessor had acted to prevent the otherwise permissible re-development of the valuable old property at Castle Cove known as Innisfallen Castle. Careful planning provision had previously been made by the responsible authorities which allowed that re-development. This was part of a negotiated transaction with the owner which brought adjoining Middle Harbour foreshore land into public ownership at half its estimated market value.

The report prepared by Mr. Smithers condemned the action taken to prevent re-development as entailing significant disadvantage for those affected without giving any measure of redress or compensation. The planning measure was said to have been created especially to negate an existing right of appeal to the Court. Mr. Smithers' report said the position was insupportable, should never have arisen, and should be rectified without delay. That report was made final in May 1982 and recommended that the planning position which obtained before the introduction of the measure which removed the right of appeal to the Court should be restored.

The Director of the Department Mr. R.B. Smyth, made arrangements soon after the report was made final for consideration by the Heritage Council of the question of whether Innisfallen Castle constitutes an item of the environmental heritage and should be subject to the provisions of the Heritage Act. As the Director was aware, Mr. Smithers' report recorded that the property had already been referred for consideration by the Council and assessed as an architectural fake lacking historical integrity.

At the time of the report to Parliament in May of this year, the Council had still not reached a decision and, commenting on the Department's referral of the matter to that body, the Ombudsman stated:

> "If the purpose of this was to place the issue on a bureaucratic back-burner it has been brilliantly successful."

About three months later the Council informed the Ombudsman that the building was, in its view, an item of the environmental heritage. The Ombudsman has requested the Heritage Council to advise whether it proposes to exercise its power to initiate the introduction of a preservation order under the Heritage Act. Such a procedure would at least give the owner some rights of objection as provided for in the Act.

Innisfallen Castle, Castle Cove (see item 20)

"Architectural fake" or "item of environmental heritage".

(Photo: North Shore Times)

21. Department of Motor Transport - role of taxi co-operatives in allocation of taxi plates

Last year's annual report included an item on the allocation of taxi plates by co-operatives. A comprehensive review of the structure of the taxi-cab industry, initiated by the Department of Motor Transport, was mentioned.

On 24th January, 1984, the Commissioner for Motor Transport, Mr. J.W. Davies, sent the Ombudsman a document for public discussion, 'Review of Policies and Practices in regulating the taxi and hire car industries in New South Wales', part 3. The discussion document included a detailed section on the seniority system of issuing new taxi licences. It referred (p.40) to the Ombudsman's criticisms of the procedures used in determining eligibility, which had been found to be open to abuse and inequitable.

The Ombudsman declined to comment on the discussion document, feeling that it would be inappropriate to involve himself in policy matters.

According to the Commissioner's letter of 24th January, it was anticipated that recommendations would be made in March, 1984, in the light of comments received. These recommendations were given to the Minister, who sent them to a number of interested persons for comment. It is understood that, although they have not yet been made final and published, the interim recommendations are now available to would-be purchasers.

22. Complaints About Pastures Protection Boards

Last year's Annual Report listed a number of areas in which complaints had been received against various Pastures Protection Boards. It will be useful to report on progress made in some of those areas.

Firstly, by way of general comment, there has been a marked reduction in the number of complaints received against Pastures Protection Boards over the past year. In fact, no complaints at all have been received over the past six months.

Notice of Right of Appeal

In a number of reports to Pastures Protection Boards, the Ombudsman recommended that rate notices should contain information about ratepayers' rights to appeal against assessed carrying capacity. As pointed out in last year's Annual Report, following these reports, both the Department of Agriculture and the Pastures Protection Board Association agreed to recommend to all Pastures Protection Boards that notice of ratepayers' rights to appeal should be included on future rate notices.

Recently, the Ombudsman requested information on the various Boards' compliance with the recommendations. The Minister has responded in the following terms:

> "Although I do not have figures available at the present time, I am advised that probably most, if not all, Boards now provide details of the means of appeal with their rate notices. I am arranging

> to obtain specific data on this matter for you. A circular will be sent to all 58 Boards asking them for such information and I will advise you of the responses as soon as possible."

Interpretation of Section 30(3)

As stated in last year's Report, the Ombudsman received counsel's advice that the method of rate fixation under Section 30(1) of the Pastures Protection Act adopted by one Board was incorrect. It was subsequently ascertained that this method of rate calculation was widespread.

A report finding the particular Board's conduct to be wrong was forwarded to the Minister for Agriculture. The Minister referred the legal question in dispute to the Crown Solicitor for advice. The Crown Solicitor agreed with the Ombudsman's opinion that the method of rate fixation adopted by the Board was incorrect. At the same time, however, he acknowledged that it was difficult to express a concluded view having regard to the seeming inconsistencies in the provisions of the Act.

On the strength of this advice, the Ombudsman recommended that the Board in question forthwith amend its rate fixing practice. It was also recommended that all Pastures Protection Boards be advised that, if they have adopted a similar practice, it should be altered.

The Minister later advised that he had sent a circular to all Boards indicating that the rating procedure found to be incorrect should not be used.

Inspection of Properties

As reported last year, the Ombudsman considers that there are occasions on which it will be essential for a Board officer to inspect a ratepayer's property. One particular matter illustrates this point well.

Ms. S. complained that the Tweed-Lismore Pastures Protection Board had behaved unreasonably, by assessing that her property was capable of carrying stock. She concluded that the property was densely forested and very steep, with only a few cleared pockets.

When questioned about Ms. S.'s property the Board replied:

> "This Board's officers are employed to enter properties and inspect them in relation to the presence of noxious animals or animal diseases. These duties in conjunction with other duties they must carry out keep them fully employed, and inspection of properties to assess carrying capacity are only made at the specific request of the occupier and if the Board consider it necessary. According to our records Ms. S. has never requested that her property be inspected for this purpose and so it has never been done."

Following this advice, an Investigation Officer from this Office contacted the Board's Acting Secretary and requested that an inspection be carried out. The Acting Secretary stated that he could not act on the basis of a telephone call but that, if the request was put in writing, it would be given consideration by the Board.

It is true that Ms. S. did not make a specific request that an inspection be made, and that the Investigation Officer's request was oral. However, in circumstances where there is an obvious dispute over an assessment, the land has been subdivided and an Investigation Officer has requested an inspection, it was felt that the Board's reluctance to carry out an inspection was unreasonable. Indeed, the property should be inspected by the Board's Officers in the presence of the occupier in any case where a dispute such as this arises. Inspection is essential to any attempt at informal resolution, and should the matter proceed on formal appeal to the Local Land Board, an inspection report would obviously be necessary evidence. Bearing in mind the wide area covered by the Board, it is unrealistic to suggest that the Board could be confident about the condition and boundaries of a specific property.

Following preparation of an Ombudsman's draft report in this matter, two representatives from the Board inspected the complainant's property. On 2nd March, 1984, the Board wrote to the complainant in the following terms:

> "Following the inspection of your property which was carried out by officers of this Board, their subsequent report to the Board, and the advice which has been sought by this Board on this matter, the Board are now prepared to accept that your property is not rateable under the Pastures Protection Act. The rates which have been charged to you in previous years have now been adjusted and your account now shows a nil balance."

This demonstrates clearly the necessity of inspection in a case such as this. As a result of investigation of another complaint, the Grafton Pastures Protection Board advised that the following procedures had been implemented:

> "The Board resolved that where land is subdivided and new owners either neglect to submit a stock return or show no stock, the Ranger inspects the property to determine the carrying capacity of the land and reports if the individual parcels are capable of carrying five large head of stock or not.
>
> The Board's Ranger has considerable experience and is considered qualified to make such assessment.
>
> The Board has sought the co-operation of the Valuer General's Department in obtaining copies of plans of subdivisions to assist in boundary markings.
>
> Any objections that are made at the Board's Office on carrying capacity determinations, a similar action is taken, with the Ranger inspecting the property and reporting back for Board decision.
>
> Where land is over-assessed or incorrectly rated, the levy is re-assessed or written-off on resolution of the Board."

These are highly desirable procedures which will help the rating system to operate more fairly in the Grafton area. The Grafton Board is to be commended.

23. Hermitage Reserve : Addition to Sydney Harbour National Park

As reported in the 1983 Annual Report (Pp. 39-40) the establishment of the Hermitage Foreshore Reserve, an extension of the Sydney Harbour National Park from Nielsen Park to Rose Bay, has been of continuing interest to this Office.

The Premier on 10th February, 1984 announced Cabinet's decision that no leases or permissive occupancies would be granted over any encroachments on the Reserve. This statement followed considerable publicity, during which the matter was raised in the Parliament.

On 9th March, 1984 the incorporation of the Reserve into the Sydney Harbour National Park was notified in the Government Gazette (No. 39).

There were some encroachments on to the Reserve from adjoining properties, and the initial decision of the responsible Minister was to sell to the adjoining land owners those portions of the Reserve where the encroachments took place. Several complaints were received about this proposal, the thrust of them being that the Minister had received poor advice. Enquiries were therefore conducted into the recommendations made to the Minister by his Department (the Ombudsman has no jurisdiction over Ministers). Enquiries revealed that there was some difference of opinion between the various authorities involved in the termination of the encroachments. Concern was expressed at the need, in the words of the National Parks and Wildlife Service, to "balance the public's right of access to the Reserve and Waterfront with practical considerations, including the need to preserve the amenity, privacy and security of householders in the area".

The history of the Government's proposal for the extension of the National Park commenced in December, 1982 when the Premier stated that he wished to have it proclaimed immediately.

The National Parks and Wildlife Service was to negotiate with adjoining owners, but so as not to restrict public access to the Reserve. On 21st January, 1983 the Premier wrote that "emphasis should be on the removal of encroachments as far as practicable and the licensing of those few which can reasonably be kept, rather than to exclude them from the park".

Following further investigation of the possiblities of "licensing", the then Minister for Planning and Environment wrote on 7th April, 1983 to the then Minister for Local Government:

> "It is noted that there are several minor encroachments comprising overhanging structures, major retaining walls slightly off the property boundaries and integral parts of the adjoining landowners "living area" upon which public use is impracticable.
>
> I am of the opinion that, it is desirable to have these small areas revoked from the Reserve prior to reservation as part of Sydney Harbour National Park, so that the areas might be disposed of to the adjoining landowners in due course under the provisions of the Crown Lands Consolidation Act."

However, two of the encroachments would not ordinarily be considered "small". One was the concrete border of a swimming pool, together with the pool's pump and filter. The other, which was the main subject of the investigation, involved a lawn area fronting the properties at 15 and 17 Queen's Avenue, Vaucluse. The area was inspected by the Director of the National Parks and Wildlife Service, who formed the opinion that "the only area where a conflict is likely to arise is in relation to the area adjoining the properties 15 and 17 Queen's Lane ...".

On 13th May, 1983 the then Minister inspected that area with the Director. The Director later stated that the Minister had expressed concern over the possible conflict between members of the public using the Reserve and the owners of the nearby properties. The Director showed the Minister other boundaries which could be used as compromises between the residents and the public. However, the Director's recollection of the conversation was that the Minister did not think the proposed "compromise" boundaries would be wholly satisfactory and suggested they be moved further into the Reserve. The Minister asked to be given options for resolving the possible conflict.

On 1st September, 1983 four options were put to the Minister for the property at 15-17 Queen's Avenue. These were that:

a) the encroachment could be reduced in size, and the landowner allowed a small curtilage to the houses at 15 and 17 Queen's Avenue;

b) in addition to (a), the owner could be granted a lease or licence over the remainder of the existing encroachment;

c) a lease or licence could be granted over the whole of the existing encroachment;

d) the whole of the existing encroachment could be "excised" from the Reserve (that is, sold to the adjoining landowner).

The Director pointed out in a memorandum that an arrangement to grant a lease or licence over the whole of the existing encroachment would provide no benefit to the public, while the excision or leasing of part of the existing encroachment would mean that the potential for conflict between the public and the adjoining landowner would remain. The memorandum suggested that the excision of the whole area from the Reserve (option (d)) "would remove the possiblity of any future conflict between the owner and the use of the area by the public".

While no specific option was recommended, the Minister appeared to have chosen option (d), although arrangements were subsequently altered. Enquiries had by this time shown that the Director had taken all the necessary administrative steps to meet the instructions of his Minister, and that there was no evidence to support a prima facie case of wrong conduct against him.

In view of the public interest in the matter it was decided to send a report to the Premier for presentation to Parliament under the provisions of Section 31(1) of the Ombudsman Act. This was done on 1st May, 1984.

A new complaint has since been received from Mr. P. Beggs, the original complainant to this Office. Mr. Beggs has complained that certain action which he had expected to flow from the gazettal of the Reserve had not occurred. Further enquiries into the matter have now begun.

24. Abandoned Motor Vehicles

This Office has received several complaints concerning Councils removing and sometimes destroying vehicles that appear to be abandoned.

The Local Government Act requires a Council to notify the police of the location and registration details of an apparently abandoned vehicle, in order to try to establish ownership.

Police normally provide Councils with the name of the last registered owner and check whether the vehicle has been stolen. If the vehicle is considered to be of a value under $250, the Council may "seize and destroy" it in one operation three working days after police notice is given. If it is valued at more than $250, and no owner is found, a Council is required to impound it and advertise the removal in the newspapers before the vehicle can be disposed of.

Councils face problems in dealing with abandoned vehicles. For example, a complainant claimed to this Office that he was repairing a vehicle for re-registration when it was removed without notification from outside his residence at Neutral Bay by North Sydney Council. When he discovered the vehicle's disappearance a matter of hours after the Council had removed it, he was told that it could not be retrieved as it had already been destroyed. The complainant put the value of the car at $650 at the time of removal.

Investigation showed that Council's officers had failed to make adequate enquiries to establish ownership of the vehicle. The motor vehicle registration print-out issued to Council by Police gave probable ownership only, and there was no attempt by the Council's officers to make even limited enquiries of residents in the vicinity of where the vehicle was parked to confirm ownership. The Council did not satisfy the Deputy Ombudsman that its officers had placed a notice on the windscreen of the car, and there were no photographs taken of the vehicle's condition.

Significantly, particularly in view of the complainant's claim of ongoing repairs, there was a gap of 4 weeks between the initial inspection of the vehicle and the actual removal. The Council's authorised officer was not qualified to assess the value of motor vehicles, and there was no inspection of the vehicle to determine its condition at the time it was removed. The Council was thus unable to demonstrate that the vehicle was not in the condition claimed by the complainant and was unable to produce records that the vehicle had actually been destroyed. Council had merely arranged for the vehicle to be removed by a private towing contractor.

The investigation raised a number of questions as to whether the Act, in the absence of additional precautions taken by councils, adequately protects the ownership of private property. It also found that Councils could easily be confused as to what powers they were given under the Act, since the terms of the Act were unclear in many respects.

A second complaint concerned the removal of 7 vehicles by Sydney City Council. The complainant, a motor vehicle repairer specialising in Volkswagons, had parked the vehicles, all of them unregistered, in the immediate vicinity of his workshop in Kensington. With one exception, all of the vehicles were owned by the complainant, who claimed to be working on them for resale. The vehicles were removed the day after a visit to his workshop by Council inspectors. The complainant considered that Council had no authority for removing the vehicles as they were not abandoned, and Council knew they were not abandoned.

Council argued that the vehicles had caused an obstruction. It had received a number of complaints from nearby residents about the vehicles. The vehicles were described by Council as "remains only of vehicles, stripped of engines, body parts and panels and had suffered damage in collisions." However, photographs taken of the vehicles by Council failed in general to confirm Council's descriptions. In addition, Council make no attempt to establish ownership prior to removal. Three vehicles were immediately destroyed, and the remaining four were towed to Council's impounding yard. One of these vehicles, owned by one of the complainant's clients, was retrieved; however, the remaining three were later stolen from the yard.

A Draft Report by the Deputy Ombudsman on his investigation of the complaint against the Sydney City Council has been commented on by the Council and these comments are currently being reviewed.

In view of the difficulty encountered by Councils in implementing the abandoned vehicles provisions of the Local Government Act, the Ombudsman recommended that the Minister for Local Government establish a representative working party to examine these provisions, and perhaps recommend changes. In response to the recommendation, a working party has now been set up. Its conclusions will be of interest to the Office of the Ombudsman. Copies of the report on the complaint against North Sydney Council were sent by the Minister for Local Government to Councils throughout New South Wales.

After receiving the report on the complaint against North Sydney Council, Alderman Mack, Mayor of North Sydney, make a number of critical comments to the press. Section 34 of the Ombudsman Act makes it virtually impossible for the Ombudsman to comment publicly on investigations, and so the Ombudsman decided in May 1984 to make a report to Parliament so that the findings of the report could be placed in perspective. Following the tabling of the report, Alderman Mack wrote to the Minister and several Councils implying that the Office of the Ombudsman was trying to make Councils' job more difficult. Specifically, he stated that the Ombudsman was seeking to "provide more onerous regulations on Councils ... and to give greater rights to individuals to leave unregistered vehicles in public streets".

The Ombudsman's position on this matter needs again to be placed in perspective. In the draft report on the Sydney City Council matter, the Ombudsman drew attention to the fact that the Act was silent as to what powers are available to Councils if, following investigations as to ownership, an owner of a vehicle considered to have been abandoned comes forward but refuses to remove it - even where the vehicle could be regarded as an aesthetic annoyance or a health hazard. In the draft report the Ombudsman suggested that the inability of Councils to act directly in those circumstances

was a deficiency in the legislation and that this issue should be referred to the Minister's Working Party.

The fact is that both reports upon abandoned vehicles make the same basic point : the law says that Councils may remove such vehicles only according to certain procedures; where procedures are set down, they should be observed. The reports further noted that the procedures caused some problems, both for Councils and for the owners of apparently abandoned vehicles, and recommended that they be examined; that is being done by the working party.

Far from making problems for Councils, the Office of the Ombudsman has been trying to help the situation by pointing to deficiencies in the legislation. When the Working Party has reported, it will be a matter of Government policy to determine what changes should be made.

25. Corporate Affairs Commission : Registration of Business Names

Over the last few years, there have been some 35 complaints to the Ombudsman alleging incorrect registration of business names. Complaints as early as 1977 highlighted the administrative problems associated with registration. In 1978 the former Ombudsman visited the Commission and inspected the procedures used for registering and checking business names. He decided that the procedures employed were adequate.

In September 1983, the Deputy Ombudsman noted that the number of complaints in this category had increased in the preceding months. Instances of one party or the other being disgruntled with the decision made by the Commission to remove or refuse to remove a similar registration were numerous. Dissatisfaction with the Commission's decision to register similar names was evident in the following instances:

(a) Computermax - Computermat

(b) Rugby League Cowgirls - NSW Rugby League Cowgirls

(c) Graphos - Graphis

(d) Kitchen De Luxe - De Luxe Kitchens

(e) Iskra Electronics - Is-kar Electrics

Aside from the obvious similarity in names, the problem was often aggravated by the close proximity of the two businesses. In most of the above instances the apparently similar names were allowed by the Commission. The reason for this is that it is often difficult to decide whether particular names are sufficiently different to warrant registration. Detailed guidelines have been issued by the Commission yet they obviously cannot cover all cases. In some cases registration or cancellation is a matter of subjective judgement. In such instances one could disagree with the Commission's judgement, but the exercise of that judgement might not amount to "wrong conduct" in terms of the Ombudsman Act.

Complaints about the registration of business names fall into three main types:

1. Complaints against refusal to register business name. Registration in these instances has usually been refused because the name applied for too closely resembles a name already registered. These sorts of complaints are generally resolved.

2. Complaints alleging that a similar business name has been registered by the Commission. In such cases, the complainants usually see themselves as having some kind of proprietary right over the business name and therefore object to a similar or identical name being registered.

3. Complaints where the Commission has inadvertently registered a business name identical or very similar to an existing business name and has then taken steps under the Act to cancel the inadvertent registration. This is the most difficult kind of complaint not only because proprietary rights are claimed even more strongly than in (2), but also because there has usually been some financial outlay by complainants on stationery, advertising and such.

What complainants tend to overlook, particularly in cases (2) and (3), is that the registration of a business name is no more than a licence to conduct a business under that name for a specified time. If one party believes that another is seeking to take advantage of a business name, then action can be taken at law; the Corporate Affairs Commission does not act as an arbiter in such matters.

In view of the number of complaints being received, extensive correspondence was commenced with the Commission and lengthy discussion ensued. Various suggestions were made by this Office as to how the present administrative procedures could be improved. The Commission advised that a restructuring of the Division was proposed. As well, the Commission proposed to send a more detailed letter when refusing registration where a complaint had been received; and, prior to refusing registration, to have the matter reviewed by a senior officer. It was decided that a senior officer was to be available for consultation on problems that might develop and the Commission also proposed to review the different forms of advice given when, after reconsideration, the Commission was still unable to grant registration of the name sought.

Complaints are still being received showing that the problems have not been resolved. Investigations are continuing.

26. Apprenticeship Directorate - Department of Industrial Relations

The Apprenticeship Directorate has been the subject of several complaints during this year, and three of these have resulted in reports to the Minister for Industrial Relations.

In the first case, a staff member of the Directorate altered an application form submitted by an apprentice, so that the apprentice was wrongly classified. This mistake was not discovered, and as a result the apprentice worked in an irrelevant occupation for 15 months. In the second case, an

apprentice who had been receiving an allowance to attend classes found that the allowance was ended without explanation. The apprentice's mother wrote to the Department of Industrial Relations, but there were long delays in replying to her and in giving explanations. It was eventually found that the Department had no method for calculating accurately the distances travelled by apprentices with out-of-town addresses; in this instance, the apprentice had been eligible for the allowance at all times, but the method of calculating the distance travelled was unsatisfactory.

The third case revealed a decision by the Apprenticeship Directorate not to answer "routine" correspondence. In this instance, the complainant's son was apprenticed to a butcher in Tweed Heads and it was not clear whether the son should attend technical college. The complainant had been told by telephone that it was not necessary for his son to attend college, but on 24th June, 1982, he wrote to the Director of Apprenticeship seeking confirmation of that advice. No reply was received to that letter. The complainant wrote again on 26th July, 1982 and 3rd September, 1982. Since no reply was received to any of these letters, the complainant wrote to this Office on 23rd February, 1983.

The Director of Apprenticeship, Mr. P.J. Darby, stated that the Directorate had a number of administrative problems. He had therefore had to determine priorities, as he did not have sufficient resources to meet all demands. He said that in setting these priorities he had few options; matters such as legal documents which protect the rights of the parties, and claims which involved payment of subsidies and incentives, had to be given priority over routine correspondence which did not affect the status of an apprentice or involve the payment of moneys. It became clear that the Director had in effect taken a decision not to answer the complainant's letter.

The decision of the Director was found to be wrong in terms of the Ombudsman Act. The Ombudsman formed the view that such a decision could only justifiably be taken in the most extraordinary of circumstances and then only as an absolute last resort. The circumstances confronting the Director at the time the decision was taken were, in the Ombudsman's view, not such as to justify the decision.

The Ombudsman recommended that all correspondence left unanswered as a result of the decision be attended to, and this was subsequently done.

Authorities such as the Apprenticeship Directorate often have to process large amounts of paper, and there can be problems in motivating staff to perform repetitive work efficiently. However, ineffective processing of the paper can have a major effect on the lives of apprentices, or of other consumers of government services. If a public authority finds that it cannot perform the tasks allotted to it, then it is expected to make a complete review of its internal workings, and then, if necessary, to ask for additional resources. When these steps have not been taken, there are likely to be complaints from the public resulting in findings of "wrong conduct" in terms of the Ombudsman Act.

27. Building Overshadowing Hyde Park

Two investigations have been carried out which relate to the proposed construction of a building at 229 - 249 Elizabeth Street, Sydney. If constructed, this building would have adverse effects on the public, including the overshadowing of Hyde Park during the winter, and adverse wind tunnel effects at street level.

Height of Buildings Advisory Committee

The first investigation arose from a complaint by Mr. John Tingle of radio 2GB on behalf of 176 persons, and, in addition, by two individual members of the public. It was complained that the Height of Buildings Advisory Committee had been inconsistent in the application of the Height of Buildings Act to tall buildings constructed along Elizabeth Street which would overshadow Hyde Park.

The Height of Buildings Act provides that no building more than 25 metres high can be built in certain local Government areas (including the Sydney Metropolitan area) unless it is approved by the Minister for Planning and Environment. Before the Minister makes this decision, the building must be considered by the Height of Buildings Advisory Committee (HOBAC). It is important to note that, under the legislation, if HOBAC recommends that the building should not proceed, the Minister cannot approve of the building. Therefore, HOBAC has the power to stop a proposed tall building from being built.

The history of the various proposed buildings on the site in question is complicated. Briefly, by October, 1982, HOBAC had clearly formed the view that it would not accept any building which overshadows the Park further than 25 metres from the western boundary between 1:00 and 2:00 p.m. in mid-winter. On the site in question, this meant that only a building with a maximum height of 45 metres would be permitted. On this basis, HOBAC recommended refusal of concurrence for a 23-storey development on the site.

The developers subsequently proposed a building reduced to 21 storeys. Such a building would still be 75 metres high. However, even though HOBAC had stated previously that no building would be permitted above 45 metres, the Committee resolved to recommend concurrence to the 21 storey building, with a suggestion that the Minister impose conditions that the height be reduced and that expert reports be referred to Council. There had been no expert evidence before HOBAC to suggest that its previous views were mistaken or exaggerated.

Prior to the Committee decision, the Minister for Planning and Environment wrote to HOBAC, and a message was sent from the Minister, stating that he would be placed in an embarassing position if he was forced to refuse the proposed building.

The investigation focused on the reason for HOBAC's change of mind. Bearing in mind that, if the Committee refused concurrence, the Minister would have no choice but to reject the building, it was found that, instead of recommending refusal, HOBAC adopted a stratagem of passing the final decision over to the Minister, suggesting conditions that amounted to a different building. The Ombudsman found that the Committee had acted wrongly in taking into account one or other of two irrelevant considerations - primarily, the desire to allow the Minister a discretion or, in a few cases,

The Ombudsman obtained an opinion from Counsel on how this finding would affect the decision. Counsel was of the view that HOBAC's decision was void, and also that the consequential decision of the Minister may also be void.

Sydney City Council

The second investigation arose from a complaint by the same complainants against the Sydney City Council. It was complained that the Council had approved a development application for a building which overshadowed Hyde Park, and that, in the course of granting that approval, wrong administrative procedures had been followed.

It was found that the City Planner held the personal view that he was opposed to the proposed building. However, he had failed to make a positive recommendation to Council. The Ombudsman took the view that, as a general administrative practice, Council should expect its staff to state their views clearly. If there are reasons why a recommendation is not being put forward, then some explanation should be given. In the circumstances of this case, Council could reasonably have formed the view that the City Planner had no firm view of the matter.

Council's conduct was found to be wrong in that it unreasonably failed to ensure that the City Planner make a recommendation to it on the development application.

Subsequent to the Ombudsman's report, the Town Clerk advised the Ombudsman that the Council had resolved that Council's staff be instructed to make recommendations where matters are submitted to Council unless there is a written explanation in the report to Council as to why a recommendation to Council is not appropriate.

Present Position

The Ombudsman made these two matters the subject of a special report to Parliament. He felt that, by making these findings public, it would enable the recently elected Council and interested citizens to determine what action, if any, should be taken.

Following that report, the Attorney General sought legal advice, and decided to have the Land and Environment Court determine whether the decisions of HOBAC and the Minister are void. An application has been made to the Court. The hearing has taken place and judgement is reserved. In the meantime, construction work on the building has not commenced.

28. The Dover Heights High Schools

The Ombudsman received three complaints about the way in which various public authorities had dealt with high schools at Dover Heights, in the eastern suburbs of Sydney. The complaints were about:-

(a) The decision to lease Dover Heights Boys' High School to Moriah War Memorial College.

(b) The terms under which the Boys' High School was to be leased.

(c) Conditions at the former Dover Heights Girls' High School, following the conversion of that school to co-education by transferring students from the Boys' High School.

(a) The decision to lease Dover Heights Boys' High School

This decision was taken as part of a policy of Government, and was not a matter of administration as defined in the Ombudsman Act. Since the Ombudsman lacked jurisdiction in the matter, the complaint was declined.

(b) The terms of the proposed lease

This complaint was directed against a body which was known as the Property Advisory Management Committee, at the time of its dealings with the lease of the Boys' High School. It was then responsible ultimately to the Minister for Housing. (The committee has since been renamed, and transferred to the Premier's Department). The Property Advisory Management Committee was established in the late 1970s' in order to rationalize the Government's holdings in real property; the main intention was to ensure that property was used effectively, and, among other things, that unwanted property was disposed of.

The Department of Education had noted that high school enrolments in the eastern suburbs of Sydney were declining, and decided that the number of high schools in the area could be reduced. After further study, it was decided that Dover Heights Boys' High School should be closed, and that the students should be transferred to other high schools, which would become co-educational. The Department eventually determined that it had no further use for the Boys' High School, and referred the matter to the Property Advisory Management Committee. The Committee was required to establish whether another Government body could use a surplus property effectively; if not, then the Committee could dispose of the property in the private sector, usually by selling it. The Committee decided that the Boys' High School could not be put to good use by public authorities, and so placed a newspaper advertisement calling for registrations of interest. Two important conditions had been attached to the property by Government, however: the Boys' High School could not be sold, but only leased, and it had to be retained for education. These conditions greatly limited effective interest.

The Property Advisory Management Committee received a handful of firm offers in response to its advertisement, but it was clear that only one of them - from Moriah War Memorial College - was worthy of consideration. Following negotiations, it was agreed that the Boys' High School would be leased for a term of forty years, upon payment of a premium and at an annual rental of $150,000, reviewable after five years, with the lessee responsible for all outgoings and maintenance. The main details of the lease were reported in the press, and complaints were later made to the Ombudsman that the terms of the lease were too generous, in view of the fact that the Boys' High School, which was located on a prime real estate site overlooking the sea, was estimated to be worth several million dollars.

Such matters as the calculation of the value of a property, or of the terms of a lease, involve expert judgement, and in some cases may not be matters of administration that can be investigated by the Ombudsman. The investigation in this instance was limited to the question of whether the Property Advisory Management Committee had taken adequate steps to satisfy itself that the terms of the lease

of Dover Heights Boys' High School were appropriate. The investigation involved examining the files, addressing some written questions to members of the former Property Advisory Management Committee, and interviewing the administrative officer of the former Committee and members of the Valuer-General's staff.

The investigation showed that it had been difficult to determine a "market" value for the lease of the Boys' High School. The conditions placed on the lease made it impossible to compare the lease with any other, and so the Committee was advised that the most effective way of determining the value of the lease was to invite bids for it. It was then a matter wholly for the lessor to decide whether any bid was satisfactory; this the Committee did, in its advice to Government. In all of the circumstances, there was no evidence of wrong conduct, and the investigation was discontinued.

(c) Conditions at the former Girls' High School

The School Captains and Vice-Captains of the now-co-educational Dover Heights High School complained to the Ombudsman in March, 1983, about the unsatisfactory conditions in the former Girls' High School, arising from building and renovation work and consequent disruption to teaching and overcrowding. A visit to the school, a few days after the complaint was made, showed that conditions were difficult; for example, an interview with the complainants in the Principal's office was interrupted by the racket of a nearby jackhammer. It also appeared that some of the teachers, parents and students blamed the conditions on the authorities who decided to close and dispose of the Boys' High School; to many, this made the disruption even harder to tolerate.

In addition to the visit to the school, the investigation involved an examination of files and interviews with senior officers of the Department of Education. The investigation revealed that the Department initially did not intend to dispose of the Dover Heights Boys' High School. For example, on 23rd December, 1981, a committee of the Department met and resolved, in respect of Dover Heights Boys' High School, that:

> "... under no circumstances would the Department be prepared to allow the property to go to any outside body. There were clearly so many demands within the Department for good accommodation that Dover Heights would not be surplus."

The committee decided that the Department's needs throughout the State should be reviewed before any decision was made about the future of Dover Heights Boys' High School, and that any such decision would not be made before the end of 1982.

As early as October, 1979, however, representatives of Moriah War Memorial College, Bellevue Hill, had asked the Director-General of Education whether a secondary school might become vacant into which the College could expand, and in October, 1980, a deputation of two, representing the College, put their request to the Minister. The deputation was advised to "quantify" its needs, and told that its interest would be noted should the Department's committee on property requirements recommend the disposal of a high school in the eastern suburbs. The impression from available records is that the Department did little to encourage the interest of the Moriah War Memorial College authorities.

By the end of 1981, at about the time that the Department of Education's committee was declaring that Dover Heights Boys' High School would not be surplus (see above), the Premier wrote to the Minister for Education concerning the school's future. On being advised that the position would not be clear until the end of 1982, the Premier pointed out to the Minister that he (the Premier) had undertaken to reply to representations from the Jewish community in respect of the high school by the end of January, 1982. In the face of reluctance in the Department of Education to decide whether the high school would be surplus, the Premier requested an early response in both March and May, 1982. In June, 1982, the Department confirmed that Dover Heights Boys' High School was expected to be surplus to requirements from early 1983. The matter was referred to the Property Advisory Management Committee with the consequences noted above under (b).

The Department of Education lost effective control of Dover Heights Boys' High School in mid 1982, was obliged to have all of the Boys' High School pupils at the former Girls' High School by a relatively early date, and felt under pressure from the time it perceived that events were to a large degree beyond its control.

The final cost of converting Dover Heights Girls' High School for co-education, with improved accommodation, was $2.1 million. Stage 1 of the conversion cost some $800,000 and was completed in December, 1981. In 1982 boys in Years 7, 8 and 11 were moved to the former Girls' High School, and it was intended that the remaining boys would move there by the beginning of 1983; that assumed, however, that the much more complex Stage 2 of the conversions would continue unhindered throughout 1982. The Department observed that Stage 2 -

> required considerably more effort and time in documentation than is usually required for a project undertaken by the Building Construction and Maintenance Branch of the Department of Public Works, which had completed Stage 1. Owing to the complexity of the task, the documentation was not complete before the Government announced its freeze on all capital works projects in March, 1982. Despite official approaches to the Treasurer from the Minister, release from the embargo was not achieved until July, 1982.

As a consequence of the embargo, work on the further conversion of the Girls' High School for co-education was delayed by several months, and the Department's schedule for transferring pupils, teaching equipment, library books and so on from the Boys' High School was disrupted. The Department of Education made efforts to have construction by the Department of Public Works carried out as quickly as possible, but it proved impossible to make up the four month delay caused by the embargo.

As preparations for the 1983 school year began, there was much confusion within the Girls' High School buildings. Some classrooms and staff rooms were unavailable, owing to building works. Furniture and materials from rooms undergoing refurbishing were stacked in other rooms, and in corridors. Library books and teaching materials from the Boys' High School added to the clutter. Builders' vehicles and work huts occupied the car park. Holes appeared in walls, or were built over. There was a smell of paint in the air. And over all of this there was the constant noise of hammering, sawing and drilling. Such was the chaos that the school was granted what the Department terms "special pupil-free arrangements"; that is, students were told to stay home for the first two days of

school while teachers struggled to restore some sense of order.

The report of the investigation by the Deputy Ombudsman found that the Department of Education did its best to hasten the work at Dover Heights Girls' High School, particularly since the leasing of the Boys' High School and the works embargo were beyond its control. However, there was wrong conduct in that insufficient efforts were made "to relieve the problems encountered by the staff and students of the school, in particular the sense of injustice that was experienced by the complainants...". The finding of wrong conduct was strongly contested by the Department, and subsequently by the then Minister, the Honourable R.J. Mulock, during a consultation with the Ombudsman and the Deputy Ombudsman. The Minister and the Department argued that a "unique" situation had been created at Dover Heights, beyond the realm of the Department's responsibility.

Nevertheless, the report's finding of wrong conduct related to conditions at the beginning of the 1983 teaching year, and not to preceding events. In response to suggestions as to further steps that might have been taken, the Deputy Ombudsman suggested such alternatives as:-

1. A Departmental liaison officer working at the High School.

2. A co-ordinating group representing the Department, teachers, parents and students, with some authority to solve immediate problems.

3. A member of the Minister's staff to act as a "troubleshooter" in what was a quasi-political atmosphere.

The report then noted, "Of course, devices of this kind cut across the hierarchical, compartmentalised structures of orthodox bureaucracies, and are thus a challenge to their power. That is why they are so rarely employed, or recommended, by such bureaucracies."

Progress reports on Dover Heights High School were sent to the Ombudsman by the Department, and it was clear from these that vast improvements were made as the year progressed; this fact was confirmed by one of the complainants.

29. Milk Sediment Tests in New South Wales

The method of testing milk in NSW for its sediment content was brought to the Ombudsman's attention during 1983.

A NSW dairy farmer complained to this Office about what he considered to be unreasonably stringent conditions laid down by the NSW Dairy Coporation (previously known as the Dairy Industry Marketing Authority). In short, his complaint related to the Corporation's requirement that a filtration residue test be carried out on all milk taken from dairy farms. He alleged that the test was highly subjective as the results of the test could vary depending upon the subjective opinion of the grader reading the test.

The sediment test is one of many tests done on milk and is used to detect dirt and yellow stain. It consists of passing a sample of each dairy farmers' milk through a

"sediment wad" at a certain pressure. The sediment in the milk leaves a stain on the wad. The wad is then examined by a grader at the factory where the test is done.

The examination involves an assessment by the grader as to whether the colour of the stain indicates;

a) That too much sediment is present in the milk in which case the result is a "rejection"; or

b) The amount of sediment is significant but not sufficient to reject the supply. In this case the test result is a "warning"; or

c) The sediment content is negligible and thus the milk passes the test.

When examining the sediment wads, the graders have no standard plates against which the colour of the stain can be compared. As a consequence, test results can vary from one grader to another and from one factory to another.

In commenting on this issue, Mr. Ferguson, the previous Chairman of D.I.M.A., in a letter to this Office stated:-

> "The Authority acknowledges that this test is subjective in its application but it does not agree that there are significant variations in test results from area to area... Graders of milk are issued by the Authority with certificates of competency and it has no reason to question the level of graders' efficiency or consistency of their judgement".

In a personal submission to the Corporation's Policy Committee, Mr. Les Isaacs, an employee of Norco, stated in reference to the sediment test:-

> "This test has no standard and it is an opinion only, changing from supervisor to supervisor and people's opinion from day to day. Yet farmers continue to be penalised very extensively on a non-existent standard".

In a submission to the Coporation's Policy Inquiry on the "Sampling and Testing of Milk" the NSW Department of Agriculture made the following point in reference to the sediment test:-

> "A further problem is that no photographic standard has been established to classify the degree of contamination. The factory operator must therefore rely wholly on his judgement. As a result, standards vary from factory to factory and even between operators within the same factory".

In defending the Corporation's continuing requirement for the sediment test in lieu of a process of clarification (which is the removal of extraneous matter from milk), Mr. Ferguson indicated that the sediment test and the related system of rejection of milk was necessary in order for D.I.M.A. to comply with the Pure Food Act. He stated:-

> "...the Authority would, if it accepted milk known to be abnormal, place itself in the invidious position of being a party to a breach of the New South Wales Pure Food Act."

Mr. Ferguson was referring to Section 10 of the Pure Food Act which states:-

> "No person shall sell any article of food which is adulterated or falsely described, which contains any matter foreign to the nature of the food or which is packed or enclosed for sale in any manner contrary to any provision of this Act or the Regulations."

This rationale for the continuing use of the sediment test lacks credibility when one looks at the actual system of rejecting milk on the basis of the sediment test.

The system is as follows:-

> The tanker collects the dairy farmers' milk each day. The sediment test is carried out at least once each week and, if necessary, more frequently. On the day the sediment test is done, the tanker driver takes a sample of milk from each farm for testing and puts the bulk of the milk in the tank with the milk collected from other farms. This milk is taken to the factory and is subsequently sold to the public as milk.
>
> The sample of milk taken by the tanker driver is subjected to a sediment test at the factory but the results of the test are not available until after that batch of milk, to which the sample relates, has already been sold to the public as milk. Even if these results were known prior to this sale, they would be of little use in terms of compliance with the Pure Food Act, as the particular batch of milk has already been mixed with milk from other farms at the time of collection.
>
> If that batch of milk results in a rejection on the basis of the sediment test, the milk which is in fact rejected is the next batch from that farm. Further, rejections does not necessarily mean physical rejection. The milk is in fact accepted, at a lower price, for use in secondary dairy products such as cheese and butter.

It is not universally accepted throughout the Dairy Industry that the Corporation would be breaching the NSW Pure Food Act by accepting "milk known to be abnormal" as was claimed by Mr. Ferguson.

Apart from the Pure Food Act the Corporation offered another reason for the continuation of the present sediment test requirements. This was that it ensured that dairy farmers maintained a high standard of hygiene on their farms which in turn resulted in a high standard of milk.

This reason was generally accepted as being sound as the existence of the sediment tests, with the chance of milk being rejected, has resulted in dairy farmers going to great lengths to ensure that as little foreign material as possible gets into the milk.

However, two points should be made about this. Firstly, because of the possible variation in test results between graders, even milk from the most hygenic farm can be rejected whilst milk from a less hygenic farm can be accepted.

Secondly, the test discriminates against dairy farmers who have low milk yielding cows. With low milk yielding cows

there is more chance of a rejection based on the sediment test as there is less milk to dilute the sediment prior to the sample being taken for testing. Consequently, dairy farms with low milk yielding cows can have a higher standard of hygiene than other farms but still have a higher rejection rate for sediment.

Despite the subjectiveness of the sediment test, neither the dairy farmer who made the complaint to this Office, nor the Department of Agriculture, nor the Corporation wanted the sediment test abandoned. They all agreed that the use of the sediment test led to a high quality of milk in N.S.W.

What was being sought by the complainant and the Department of Agriculture was some standardization of the test so as to reduce its subjectivity. This would not affect the standard of milk but would protect dairy farmers against inconsistent readings of the test results by graders.

The Corporation considers the process of clarification or centrifuge, which is common to many of the other Australian States, to be an unnatural act which results in the production of an unnatural product. The Corporation is not willing to introduce this process into New South Wales, as it believes it will lower the quality of milk in this State.

After the investigation by this Office was started and just after the Corporation replaced the former Dairy Industry Marketing Authority in early 1984, the Corporation began investigating an electronic device which could possibly be used to read sediment test results. The results of the test would be obtained by an electronic method of passing light through a sample of milk to detect dirt.

This method involves using a machine called the Chroma Meter II produced by Minolta. The machine would be programmed to enable it to give a reading of the amount of dirt present on a sediment wad. This reading would then be compared to standard readings to indicate whether the milk being tested should be "accepted" or "rejected" or whether the dairy farmer should be "warned" that the dirt content was high.

At the time the Ombudsman's investigation was concluded, the Corporation was conducting a field trial to establish whether the Chroma Meter II was reliable enough for use in sediment tests of milk. The preliminary tests indicated that it would be suitable but a final decision on its suitability was not expected until early 1985.

If the Chroma Meter II can be used in sediment tests it will totally remove the subjective nature of these tests.

After the investigation into this matter, the Ombudsman concluded that the conduct of the Corporation in requiring the continued use of the sediment test (when it was aware of its subjective nature and thus questionable results), without actively pursuing an alternative method of obtaining readings of sediment content, was unreasonable and based partly on irrelevant considerations, and therefore was wrong conduct in terms of the Ombudsman Act.

On the basis of that conclusion, the Ombudsman recommended that the Corporation establish a committee comprising representatives of the Corporation and the Department of Agriculture to oversee the field trial with the Chroma Meter II and, if the machine was suitable, to facilitate its prompt introduction into the Dairy Industry. Alternatively, it was recommended that, if the Chroma Meter II

proved unsuitable, then that committee should investigate and recommend an alternative method of obtaining sediment test results which would significantly reduce the subjective nature of the test and, in that event, the Corporation should implement, as soon as practicable, the recommendations of that Committee.

30. Department of Consumer Affairs: Allegedly Dangerous Hose Attachments.

For some years now the several water supply authorities in New South Wales have been concerned at the multiplying use by the public of various unapproved devices operated by attachment to domestic water connections, which dispense detergents, liquid fertilizers, and any other chemical, to assist in such common place activities as washing cars, external walls and windows, and gardening. The use of these unapproved devices can present a real hazard to the safety of the user, his family, and the local community, through the possible back-syphoning into the water supply of toxic material and the pollution of garden taps and hoses by such material.

The use of such unapproved devices is, as one might expect, prohibited by the water supply authorities' by-laws. However, for various reasons this has not prevented their increasing use, let alone prevented their sale which would obviously resolve the problem. The water supply authorities have no statutory power to ban sales of products considered by them to be dangerous.

As a result of a complaint made under the Ombudsman Act action was taken which led to a conference attended by the Ombudsman, one of his Senior Investigation Officers, the then Commissioner for Consumer Affairs, and expert representatives of the various water supply authorities, the Department of Health, the Office of Local Government, and the Department of Public Works.

The problem was discussed exhaustively and the general consensus of the experts and Departmental representatives seemed to be that:-

1. The most effective solution to the problem would be a statutory ban on the sale of the attachments concerned.

2. It would not be practicable to try to achieve this by amendment of the various statutes governing the conduct of the water supply authorities.

Under Section 39E (1A) of the Consumer Protection Act, the Minister for Consumer Affairs may prohibit the sale in New South Wales of any specified goods which have been proscribed by a competent authority elsewhere in Australia, after that Authority's full consideration of the matter and representations by interested parties, on the grounds that the goods were dangerous. The Minister does not, in those circumstances, need to refer the matter to this State's Products Safety Committee.

Oddly, one might think, the Minister cannot act similarly in respect of goods proscribed by competent New South Wales authorities on the grounds that the goods are dangerous. It was the correction of this anomaly, by an amendment modelled on Section 39E (1A) of the Act, that seemed

to those at the conference to offer the most obvious and practical solution, and which was thereupon recommended to his Minister by the Commissioner, in a submission dated 3rd March, 1983. However, the then Minister, the Hon. D.P. Landa, declined to accept that recommendation, and instead, in the exercise of his undoubted Ministerial discretion, invoked the product safety provisions of the Consumer Protection Act.

At 30th June, 1984 the problem was still under consideration by the Products Safety Committee. The Committee has, however, tentatively adopted a specification for hose end attachments for dispensing chemicals which is to be commented upon by other authorities and manufacturers. If no persuasive objection is received, the Committee will confirm its adoption of the specification, and will recommend that the Minister ban from sale any device not meeting that requirement. This would at last encompass the banning from sale of the devices which have been of concern to the water supply authorities over several years.

However, if the Committee does not confirm the specification, or otherwise does not bring about the action sought by the water supply authorities, devices they consider dangerous will continue to be marketed.

In effect, this State's statutory consumer protection machinery would in those circumstances continue to allow the sale to the public of devices seen by competent New South Wales government authorities to be a hazard to the health, perhaps life, of the user and others, and which, if connected to the public water supply through a domestic connection, will continue to make the consumer/user liable to a penalty of $1,000 plus $50 for each day of continued use under by-laws authorised by Parliament.

That is, of course, speculative comment, and no doubt an appropriate decision will, eventually, be taken either before or during the coming summer/gardening season. It is to be hoped that no injuries to health (or worse, no fatality, as has happened in the United States) occurs in the meantime. Prompt conclusion of the Committee's deliberations is clearly necessary.

31. Government Insurance Office

Past Policy

As a result of increasing number of complaints being received in this Office and the resulting increase in workload for the Investigation Officers, the present Ombudsman early in his term took the view that where the conduct complained of related to the discharge by a public authority of a function which was substantially a trading or commercial function (Section 13(4)(b)(iii) of the Ombudsman Act) these matters were to be declined and referred to the Department of Consumer Affairs for appropriate action and advice direct to the complainant. This was to be the policy followed in regard to authorities such as the Government Insurance Office unless there were public interest considerations as to why a particular matter should be pursued. The Ombudsman was of the view that it was not appropriate for this Office to intervene in such commercial dealings.

Whilst following this policy, a register of complaints received against the G.I.O. was also kept in order to monitor

the complaints being received. During the period July, 1983 to June, 1984, 68 written complaints were received. A large number of these complaints concerned an alleged failure by the G.I.O. to reply to correspondence, unsatisfactory handling of a claim, and delay in handling matters. It should be noted that during this time period, people were also complaining direct to the Department of Consumer Affairs (125 written complaints were received during that period) and a substantial number of telephone enquiries were being received by both the Department and this Office.

Some large authorities hold the view that it is their size which creates the problems and therefore the complaints. However, the size of an organisation need not necessarily diminish its level of efficiency. The State Bank, in terms of size, would be a comparable authority, yet during the same period, 5 written complaints were received by this Office about the State Bank. Very few telephone enquiries were received.

Change in Policy

The number of complaints being received, particularly in regard to the alleged failure of the G.I.O. to reply to correspondence, indicated that very real administrative problems appeared to exist within the G.I.O. It was also noted that where matters had been raised with the G.I.O. this office had also experienced difficulty in obtaining information and in some instances, replies. A number of the replies received revealed possible flaws in the administrative procedures utilised by the G.I.O. and warranted investigation.

One example of such correspondence would be the letter of 6 March 1984 from the Secretary of the G.I.O.:-

> "From this information, we have been able to identify a workers' compensation claim number 442798, which may relate to the subject matter.
>
> Unfortunately, due to the time factor involved, we have been advised by the Archives Authority of NSW that this file has been destroyed.
>
> The Workers' Compensation Claims Department has been unable to locate any records of receipt of the letter Higgins Solicitors forwarded to the G.I.O. In this regard it is noted their copy letter dated 15 November 1982 was addressed to "The Manager" Government Insurance Office of NSW.
>
> With respect, it would be difficult for our Mail Room Staff to accurately sort mail inadequately addressed with so many departments potentially involved and in this regard we have been unable to determine the recipient of those letters." *1

Another example would be the reply from the Acting Manager, Third Party Claims, received some 9 weeks after the request for information was made. It was as follows:

> "A cheque which had been paid to Dr. B. for $29.00 on 11 August 1981 was returned to this Office on 3 September 1981. When the matter was eventually

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*1 The facts of this matter are documented in Case Note 8.

> resolved this amount was incorrectly deducted from settlement monies paid on 6 July 1982. In accordance with normal procedure the file was then finalised and despatched to our Redfern repository.
>
> No action was taken on the subsequent letters sent by the Solicitors until the file was able to be retrieved from the repository on 4 October 1983. A cheque for $29.00 was then forwarded to the Solicitor without explanation.
>
> The matter has since been discussed with the Solicitor involved." *2

Following prolonged difficulty in obtaining this reply from the G.I.O. and due to its unsatisfactory nature, it was decided that a formal enquiry would be held by the Ombudsman under Section 19 of the Ombudsman Act. A Senior Officer, the Secretary and Managing Director were required to attend. The enquiry elicited the relevant information, established unreasonable delay on the part of the G.I.O. and as required by the Ombudsman Act a report was written.

Repercussions

Apparently, the Managing Director, Mr. Jocelyn took exception to being required to attend the Office of the Ombudsman in regard to a matter "involving a magnificent sum of $29". Relations with the G.I.O. reached an all time low. Mr. Jocelyn took to expressing his views of this Office in letters and memos. One of the more colourful examples would be the analogy used to explain why he did not intend implementing the recommendations of the Ombudsman in the Higgins Report. The following analogy was used:

> "Put another way, if you have tenants in a house with a backyard dunny with a leaking pan and you are about to build a new house and in any event the drainage authority is examining whether or not the sewer is to be extended, you put up with tenant whinges and continue to collect the rent."

In a letter to the Treasurer, on the same matter, Mr.Jocelyn did not engage in sublety:

> "You will appreciate what the Ombudsman is giving me when you read the analogy at the end of my letter."

In direct contrast to Mr. Jocelyn, the Treasurer has been most supportive of this Office and the investigations carried out. A consultation was held with the Treasurer in regard to the Ryan and Gilmore Report. The following view was expressed in regard to the Higgins Report:

> "As the complaint again deals with failure to deal with correspondence, as in the case of Ryan and Gilmore, Solicitors, I do not think consultation will be necessary.
>
> I would like to assure you that such incidents are of great concern to me. However, with an efficiency audit underway and development of computer facilities, these problems should be eradicated."

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*2 The facts of this matter are detailed in Case Note 9.

This Office also hopes that the efficiency audit presently being undertaken by the Public Service Board and the development of computer facilities will indeed resolve the administrative problems evident within the G.I.O. and significantly reduce the number of complaints being received by this Office.

As the G.I.O. has recently been given a statutory monopoly in the area of motor vehicle third party claims, complainants in this area do not have the option of taking their business to another insurer. Accordingly, the Ombudsman owes it to the public to institute enquiries in this area when complaints are received.

32. Electricity Supply to Caravans

The Chairman of a Caravan Park Residents Association complained to this Office about the fact that people who live permanently in caravan parks are forced to pay for their electricity at general supply rate whilst residents in houses and flats are charged the lower domestic use rate. Further, pensioners who live permanently in caravan parks are not entitled to a pensioner rebate.

Enquiries made of some County Councils and the Energy Authority of New South Wales revealed that, to qualify for the domestic rate, a service must be connected to a permanently wired, self-contained residence generally having the characteristics of domestic load and connected to an individual meter. Electricity consumed within a caravan park is conventionally sold by a County Council to the park operator who is classified as a commercial customer in the same way motels, hotels and guest houses are classified as commercial customers.

In the general situation then, without separate metering, caravan park residents cannot be individually billed as electricity customers and therefore are unable to benefit from domestic supply rates and are ineligible for pensioner rebates under the terms of the Electricity Development Act.

However, the Energy Authority advised this Office that, in response to numerous representations regarding this issue, the Government had requested the Authority to explore means by which the domestic tariff could be made available to permanent park residents and an information gathering exercise had already been started. In view of the fact that the issue was already being examined by the Energy Authority, this Office felt it would be inappropriate to pursue the complaint and therefore discontinued its enquiries, but furnished the complainant with all the relevant information gathered.

33. N.S.W. Division of Forensic Medicine - Non Retention of Blood Test Slides and Photographs

A complaint was received from a firm of solicitors acting on behalf of their clients in respect of the procedures of the Division of Forensic Medicine, New South Wales Department of Health, relating to the identification of blood samples likely to be used in criminal trials including the

carrying out of scientific experiments or tests, the recording of those experiments or tests and the preservation of the evidence relating to those tests.

It was decided to carry out preliminary enquiries and the Secretary, Department of Health was asked to comment on several allegations which included the alleged failure of the laboratory, as a matter of practice, to preserve and keep slides and plates (except for Iso Electric Focusing plates). In addition it was alleged that test results were not routinely photographed and that the laboratory did not have any photographic facilities.

The Department was, inter alia, asked to comment on the complainant's observations that all test plates (particularly in criminal matters) should be stained, dried and preserved as a permanent record and the laboratory should be equipped with photographic facilities to routinely record all results. It was also stated that unless anti-serum is properly tested reactions could be obtained and wrong conclusions drawn.

It was emphasised to the Department that the enquiries were limited to matters of administration within the Division of Forensic Medicine. In respect of the matters which were subsequently investigated the Department replied that it was not denied that test slides and plates were not kept as this would lead to a great deal of unnecessary work and require additional staff to file and care for the material and involve a large storage space. It was admitted that test results were not routinely photographed as this would again lead to a great deal of unnecessary work. It was alleged that all anti-serum is tested when a new batch is received prior to initial use.

Several Australian and overseas forensic laboratories were asked for details as to their practices regarding their procedures for retention and photographing of slides. The laboratories involved in the enquiries all advised that they had photographic facilities to record the results shown in test plates or slides and in varying degrees took photographs as a permanent record of results. Four of the laboratories advised that test slides and plates were not routinely kept, one kept them in exceptional circumstances and four retained the material in varying degrees. The Home Office in the United Kingdom had more than one laboratory under its control and different laboratories adopted different techniques.

The Ombudsman had an inspection and discussions at the South Australian Forensic Science Centre, Adelaide. The Ombudsman also appointed an expert to assist him under under the provisions of Section 23 of the Ombudsman Act.

An inquiry under Section 19 of the Ombudsman Act was conducted. A draft report setting out the prima facie conclusions of the Ombudsman has been recently completed. Comment is awaited.

34. Truck Safety in the Wollongong Area

Mr. Bassett, a driver of heavy trucks in the Wollongong area, complained to Mr. John Hatton, Member for South Coast, that the Departments of Main Roads and Motor Transport were not ensuring that trucks were operating safely. Mr. Bassett had reported a defective truck, and been dismissed by his employer. The essence of his complaint was that, if the regulating authorities had been functioning properly, the

defective truck would have been detected by them. Mr. Bassett also complained that truck drivers were frequently prosecuted while truck owners rarely were. As Mr. Bassett put it,

> "There is a large and complex pyramid, beginning with individual departmental inspectors, licensing authorities, police officers, and going up through engineers, legal officers and supervisors, to policy officials and departmental heads, to the Ministers in charge. All of these people and organizations have their own responsibilities and expertise, and they often have difficulty in finding answers. Yet the individual truck driver is required to know about the whole range of regulations; he is supposed to be an expert in everything".

Truck safety has been a matter of public concern for some years in the Wollongong area, particularly since an horrific accident on Mount Ousley in 1979. There is a great deal of heavy traffic to and from the industrial area and the port, and several very steep gradients. A lengthly investigation showed that steady improvements had been, and were still being, made to control the loading of trucks and their mechanical efficiency. The Departments of Main Roads and Motor Transport, in conjunction with the Police, have issued more explicit instructions to their staff, have improved their training programs and have increased the numbers and effectiveness of their inspections of vehicles. The Department of Motor Transport now inspects trucks annually and, partly as a result of its experience at Wollongong, is extending this scheme throughout the State.

Much of this information was gained following suggestions from Mr. Bassett, who proved to be a most persistent and effective complainant. With his long experience as a driver, Mr. Bassett was able to see omissions in the public authorities' replies to the Ombudsman, and suggested several matters for further enquiry. Owing to the improvements in safety regulation disclosed by the investigation, thre was no finding of wrong conduct against the Departments involved. However, should they fall to maintain this improvement, there is no doubt that the Ombudsman will again hear from Mr. Bassett.

35. Misleading Advertising by Government Authorities: Proposed Introduction of New South Wales Trade Practices Legislation

During the year under review, the Ombudsman made a report to Parliament expressing the view that there is a need for the New South Wales Government to enact a Trade Practices Act which would apply, inter alia, to the commercial transactions of State Government departments and authorities.

The report resulted from the investigation of a complaint made by a Member of Parliament, on behalf of Mr. and Mrs. S. The complainants obtained a Land Commission brochure promoting the sale of "high quality homesites". They applied to buy one in December 1979 at a purchase price of $14,000. Settlement was effected on 16th July, 1980. When bulldozing work was commenced on the land in preparation for the building of their home, they found that much of the block had been filled with all sorts of rubbish - old washing machines, bottles and the like. Complaints were made to the Department

of Lands and the Land Commission but responsibility was denied by both authorities. An offer made by the Commission to repurchase the land for the original purchase price, but not offering compensation in any way, was unacceptable to the S's. They maintained that the land had been misrepresented to them.

The investigation found that it had been misleading for the subject land to be advertised as a "high quality" homesite. The expectation conjured up by such a representation would be that the homesite would be suitable for building a home without further preparation.

On that basis, it was recommended that the Department and Commission make an ex-gratia payment to Mr. and Mrs. S. for the cost of the removal of unsatisfactory material and its replacement by suitably compacted fill, and for the additional building costs caused by the delay. The ex-gratia payment has since been made for the sum of $8,016.10.

It was of particular concern that, at present, should a person wish to question the advertising practices of a N.S.W. State Authority, the only avenue available is persistent representations to the particular authority or the responsible Minister. If the authority and the Minister take a stand on the matter, no other remedy is available. It is particularly important to note that the Commonwealth Trade Practices Act does <u>not</u> apply to State authorities.

A private company dealing in commercial matters, such as the sale of land, is subject to the requirements of the Trade Practices Act. In a case such as this, section 52(1) of the Act would expressly preclude misleading or deceptive advertising, providing the aggrieved party with a remedy at law.

The Ombudsman believes that N.S.W. State Authorities when engaging in commercial practices, should be subject to the same provisions which control the conduct of private organisations. It is clearly illogical that citizens should be offered legal protection against private companies, but not against State government authorities. The standard of conduct of government authorities in commercial dealings with the public should be at least as high as that of private corporations.

The Ombudsman felt that this issue was a matter of public significance which should be brought to the attention of Parliament by way of special report. He recommended that the Government of N.S.W. consider the introduction in N.S.W. of a Trade Practices Act that would apply, inter alia, to sales of land and commercial transactions of State Government departments and authorities. It was envisaged that such legislation would, as far as possible, provide citizens with similar legal protections against government authorities as exist against private corporations .

As a result of the tabling of this report, the Premier announced that he had instructed the Minister for Consumer Affairs to examine the ramifications of the proposed legislation. The Premier also asked the Minister for Housing to ensure that this problem does not occur again.

In his speech to the Australian Association of National Advertisers, on 23rd May, 1984, the Minister for Consumer Affairs said:-

> "I also said then that I endorse fully the general observations of the Ombudsman that the standard of conduct of government authorities in commercial dealing with the people should be at least as high as that of private corporations, and I do not deviate from that position now."

More recently, the Minister for Consumer Affairs has advised that, hopefully late in 1984, he will be seeking Cabinet approval for a Fair Trading Act, which, among other things, will incorporate most of Part V and the relevant provisions of Part VI of the Trade Practices Act. The Act will be binding on the Crown in the same way that the Federal Trade Practices Act binds the trading activities of the Commonwealth Government and its authorities.

36. Day Care Centre - Funding payment practices by Department of Youth and Community Services - Dramatic changes following Ombudsman Report and Ministerial Direction.

A Department in the business of funding community services should be responsible for ensuring that the programmes it funds are in a position to run efficiently.

An example where a Department was negligent in its duty to provide the administrative pre-requisites for the efficiency of a government funded community service was uncovered following investigation of a complaint made by the Director of a child care centre.

The long day care centre concerned is entitled to salary subsidies at the rate of 90% of teachers' salaries paid by the Department of Youth and Community Services. Apart from fee income, these subsidies are its only source of income.

The Director complained that salary subsidies had been consistently received late by at least eight weeks, resulting in staff having to go without wages until the subsidy cheque arrived. A grant in aid of $5,000, instead of going towards much needed equipment, had to be kept as a float in an attempt to cover wages until the cheque was available. Repeated phone calls to the Department had had no effect in overcoming the problem of delay.

Investigation revealed that the Department's practice was to forward subsidy cheques by the middle of a quarter, e.g. the cheque for the quarter commencing 1st April was to be sent no later than the middle of May. In other words, the Department had adopted an in-arrears payment system.

Asked by the Ombudsman about the reasons for this practice, the former Director-General of the Department, Mr. Langshaw stated: "...the practice of making payments in arrears rather than in advance is simply one that was instituted when the subsidy system for long day care centres began..."

The Ombudsman considered the Director-General's explanation to be unsatisfactory, particularly in view of the fact that many examples of in-advance payment systems existed for the Department to model a new subsidy scheme on, not the least of which is the Department's own subsidy for pre-schools which is paid in advance.

The Ombudsman took the view that any practice which allowed staff to go without wages on a regular basis was unreasonable and unjust. The Department's conduct in paying long day care subsidies in arrears was in accordance with an established practice, but that practice was found unreasonable and unjust within the meaning of the Ombudsman Act [Section 5(2)(b1)].

Investigations further revealed that, even within the parameters of the Department's practice of paying subsidies in arrears, the centre still received its cheque late on several occasions. Further, despite many complaints, the centre had never been informed of the practices adopted by the Department in relation to subsidy payments.

The Ombudsman recommended that the Department seek Treasury approval for an in-advance subsidy payment system as a matter of urgency. He further recommended that the Department give urgent attention to its long day care subsidy payment system to ensure that subsidy cheques are issued and dispatched at the earliest possible date, irrespective of the method of payment applicable.

Shortly after publishing the report, the Minister for Youth and Community Services advised that the Treasurer had been approached for approval to change the method of payment in line with the Ombudsman's recommendation. He also advised that a new procedure had been adopted, aimed at expediting subsidy payments.

The complainant subsequently reported a dramatic improvement in payments.

Quite recently, the present Director-General of Youth and Community Services advised that all salary subsidies paid to long day care centres and occasional care centres had been adjusted to a quarterly in-advance system. He added that the Department had received supplementary funding of $1.178 million to meet the additional expenditure involved in effecting the change during 1983/84.

37. Public Servants may be Complainants

There is nothing in the Ombudsman Act to prevent public servants from making a complaint, even if the conduct of their own department head is investigated as a result. Section 12(1) of the Ombudsman Act allows any person, including a public authority as defined in the Act, to make a complaint about the conduct of any public authority within the Ombudsman's jurisdiction.

In practice few public servants exercise this right where their own departments are concerned. In one recent case, a departmental head who was a member of a committee whose conduct was investigated, expressed concern that the complainant had not made a personal approach to him rather than complain to the Ombudsman. The complainant's view was that a personal approach would not have been available to private citizens who shared his problem, and could have been morally wrong. The Ombudsman Act certainly allows complaints to be made by public servants. Anonymous complaints can also be lodged.

38. Discretion to Decline Complaints

The Ombudsman Act provides the Ombudsman with the discretion to decline complaints or discontinue investigations. In deciding whether to decline a matter, the Ombudsman may have regard to 'such matters as he thinks fit' [s.13(4)(a)], and a number of other considerations, including the public interest. By Section 13(4)(b) he may have regard to whether, in his opinion -

(i) the complaint is frivolous, vexatious or not in good faith;

(ii) the subject-matter of the complaint is trivial;

(iii) the subject-matter of the complaint relates to the discharge by a public authority of a function which is substantially a trading or commercial function;

(iv) the conduct complained of occurred at too remote a time to justify investigation;

(v) in relation to the conduct complained of there is or was available to the complainant an alternative and satisfactory means of redress; or

(vi) the complainant has no interest or an insufficient interest in the conduct complained of.

The Office of the Ombudsman does not have infinite resources, and must be selective as to which investigations are fully pursued. The discretion to decline complaints prevents resources being wasted on matters which are relatively unimportant. It also prevents duplication of effort where other remedies exist.

Four brief examples illustrate matters which were thought not to warrant full investigation:-

- A land buyer had problems relinquishing a block of land at Lightning Ridge. Letters from the Western Lands Commission took no account of his stated intentions. The land buyer made simultaneous representations to the Minister for Lands. There was no need for the Office of the Ombudsman to become involved, as the complaint was satisfactorily resolved by the Minister.

- A theatre-goer who left his car at the Domain Parking Station and went to the Opera House by bus (the 'Park and Ride' service) complained that he had been unable to retrieve it just ten minutes after midnight on a Saturday. By the time the station opened on Monday, he owed $23.00 in parking fees. He complained that the Sydney City Council, which operates the station, had failed to inform him of the parking station's hours of business. A preliminary enquiry by this Office confirmed the Council's claim that signs were prominently displayed.

- A ratepayer in the Prospect County Council's area complained that the Council did not contact him personally before disconnecting his electricity. He wrote: "It is not denied that the amount was

not paid within the specified period ... It was not paid due to tardiness and procrastination on my part". The Office declined the complaint after learning that in the past 12 quarters the ratepayer's property had been visited 5 times by the Council with 3 notices of intention to disconnection, one second notice and one actual disconnection. It was pointed out to the complainant that tardiness and procrastination are not valid reasons for non-payment.

- The Prisoners' Action Group of West Perth, Western Australia, lodged a complaint about police conduct at Goulburn Gaol during the prison officers' strike in January 1984. It was alleged that on the morning of 19th January, 1984, a marked police car with a loudspeaker on its roof drove slowly around the prison playing a version of the song "Please release me, let me go". The Prisoners' Action Group complained this was provocative action on the part of the police.

  No prisoners at Goulburn Gaol complained to the Ombudsman about the alleged events. It was decided to decline the complaint for this reason and on the basis that the matter did not warrant the commitment of the limited resources of both this Office and the Police Department that would be involved in investigating it.

39. Policy, Professional Judgement and Matters of Administration

The Ombudsman has power to investigate the conduct of public authorities in matters of administration. Some examples of matters of administration were given in the Annual Report for 1981-82 (p.11). However, it is hard to provide an exact definition of this kind of conduct, and to explain to complainants the distinctions which have to be made when deciding whether a matter should be investigated. Some of the guidelines used within the Office of the Ombudsman for determining whether a complaint concerns a matter of administration are set out below. They are not intended to be definitive statements, but rather to provide information about one aspect of the work of the Office.

There are two kinds of conduct which seem to create a particular uncertainty in the minds of both the public and officers of government authorities; these concern matters which can correctly be termed "policy", and those which involve questions of a highly technical nature, or in which professional competence is disputed. If conduct can most properly be classified as relating to a matter of policy or of professional judgement, then in some circumstances it may be distinguished in some respects from a matter of administration, and investigation perhaps declined by the Ombudsman for that reason. This involves excluding certain things, rather than providing a positive definition, but it is useful in setting some general boundaries for matters of administration. Nevertheless, some conduct might be of a kind that would be investigated by the Ombudsman, regardless of any tests or general boundaries; this is dealt with below.

Policy

In the classic description of Australian Practice, Professor R.S. Parker pointed out that the term "policy" is used in several ways, and can mean a political aim, a changing pattern of action, or even a set of precedents that form "departmental policy" (Public Administration (Sydney), Vol. 19 No. 2, June 1960). Public authorities have occasionally implied that an investigation by the Ombudsman should not proceed, on the grounds that it involved an aspect of the authority's "policy". By this has usually been meant the principles, or accumulated wisdom, or habitual practices of the public authority and its staff. Yet this provides no useful criterion, for practices and habits can include the most routine procedures that would clearly be matters of administration.

An alternative approach to deciding whether conduct involves matters of policy is to consider, firstly, the source of the decision which has resulted in the policy and, secondly, its ambit. Where a decision is taken by a popularly elected body, or by an appointed or partially-appointed public body which is intended to represent a range of community interests, there is an element of policy-making; examples include local government councils and such organisations as the governing boards of certain statutory authorites. There is a further element of policy-making if the decision is to be applied to all of those persons normally dealt with by the public body, or to a substantial proportion of them; examples would include a variation to garbage collection services, or a general increase in levies or prices.

It follows that, even though a decision might be made by an elected or representative body, it can involve matters of administration, particularly where an individual application requiring compliance with certain rules is being considered (such as a development application to a local government council). In such instances the public body should ensure that its administrative officers have completed all the necessary procedures, and could be the subject of investigation by the Ombudsman if it had not carried out its own checks.

There could also be decisions, even though taken by elected bodies and broad in ambit, which were apparently so unreasonable or bizarre as to suggest that the administrative conduct leading up to them was wrong. If, for example, a decision to levy a charge was applied to a peculiar group - people with blue eyes, for example - then an investigation by the Ombudsman would be indicated.

In short, many kinds of conduct involve matters of administration, even though they may appear to fall within one of the several meanings of "policy".

The Ombudsman Act precludes investigation of the conduct of Parliament and of Ministers, and many of the decisions of Parliament and Cabinet would in any event creat "policy". However, even in this context the Ombudsman may investigate the conduct of a public authority relating to a recommendation made to a Minister. Thus the events leading up to a policy decision might well be the subject of investigation, even though the policy itself is much less likely to be investigated.

Professional judgement

Many complainants to the Ombudsman believe that the experts are wrong: over the treatment given in a hospital, the siting of a playing field, the closing of a road, the marking of an examination paper, the building of a bridge, and a host of other things. The common element in many of these decisions is that they are taken by people with special training and skills, usually gained over many years and often recognised and tested by technical institutes or professional associations. Conduct involving only the exercise of technical skills or professional judgement may fall outside of the administrative area. Alternatively, it can be said that the choice by an expert between two or more reasonably open courses of action cannot be "wrong conduct in a matter of administration" to take the whole phrase. Examples would include the construction of a concrete rather than a steel bridge; the use of antibiotic X rather than antibiotic Y in the treatment of a patient. In such instances the Ombudsman would not usually wish to "second guess" the technical or professional experts.

Nevertheless, the most complex of technical decisions usually involves preliminary steps or parallel procedures of an administrative kind. Grades should be awarded on a scale which, in all fairness, has been made clear to students some time before their work is to be handed in. Giving prior information about grading scales involves conduct relating to a matter of administration. Any failure to provide adequate advice about grading scales to students might thus be the subject of an investigation by the Ombudsman. The use of a particular drug might involve monitoring dosage or side-effects. In such a case suitable procedures should be set up to carry out the necessary checks, and a failure to do this might well be investigated by the Ombudsman.

Professional judgement, like policy, might produce results so extraordinary that investigation by the Ombudsman becomes necessary in order to establish the kinds of decisions that led to the remarkable outcome. The Ombudsman might have no interest in the material used to construct a bridge, but would certainly like to know why a bridge had apparently been built in the wrong place.

When complaints are received in this Office, they are examined carefully to ensure that they are within the jurisdiction of the Ombudsman. Certain exclusions are established by the Schedule to the Ombudsman Act, and Section 13 of the Act sets out certain matters which the Ombudsman may take into account when deciding whether to investigate a complaint. Further, Section 13 of the Act also gives the Ombudsman wide discretion to decline complaints, and the fact that "policy" issues loom large or highly skilled professional judgement is involved may lead the Ombudsman to decline a complaint on discretionary grounds.

40. Department of Youth and Community Services : Special Containment Programme, Endeavour House, Tamworth

In November 1983, this Office received information that a 16 year old boy was being held in solitary confinement at Endeavour House, a training school for delinquent boys at Tamworth. A formal complaint was not made about the matter; however, following preliminary enquiries it was decided to

commence an immediate investigation under the Ombudsman's own motion. A matter of hours after the information was received, two of the Ombudsman's officers travelled to Tamworth to carry out the investigation. Nine days later the investigation was completed and the Ombudsman's report was delivered to both the Director-General of the Department, Mr. H. Heilpern and the Minister for Youth and Community Services, the Honourable F. Walker, Q.C.

The investigation confirmed the information. Two boys were being segregated in conditions amounting virtually to solitary confinement. One had been held for three and a half months. Each was locked in one of 4 cells of approximately 100 square feet in area. The cells did not contain any plumbing or sewerage. No association with other residents was allowed. The boys were not given exercise on each and every day and when they were given exercise they were allowed no more than one hour.

The decision to segregate the boys was taken by the Superintendent, Mr. Gould and the Regional Director, Mr. Hart. The boys were clearly dangerous. One of the boys was facing charges of armed robbery and assault.

The Superintendent stated that Endeavour House Training School was not a secure institution and one of the boys had made it clear that he would abscond at the first opportunity. It was his view that both boys ought to have been confined to prison. However, the boys were sent to Endeavour House by a Court direction. Insufficient staff were available to closely supervise the boys as the department intended to close the institution and there were a number of unfilled vacancies. Accordingly they were placed in what was called the "Special Containment Programme". The programme was in effect, a form of solitary confinement. The approval of the Head of the Department was not sought or given. The programme was initially intended to be of short duration. Ultimately it lasted for 4 months.

The Ombudsman concluded that while the programme arose out of a recognition, based on sound professional judgement, that the boys could not be contained in the institution with any guarantee, the effect of the programme was to segregate the boys and that there was no provision in the Child Welfare Act authorising such segregation. The programme in its initial stages, being a short term initiative, could be regarded as a reasonable exercise of the Superintendent's power to "control" an inmate under section 52 of the Child Welfare Act and therefore, not wrong. However, the programme for one boy was allowed to continue for four months and there was no evidence that the officers concerned contemplated any limits being placed on its life. Indeed, the other boy was added to it and Mr. Gould had foreshadowed the inclusion of a third resident to into the programme. Segregation of children was not authorised under the Child Welfare Act, and it was noted the power given to the Corrective Services Department to segregate adult prisoners under Section 22 of the Prisons Act can be used only for limited periods and beyond that, by ratification of the Head of the Department. The segregation of the two boys had been made for a lengthy period without specific statutory authority and without formal consent from the Director-General. In addition, there were no records of the operation of the programme and there was no evidence that the programme was being properly monitored by Mr. Hart. Indeed, Mr. Hart appeared surprised at statements put to him by this Office that the two boys appeared to have received only an hour's exercise per day. In addition, whereas the programme as originally submitted to Mr. Hart made provision for three work periods per day, no facilities were provided for such work.

Thus, while both Mr. Hart and Mr. Gould acted in what they considered to be the best interest of the community and the institution, their actions showed a lack of appreciation of the proper limits of authority. It could be said that, in all the circumstances their actions amounted to a serious abuse of authority.

The Ombudsman recommended that the special containment programme be terminated as soon as practicable, that sufficient extra staff be appointed to allow the free association of the inmates while at the same time ensuring their effective containment and that consideration be given to upgrading facilities at Endeavour House. The Director-General agreed to terminate the Special Containment Programme.

41. The Need for a Juvenile Prison

This Office is concerned at the facilities available for the accommodation and management of "problem" juvenile offenders.

These juvenile offenders are mainly those who have committed serious crimes of violence or who have a record of "unruly" behaviour in the Youth & Community Services establishments. Such juveniles have, in the past, been routinely sent to prison by the Courts.

Last year, a number of complaints were received from a group of such boys who were confined to Parramatta gaol. The boys complained that they had no access to the recreational or sporting programmes at the gaol and that they were confined to a small yard during the day which contained no seats, inadequate shelter and poor toilet and washing facilities. They also complained that the yard containing them had no amenities, not even a T.V. set.

Inspection of the area where the boys were confined substantially confirmed the claims. The management of the gaol was aware of the problems which existed and had already taken steps to improve the conditions at the yard. However, the Superintendent said that he had no choice but to separate the boys from the adult gaol population because of the very real risk of sexual assault. His view was that the gaol was not set up to handle juveniles and that he would prefer they were not sent there by the Courts. A subsequent inspection of the gaol by this Office revealed that the boys had been released or transferred, either to other gaols or to Youth & Community Services establishments. The juveniles that were at that time in the gaol had been moved to a larger yard but only minor improvements to their amenities had occurred. The area in fact was more appropriate to adult prisoners held in administrative segregation and was adjacent to where these prisoners were being held.

The issue was raised with the Chairman of the Corrective Services Commission, Mr. V.J. Dalton, who advised that the Commission was "acutely aware" of the conditions at Parramatta gaol and that discussions had been taking place at Departmental Head level about the need for a separate, secured, institution for juveniles.

Later advice was received that the conditions at Parramatta had been improved; particularly in regard to access to the sports area, library and movies.

The problem appeared to be completely resolved when, following newspaper reports of allegations that a juvenile offender at Long Bay was given heroin and that attempts were made to sexually assault him, the Minister for Youth & Community Services took action to transfer many young offenders out of prison and into Youth and Community Services establishments.

However these establishments are unsecured and generally operate with emphasis on self discipline rather than secure confinement. Juveniles transferred to these establishments often present a clear security risk. In reacting to this risk, the department's options are few. One option has been to place juveniles on a "Special Containment Programme" in conditions approximating solitary confinement. The exercise of this option in one particular case was investigated by this Office and found in the particular circumstances to constitute wrong conduct under the Ombudsman Act (see previous topic).

The Ombudsman intends to closely monitor developments in this area in the coming twelve months. If necessary, an investigation under the Ombudsman's own motion powers will be made with a view to submitting a special report to Parliament, if appropriate. It is the Ombudsman's view that the case for the urgent consideration of the need for construction of a secure juvenile institution is a strong one.

It is noted that, on 3 October, 1984, the Minister for Youth and Community Services was reported in the press as having announced the Government's intention to construct a high security centre for juvenile offenders next door to the Cobham Remand Centre at Werrington.

42. Sydney Harbour and Foreshores Management : Changes Resulting from Ombudsman Report

As outlined in the Ombudsman's previous Annual Report, the final report in this matter contained several recommendations for action. These included:

(1) that the Maritime Services Board implement the environmental impact assessment provisions of the legislation and regulations on a broader and more consistent basis;

(2) that the Minister for Ports (after consultation with the Minister for Planning & 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;

(3) that as an interim measure, prior to the review and 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

(4) that when an environmental impact statement was received for the marina development in Sailors Bay, it should be referred to the Foreshores Building Committee of Advice for a decision to be made by that body in accordance with its amended constitution.

In response to this report, the following advice has been received from the Minister for Ports and from the Maritime Services Board:

(1) the Board has advised that it "unreservedly" accepts the recommendation that it implement the environmental impact assessment provisions of the relevant Act and regulations. In this regard, the Minister has advised that he has been informed by the Board's Acting General Manager that instructions have been issued to the Board's staff to ensure that the legislation is fully and properly implemented. To this end, guidelines and checklists have apparently been formulated by the Board's solicitor to assist the assessment of proposals in terms of the Act;

(2) the Minister has advised that he has noted the observations made in paragraph 5 of the final report concerning the multiplicity of jurisdictions and legislative measures which can operate with regard to developments on the Harbour, and that it seems to him that a review is warranted. In this connection, the Minister has put forward the opinion that the review of the legislative and administrative controls affecting the Harbour and its tributories, as recommended by the Ombudsman, could properly be made a part of a study being undertaken by the Department of Environment & Planning, in association with representatives of all relevant councils, government authorities and other interests. This involves a regional environmental study which is being undertaken as part of the regional planning for the Sydney Harbour waterways. As a first step a regional environmental plan is to be prepared for the Parramatta River.

The Minister has advised that he has written to the Minister for Planning and Environment advising him of the Ombudsman's recommendation and asking him to refer it to his Department for consideration within the context of this study;

(3) the Maritime Services Board has advised that it shares the Ombudsman's "belief that the quickest and most efficient interim solution of the problems attending harbour and harbourside developments is to be found in expansion of the role of the Foreshores Building Committee of Advice".

In this regard, the Board prepared a new constitution for the Sydney Harbour Foreshores Building Committee of Advice which incorporates, in one way or another, most of the specific matters recommended in the Ombudsman's final report in a way which is consistent with the spirit of those recommendations;

(4) the Minister has advised that the Sailors Bay development proposal is to be referred to the Foreshores Building Committee of Advice so that it can express a view to the Board in the light of the environmental impact statement prepared in relation to the development, and the findings of the public inquiry instituted by the Minister for Planning and

> Environment under section 119 of the Environmental Planning & Assessment Act, 1979. The Minister further advised that his views in this matter are shared by the Board's Acting General Manager who has made arrangements for the matter to be referred to the Committee.

In the circumstances, it would appear that action has been taken in relation to all recommendations contained in the Ombudsman's final report in this matter.

This Office will of course keep the situation under consideration until such time as the review of the legislative and administrative controls affecting Sydney Harbour has been carried out.

43. Administration of Police Citizens' Boys Clubs

Item 27 in last year's Annual Report recorded action taken on a complaint centred on allegations about misappropriation of funds and continuing inefficiency in the administration of the Glebe Police-Citizens' Boys Club.

The action necessarily encompassed examination of the procedures followed by the Federation of New South Wales Police Citizens' Boys Clubs in monitoring the conduct of its Clubs, and as recorded in Item 27 disclosed that the conduct of the Federation, as well as that of the Glebe Police-Citizens' Boys Club, was wrong in terms of the Ombudsman Act. Recommendations were made in a report under Section 26 of that Act concerning immediate steps that might be taken to ensure the adoption of sound administrative and financial procedures.

At about the time the report was being completed the Government set up an Inter-departmental 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.

The Inter-departmental Committee had been set up in the light of a report made in 1981 by the Hon. Mr. Justice E.A. Lusher following his Inquiry into the N.S.W. Police Administration. That report also made recommendations in respect of the role of Police. The Inter-departmental Committee found that whilst in agreement with many of the propositions put forward by His Honour, it could not advocate the removal of police from the Federation because cessation of police involvement would effectively eliminate the movement.

The various investigations disclosed a number of apparent breaches of the Crimes Act and the Charitable Collections Act, which have led to prosecutions of members of the Police force. One former Sergeant has been committed for trial on forty charges preferred against him in connection with two art unions conducted on behalf of the Parramatta Police-Citizens' Boys Club and certain charges are pending against a person connected with him. A Senior Constable has pleaded guilty and been sentenced on thirty-two counts of breaches of the above two Acts, and a number of other police have been charged with offences.

The Inter-Departmental Committee's report has been referred to the Federation and it is understood that a considerable number of its recommendations have been

implemented. At present consideration is being given to the question of whether the Committee should be re-convened.

44. Complex Structure of Government in New South Wales

One of the problems of investigating the conduct of public authorities in New South Wales is the great complexity of the structures of government. There is, for example, a lack of consistency in naming government bodies and their senior officials. There are bodies called "Departments" which are nevertheless not part of the public service proper. "Departments" are headed variously by Commissioners, Directors, Secretaries and Under-Secretaries. The variety of Ministries, Commissions, Boards, Councils and Authorities is wondrous.

It is possible to make enquiries of what is, to all appearances, an autonomous body, only to receive a reply from the head of a larger organisation to whom the other public authority is in some way responsible. Alternatively, bodies which appear to have identities of their own may prove to be little more than offshoots of another authority, owing in part to their reliance on a large organisation for administrative services. People making enquiries of the Ombudsman's Office are often confused about the structure of government, and that fact is hardly surprising.

Several years ago there was an extensive inquiry into New South Wales Government Administration, and a good many changes flowed from it. The inquiry paid relatively little attention to the formal structure of government, no doubt because other matters were of higher priority. However, one of the major concerns of modern public administration is to improve access for citizens to the institutions of government. One way of achieving this goal in New South Wales could be to consider simplifying and rationalising the structures of its administration.

45. Ex-Gratia Payments

In his last Annual Report, the Ombudsman noted that, both overseas and in Australian States and Territories, Ombudsmen commonly recommended that public authorities make ex-gratia payments to complainants where wrong conduct is found. This generally occurs in cases where there is no legal remedy available to the complainant to obtain compensation.

There are financial mechanisms available to government departments and authorities for the making of ex-gratia payments. However, these mechanisms have no statutory basis, and are not available to all authorities coming within the Ombudsman's jurisdiction. The Ombudsman has for some time been concerned about the uncertainty of the position and possible absence of power for authorities to make payments in some cases.

For this reason, the Ombudsman wrote to the Premier on 20th May, 1983, seeking a specific amendment to the Ombudsman Act, empowering public authorities to make ex-gratia payments where they have been recommended by the Ombudsman. On 28th November, 1983, the Premier advised the Ombudsman that he did

not consider such an amendment to be justified. Among other things, the Premier said:

> "In this regard, a system of ex-gratia payments, based on the executive power and appropriation of moneys by Parliament, has been administered by the Treasurer for many years. No evidence has been offered that this system is not operating satisfactorily.
>
> In the case of a public authority which is a body corporate, reference would be necessary to its statutory functions and powers to determine whether it could make an ex-gratia payment in a particular case. This would be well understood. In the absence of substantial evidence that corporate public authorities claim lack of power to implement recommendations by you for ex-gratia payments, it is considered that no change from the present position is warranted."

In one recent case, a corporate public authority has claimed lack of power to make an ex-gratia payment. The Ombudsman investigated a complaint against the former Local Government Superannuation Board, which has been more recently re-constituted as the Public Authorities Superannuation Board. In a draft report, the Board's conduct was found to be wrong on two counts. The Ombudsman recommended that an ex-gratia payment be made to the complainant for a sum of approximately $10,000.

A copy of the draft report was sent to the responsible Minister, the Minister for Industrial Relations. The Minister sought the Treasurer's advice on the ex-gratia payment issue. The Treasurer stated that the making of an ex-gratia payment from the Consolidated Fund would not be appropriate in this case, since the Board is an independent statutory authority with separate financial responsibilities outside of the State budget sector. The Minister has pointed out that he has no power to direct the Board on this matter, and the President of the Board has asserted that there is no legal authority for the Board to make the payment.

This is a situation where the Ombudsman has recommended that a public authority make an ex-gratia payment, the Treasurer does not consider it appropriate to use the system based on executive power which he administers, and the authority is claiming lack of power to make the payment. This uncertainty and possible lack of power surrounding this type of case would have been avoided by enactment of the legislation proposed by the Ombudsman.

A further case has recently highlighted problems with the operation of the existing ex-gratia payment system. Mr. and Mrs. O. complained to the Ombudsman that officers from the Strata Titles Board Office, Department of Consumer Affairs, provided them with incorrect advice. The complaint was investigated, and the conduct of officers of the Department and delegates of the Commissioner was found to be wrong in terms of the Ombudsman Act.

It was recommended that the Director of the Department make a recommendation to the Minister for Consumer Affairs that an ex-gratia payment for the amount of $530 be made to the complainants to compensate for the financial detriment suffered as a result of the inaccurate advice supplied. The Commissioner for Consumer Affairs accepted the Ombudsman's recommendation in a draft report and, on 7th May, 1984, he wrote to the Treasury requesting that payment of $530 be made to the complainants.

There was an exchange of correspondence between the Department of Consumer Affairs and the Treasury. However, by 20th September, the Department had not received a decision from the Treasury, and the complainants had not received the payment.

The Ombudsman considered that it was most unsatisfactory that the complainants should be forced to wait in excess of 4 months for a decision from Treasury on whether an ex-gratia payment will be made for the small amount of $530. It was felt that this case provides an example of how the present system for payments is not operating efficiently.

This matter was raised by the Ombudsman directly with the Treasurer and Treasury. By the 25th September, the payment had been made. The Secretary of the Treasury has taken steps to alleviate delay in future cases. The Treasurer has sought the advice of the Crown Solicitor in relation to the need or otherwise for legislative amendment.

The Ombudsman remains convinced that the Ombudsman Act should be amended to include the following provision:

> "Notwithstanding any provision in any Act, where, following an investigation, the Ombudsman recommends that a public authority make an ex-gratia payment to any person, the public authority has, by virtue of this section, power to authorise and make the payment."

46. Resumptions - Need to increase Interest Rates

Mention was made in the previous annual report of an investigation in progress concerning resumption of land by the Department of Environment and Planning. The complaint related to alleged delays in making advance payments of compensation following resumption and the making of inadequate part payments. While the results of the investigation found that the allegation of inadequate part payments of compensation could not be supported, wrong conduct was found on several other counts. These were: the Department's delay in referring the claim for compensation to the Valuer General for assessment; the failure of the Department's administrative procedures to prevent an incorrect payment of statutory interest being made; and the Department's general delay in making part payments on account of compensation to the complainant's client.

The investigation also highlighted an injustice in relation to the rate of statutory interest that applies to outstanding amounts of compensation in the first twelve months following resumption of land. This rate is currently 4% per annum.

The above case is not an isolated one in this regard. In another matter that is not yet determined, a Dubbo grazier had his 108 hectare grazing property resumed by Dubbo City Council. That person complained to this Office of the delay by Council in making him an advance payment on account of the compensation that was finally determined as a result of legal proceedings initiated in the Land and Environment Court. In that matter, the complainant was deprived of his property and source of income for over 16 months. The failure of the Council to make an early advance payment of compensation also

prevented the complainant from purchasing a replacement property to carry on his chosen form of work, or to derive income from his capital by other means.

In such cases the payment of 4% interest on the monies outstanding in the first twelve months following resumption cannot be considered fair and reasonable in contemporary circumstances.

During the investigation of the first matter mentioned above, it was noted that the Inter-Governmental 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 resumption at a rate of interest that is fair and reasonable in the contemporary circumstances."

In his report on the complaint against the Department of Environment and Planning the Ombudsman recommended that the Government adopt and implement this recommendation as he considered the current rate of 4 per centum per annum to be grossly unfair to citizens whose land is resumed.

Following the publication of the final report on this investigation in November 1983, it appears that the Department of Environment and Planning did not forward this recommendation on to the Government authorities that are chiefly responsible for advising the Government on the appropriate rate of statutory interest.

On 24 September 1984, the Minister for Public Works, Ports and Roads, the Hon. L.J. Brereton advised the Ombudsman that a further report and recommendations from the re-convened Inter-Departmental Committee on Land Acquisition Procedures was at that time the subject of a Cabinet Minute.

Pending the receipt of further information on the outcome of Cabinet's consideration of this matter the Ombudsman will give consideration to launching an own motion investigation into the failure of the relevant public authorities to implement the recommendations of the Inter-Departmental Committee on Land Acquisition Procedures by Government and Government Authorities.

47. Satisfied Complainants

The Office keeps a file of letters of thanks from members of the public. The following are excerpts from these letters. In some cases the spelling has been corrected.

- Since our letter to you the speed with which this matter has been finalised is incredible, I'm only sorry I didn't write to your office sooner.

- Thank you for your swift intervention in this matter. Your inquiries of the G.I.O. have proved fruitful. A cheque for $100 was delivered to us last night by courier. We are grateful for your help.

- I wish to thank you for your help with my complaint against the Wingecarribee Shire Council. They have sent me a letter telling me of their decision to waive the amount of $75.50 in my favour. I am of course happy with the result.

- Just a short note to thank you and the department for your recent help with my complaint regarding the Prospect County Council. I feel quite certain that your involvement hurried the Council and their 'red tape' along.

- I must thank you for your help in our dispute with the Water Board. Our protracted dealings with the Board have been most frustrating. We hope that your report will help to prevent similar exercises in obfuscation and evasion in the future ... Ms. Fleming's help has been particularly appreciated by myself and my wife.

- Last week the (Sydney County) Council came out and handed me a cheque for $708 which made us very happy. I wish to thank you for what you did as I am quite sure we would never have got this money otherwise.

- Thanks to your intervention on my behalf in 1981 and again this year, the Department of Planning and Environment have this week exchanged contracts and are going to pay for the seven blocks of land in ... which they proclaimed as part of a proposed highway in 1938. They are paying half the prices proposed by the local agents, but it covers the rates I've paid over the years plus interest, so I'm not complaining.

  Hope you become independent of Government departments, they're a law unto themselves. If the results of your cases are published they should make interesting reading, a combination of Dorothy Dix, Who Done Its, & the Book of Records.

48. Dissatisfied Complainants

Apart from receiving a number of abusive or irrational letters, the Ombudsman's Office receives some letters from dissatisfied complainants who are critical of the services provided. The following are excerpts from letters of this sort:

- I received your reply this morning. Your reply from an Ombudsman is not good enough - far from it, and is a cop-out.

- It appears your office is more able to handle stupid complaints than REAL ONES.

- The whole situation seems to indicate what the writer has believed all along and that is that the Office of the Ombudsman does more harm than good.

- It's almost like having a watch dog without teeth. Get some dentures Mr. Masterman! Have a go!

- We have been instructed by our client that he is dissatisfied with your decision and requests that your office reconsiders the need for further investigation. The only reason you have given us for your decision is that "the evidence relating to the complaint is conflicting". This reason is unsatisfactory. It appears to us that a case involving "conflicting evidence" is the very case which warrants investigation by your office. In fact it is hard to envisage any

worthy complaint which does not involve "conflicting evidence". Please reconsider your decision. (1)

- I've written to you before without much response so I don't suppose it will be any different this time, but I think it is worth a try ... Ombudsman's Officers are about as useless as tits on a bull. (2)

49. Staff

The current office bearers are:-

Ombudsman:	G. G. Masterman Q.C.
Deputy Ombudsman:	Dr. Brian Jinks
Assistant Ombudsman:	John Pinnock

In last year's Annual Report concern was expressed that the position of the Assistant Ombudsman had not been regularised by statutory amendment. The position of Assistant Ombudsman was given statutory recognition by the Ombudsman Amendment Act 1983, passed in November 1983.

During 1983-84 the staff of the Office of the Ombudsman increased from 39 to 61, an increase caused chiefly by the new procedures for investigating complaints against the Police. The Premier's Department and the Public Service Board approved a staff of 17 for the new function: ten police officers seconded as investigators; a base grade clerk, a clerical assistant, two stenographers and two typists. To assist the Ombudsman and Deputy Ombudsman with further investigations, the position of Executive Assistant (Police) was created.

Following the gazettal of the Office as an Administrative Office on 24th February, 1984, three new positions were created to provide for an Accounts Officer, Personnel Officer and an administrative clerk. The Public Service Board also approved the regrading of two positions, Principal Investigation Officer and Executive Officer.

In May 1984, two additional positions were approved in recognition of the heavy workload of the Office: a typist, and an investigation officer with special expertise in liaising with ethnic communities.

Gordon Smith, the Principal Investigation Officer, has continued to be the linchpin in the work of the Office. The heavy responsibility that his position carries was recognised by the Public Service Board by regrading the position Grade 11/12.

The increase in the size of the Office has imposed additional responsibilities upon the Executive Officer, Penny Nelson. There is a distinct risk that the Office of the Ombudsman itself will become unduly bureaucratic. Every effort will be made to avoid this.

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(1) Counsel's advice is being obtained in relation to this police complaint.

(2) This comment related to the police complaint procedures prior to the November 1983 amendments discussed in the Annual Report.

During the first half of 1984, a number of temporary investigation officers were employed to handle an increased volume of work in the office. Availability of funds for temporary assistance in times of peak demand is important for the efficiency of the Office. We are extremely grateful to Anthony Lennon, Sue Thompson, Bruce Barbour and Mark Conway, who as temporary investigation officers have greatly helped the office to cope with the high volume of investigations.

The workload carried by many of the staff must be among the highest in the Public Service. Despite the pressures, the calibre of many of the draft reports written by investigation officers has been excellent.

50. Resignation of Assistant Ombudsman

Ms Susan Armstrong was appointed Assistant Ombudsman in October 1981. She specialised in the investigation of complaints from prisoners and the review of investigations into alleged misconduct by police carried out by the police force. After some two years and three months in the position, she tendered her resignation effective from 27 January, 1984.

In a number of public statements Ms Armstrong gave as her reasons for resigning the fact that the November 1983 amendments to the Police Regulation (Allegations of Misconduct) Act, while empowering the Office of the Ombudsman to directly re-investigate complaints against the police for the first time, required the Ombudsman and Deputy Ombudsman to carry out those investigations with police officers seconded to the Office. Under the new legislation, neither the civilian Ombudsman investigating officers nor the Assistant Ombudsman can be involved in the re-investigation of police complaints.

Ms Armstrong was quoted in "The Sydney Morning Herald" of 17 January, 1984 as saying: "I don't feel happy about continuing in a job where I believe the role I have been allocated by the legislation is a charade .... but the legislation is only a symptom of the problem. As far as I can see, the Government is not willing to make an effort to deal with the major problem of the police force .... I have said before that the Internal Affairs Branch is more concerned with public relations than finding the truth of things, and I stand by that."

The Office of the Ombudsman had no part in the development of the policy behind the November 1983 amendments to the new police complaints procedure. Clearly, the provision for direct re-investigation of police complaints by the Ombudsman was an important Government initiative. Clearly also, the former Assistant Ombudsman's view that the choice of investigators open to the Ombudsman should not be restricted to officers seconded from the police force has merit. However, the fact remains that the new amendments to the Police Regulation (Allegations of Misconduct) Act in October 1983 had the support of both sides of the New South Wales Legislature. The Ombudsman and Deputy Ombudsman (in contrast to the Assistant Ombudsman) both took the view that it was their task to lend their energies to attempting to make the new legislation work as effectively as possible. If, after a reasonable trial they believe that there are real defects in its operation in practice, their duty is to draw the attention both of the Minister and Parliament to these defects. The present Ombudsman did this by successive reports to Parliament

on 4th March, 1982 and 14th September, 1982 and will not hesitate to do so again if, in his opinion, the circumstances warrant it.

During her short period as Assistant Ombudsman, Ms Armstrong spent considerable energy on developing the independent image and role of the Office of the Ombudsman in the prison area. She had celebrated clashes with the then Minister for Corrective Services, Mr. Rex Jackson and even instituted defamation proceedings against him.

51. Appointment of New Assistant Ombudsman

On 16 May 1984, Cabinet appointed Mr. John Pinnock, 33, as Assistant Ombudsman. He took up duty on 4 June 1984.

Mr. Pinnock has for the past seven years practised in the field of criminal law with the Public Solicitor's Office, Legal Services Commission. He was, progressively, Solicitor-in-Charge of the Hurstville and Manly Legal Aid offices and finally Solicitor-in-Charge of the Research and Advising Section of the Public Solicitor's Office.

Mr. Pinnock's background means that he brings to his new task sound practical experience and knowledge of the law and the courts in general and the criminal justice system in particular. This knowledge will be at the call of all Investigation Officers. Mr. Pinnock has shown a marked enthusiasm for the work of the Office in those investigations he has carried out. It is envisaged that he will be responsible for the conduct of the more complex investigations particularly those relating to complaints by prisoners.

The advent of a new Minister for Corrective Services, Hon. J.E. Akister, M.P., and a new Assistant Ombudsman, provides an opportunity for the development of better relationships without any diminution in the vigour of the investigations carried out by the Office.

52. Staff recruitment : limited-term appointments and secondments

The Ombudsman's policy of limited-term appointments and secondments has continued to attract high-calibre recruits to the Office. Of the investigation staff of 21 (excluding seconded police officers), four have been appointed under the new system, two by secondment and two under section 80. During the course of the year, a number of short-term appointments were made from the temporary assistance fund, also, to replace temporarily absent officers and meet peaks of demand. A legal challenge to the practice of limited-term employment is discussed in item 54, Industrial Relations.

It is sometimes suggested that the N.S.W. Ombudsman's view that limited-term appointments for investigation officers are desirable is unusual, or personal to him. On the contrary, appointments on a limited-term basis are usual in a number of States and in many other countries.

A model which in the Ombudsman's view is acceptable is the Tasmanian Ombudsman Act 1978, of which the relevant section is set out below:-

9.(1) The Governor may, on the recommendation of the Ombudsman, appoint such officers as he considers necessary for the purpose of enabling the functions of the Ombudsman properly to be carried out.

(2) Subject to this Act, the terms and conditions of employment (including salaries, allowances and leave) of the officers of the Ombudsman shall be such as are determined by the Governor from time to time.

(3) The Public Service Act 1973 does not apply to the officers of the Ombudsman but those officers, for the purposes of the Superannuation Act 1938, the Retirement Benefits Act 1970 and the State Employees (Long-Service Leave) Act 1950 shall be regarded as being employed by the State in a department of the services of the State.

(4) If an officer of the Public Service is appointed as an officer of the Ombudsman, he is entitled to retain all his existing and accruing rights as if his service as an officer of the Ombudsman were a continuation of his service as an officer of the Public Service.

(5) Where a person ceases to be an officer of the Ombudsman and becomes an officer of the Public Service, his service as an officer of the Ombudsman shall be regarded as service in the Public Service for the purposes of determining his rights as an officer of the Public Service.

(6) Where a person appointed as an officer of the Ombudsman was immediately before his appointment an officer of the Public Service (not being a person employed in the Public Service as a temporary employee), sections 32 and 33 of the Public Service Act 1973 shall continue to apply in respect of that person as if his service as an officer of the Ombudsman were services as an officer within the meaning of that Act, and for the purpose of those sections he shall be deemed to be an officer within that meaning while he remains an officer of the Ombudsman.

(7) The provisions of section 5(3), (4), (5), and (6) shall, with necessary modifications, apply to the office of officer of the Ombudsman in the same way as they apply to the office of Ombudsman.

Under this section the Tasmanian Ombudsman makes appointments for three years which can be renewed for a further two. Protective provisions enable all employment rights such as superannuation to be retained by public servants seconded to his Office.

53. Long-serving Investigation Officers

a) Effects of stress

In a letter to the Public Service Association of 6th April, 1983 the Ombudsman referred to the stressful nature of investigation work and the need for lateral mobility. The

letter was quoted in full in last year's Annual Report. In part, it read:-

> "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 in 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 attemtps to arrange short term exchanges with other Departments."

In its reply of 31st August, 1983, the P.S.A. claimed that: "The career structure of the N.S.W. Public Service is based on the premise that officers efficiency increases with time in a position and this is borne out by the current structure of incremental advances and broadband gradings."

Experience in the past year amply supports the Ombudsman's view that five years' continuous service in a stressful occupation is an optimum period. Occupational stress can also be compounded by lack of promotion and transfer possibilities. At the time of writing (September 1984), two Senior Investigation Officers are currently on sick leave with anxiety symptoms. The Ombudsman believes that if there had been proper scope for mobility within the Public Service for such officers, there would have been less likelihood of their being affected by stress.

b) Effects on the public

In view of the large number of complaints received from members of the public, the Ombudsman has to allocate them to investigation officers who have a high degree of autonomy in pursuing them. The speed and course of the investigation depend to a large extent on the workstyles and "adrenalin" of particular officers. It is the Ombudsman's view that it is difficult if not impossible for Ombudsman investigating officers engaged in repetitious investigations of complaints by the public to maintain the necessary "adrenalin" factor for more than five years. Accordingly, there will be an inevitable disparity in the manner and verve with which complaints are handled in the Office. Further, where long

serving officers are away because of stress, the workload of other officers is increased and the public suffers from the transfer of matters between officers.

c) Lateral mobility for long-serving officers

During the year, the Ombudsman has attempted to pursue the question of mobility for investigation officers. The Secretary of Premier's Department, despite several approaches by the Ombudsman, refused to make relocations within the Department possible while this Office formed part of it. Letters to the Heads of a number of other Departments also had absolutely no result.

On 13th April, 1984, the Ombudsman wrote to the Chairman of the Public Service Board:-

> LATERAL MOBILITY - INVESTIGATION OFFICERS
>
> For some time I have been concerned that opportunities for lateral mobility should be available for officers who have served as Investigation Officers for more than five years. I am writing to seek your advice on the issue.
>
> The gazettal, on 24th February, 1984, of the Ombudsman's Office as an administrative office under Schedule 2 of the Public Service Act has several potential benefits. A disadvantage, however, is that the possibility of transfers and exchanges to and from the various branches of Premier's Department no longer exists.
>
> My attention turns, therefore, to the powers of the Public Service Board under Section 112 (2), to direct the transfer of an officer from a position in one department to a position at equivalent salary in another department, provided that the relevant qualifications are possessed and that both Department Heads concur. I also note that the Board may provide such assistance and advice as will foster improvement in the efficiency or management practices of a Department (S.108).
>
> Lateral mobility has been endorsed by the Wilenski Review of N.S.W. Government Administration. Career development programmes reduce occupational stress, whereas lack of promotion and transfer opportunities compound it. My counterpart in Western Australia, Mr. Eric Freeman, Ombudsman, has 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."
>
> May I suggest that the Board nominate suitable officers to liaise with this Office on strategies for developing a programme of lateral mobility, in the interests both of long-serving staff of this Office and of the Public Service in general.

Following this letter, discussions took place between the Ombudsman and senior officers of the Public Service Board.

Two of the long-serving investigation officers agreed to be interviewed by Board officers who were to pursue transfer options. Recently, some five months after the original letter from the Ombudsman, a letter dated 12th September, 1984 has been received from the Board in the following terms:-

> "LATERAL MOBILITY - INVESTIGATION OFFICERS
>
> I refer to your letter of 13 April 1984 concerning the above matter and subsequent discussions with Board officers, Berenice Buckley and Helen Bauer.
>
> I am informed that as a result of these discussions it was agreed that two of the Investigation Officers would be given the opportunity to discuss with Ms. Buckley their work experience and their preferences in relation to possible employment in other departments. Following on from these interviews Ms. Bauer initiated negotiations with departments in an attempt to facilitate on your behalf, temporary appointment pursuant to Section 75/76 of the Public Service Act, 1979, for the above officers into departments. Unfortunately, due to the temporary suspension of recruitment within the Service, departments were unable to assist in this matter. However, Ms. Bauer has informed me that she will renew these efforts when the recruitment suspension is lifted."
>
> (The balance of the letter enclosed some Board information booklets!)

Without in any way doubting the bona fides and good will of the Board officers involved, the whole exercise has been quite fruitless. Indeed it has raised expectations only to diminish them.

The Ombudsman believes that the present position whereby previously appointed investigating officers may remain in those positions for indefinite periods is neither good for the Office of the Ombudsman, the officers concerned nor, most importantly, the public.

54. Industrial Relations

In mid-1982, the Ombudsman adopted the practice of appointing Investigation Officers for terms of up to three years, pursuant to sections 75 and 76 in the case of 'officers' of the N.S.W. Public Service, and to section 80 in the case of employees. The limited-term filling of Investigation Officer positions was approved by the Public Service Board because of the distinctive features of the positions. The Ombudsman has expressed the view in past annual reports that officers should not be appointed indefinitely to positions of considerable stress. The Office has limited promotional opportunities, and the possibility of lateral transfer for those who have served five years or more in the positions is an issue of some importance. The Ombudsman's attempts to foster transfer possibilities, together with the limited-term employment policy, have resulted in conflict with the Public Service Association during 1983-84.

Last year's Annual Report quoted a letter from the Public Service Association which stated its total opposition to the concept of contract employment

"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 report also referred to a conference held on 18th October, 1983, between the Public Service Board and the Public Service Association at which the Board's approval of limited-term employment was reaffirmed. The Board subsequently wrote to the P.S.A. restating its position.

Two and a half months later, the issue was reactivated by an article in the Sydney Morning Herald of 6th January, 1984. The headline on this article, which the Acting Editor later agreed to be misleading, included a phrase which the Ombudsman had ceased using, a colloquial term for a work-stress syndrome to which the P.S.A. had earlier objected.

On 9th January, 1984, the P.S.A. issued a press release, rejecting any suggestion that public servants should be 'moved on' after five years as Ombudsman investigating officers. This release said in part:

"The Public Service Association does not agree that after five years in a job a person will necessarily "burn-out". On the contrary, we believe that there is a great deal of benefit to the public, gained by Public Servants developing expertise in a specialised area.

The P.S.A. cannot see a real difference between other investigation officers in other Government Departments and the investigation officers referred to by Mr. Masterman.

Mr. Hammond said, "In fact our information is that five year term officers have not attracted adverse reports on their efficiency, and if they had then provisions exist in Public Service procedures to take appropriate action."

It has not in any way been proved that health problems experienced by officers directly related their work as investigating officers in the office of the Ombudsman.

Mr. Hammond said "We of course may consider the negotiation of a rotation procedure in the Public Service so long as this system would not be compulsory or detrimental to the officer involved."

On 17th January, 1984, the General Secretary of the P.S.A. notified an industrial dispute under Section 25A of the Industrial Arbitration Act to the N.S.W. Industrial Registrar. Mr. J. Shaw of Counsel had been briefed to appear for the P.S.A. The notification said in part:

"The Association objects to the proposal encapsulated in a letter from the Public Service Board dated 2nd December, 1983. Advice was therein

> furnished that in future the positions of Investigation Officers would be filled on a limited term basis by temporary appointment under Section 75, Public Service Act or Section 80."

On 19th January the Sydney Morning Herald ran a story headed 'Staff threaten ban on Ombudsman'. The dispute was listed for hearing on 23rd January, 1984, but was stood over to allow the parties to confer. Judge Bauer indicated that it could be relisted on application of either party. A conference attended by representatives of the Public Service Board, Premier's Department and Public Service Association took place on 1st February, 1984. On 5th March, 1984, the Board sent the following letter to the P.S.A.:

> "EMPLOYMENT OF INVESTIGATING OFFICERS - OMBUDSMAN'S OFFICE
>
> I refer to the conference held 1 February 1984 with representatives of the Association concerning the filling of vacancies of Investigating Officers.
>
> The Board has considered the matters raised by your representatives at the above conference but is not prepared to vary its approval that positions of Investigating Officers should be filled on a term basis, in the case of officers this would be by temporary appointment under Sections 75 and 76 of the Public Service Act and in the case of temporary employees, employment under Section 80."

Following this letter, the P.S.A. arranged to list the matter again before Judge Bauer. There was some discussion of the reference of a question of law as to what remedy the P.S.A. might seek from the Industrial Commission. The Association did not wish to proceed with the dispute. His Honour concluded a compulsory conference on 22nd May, 1984, saying the dispute as it stood could not be maintained. Should the P.S.A. wish to raise any new matter, it would have to be by way of a fresh dispute application or award application.

55. Publicity

The Office has continued to promote public awareness of its role throughout 1983-84. This has been done through pamphlets, posters, press releases, and ethnic radio.

Two new pamphlets have been issued. One (see illustration) is in four colours and is addressed to young residents of State institutions. Entitled "Someone You Can Complaint To", it is simply phrased and has lively illustrations by Christine Alderton. This pamphlet replaced a formally-written printed sheet which was prepared by the Department of Youth and Community Services.

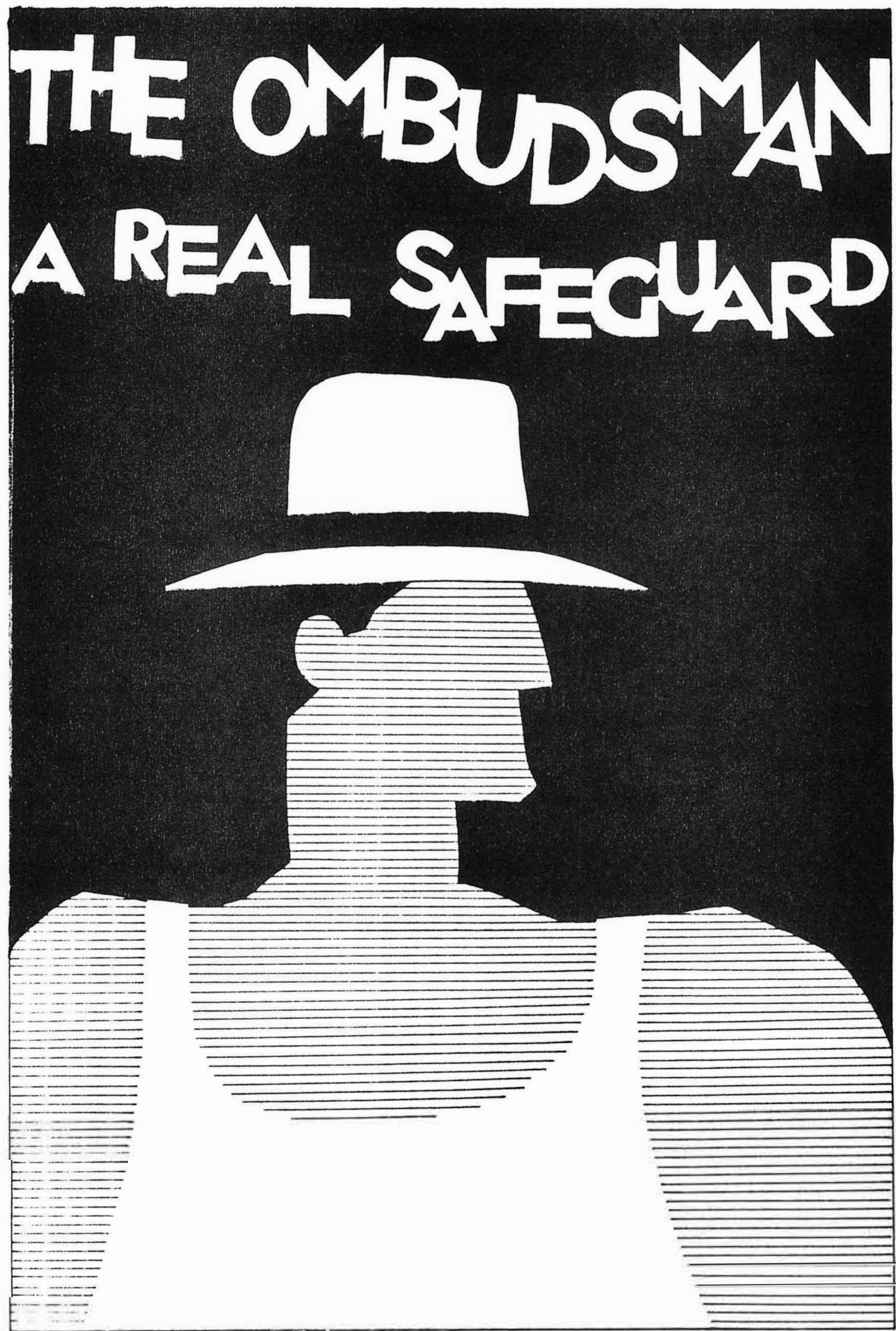
A second pamphlet, "Police and the Citizen", was designed to coincide with the new procedures for investigating complaints against the police. A formal information sheet explaining the procedures to complainants was also prepared.

An experienced poster designer, Robert Skinner, designed a blue and orange poster, "The Ombudsman - a real safeguard" (see illustration). This poster has proved popular with legal aid offices, community information centres and colleges. It will also be displayed in post offices.

The bus poster campaign begun in 1982-83 was followed up during the year, with a poster reissued with the new telephone number, 235-4000, and a changed colour scheme. Many telephone approaches to the Office are triggered by this poster.

Press coverage of the Ombudsman's reports to Parliament, the Assistant Ombudsman's resignation, and amendments to legislation have created considerable publicity for the Office. Greater effectiveness in this realm is inhibited by the secrecy provisions of the Ombudsman Act. Nevertheless, our experience has been that most journalists strive to be accurate, and that media coverage has greatly increased public awareness of the work of the Office. Some individual media personalities, such as John Tingle of 2GB, have systematically channelled relevant complaints to our Office. In overseas Ombudsmen's Offices, such as Sweden, the media and the Ombudsman work together in the public interest.

Steps have been taken to improve the provision of information to non-English-speaking communities. Versions of the pamphlets "Your Ombudsman" and "Police and the Citizen" are being translated into twelve languages. In addition, a radio community service announcement in eight languages is being produced by 2EA.



Design by Robert Skinner for display poster (see item 55).

Cover of brochure designed for young readers in State institutions.

56. Community Information Programmes in Country Areas

Last year's report described how the Office conducts outreach campaigns in country centres. An office located in metropolitan Sydney but serving all New South Wales citizens must devise effective but economical methods of reaching people who need its services.

During 1983-84, outreach campaigns were conducted in the following areas:-

* South Coast - Narooma, Moruya, Nowra
* Far West - Broken Hill, Dubbo
* North Coast - Lismore, Grafton, Coffs Harbour
* Riverina - Albury, Wagga Wagga, Cootamundra

In each centre two officers made themselves available for interviews with the public at a location recommended by community workers. Pre-publicity was followed up by interviews with local television, radio and press. The enthusiastic co-operation of paid and volunteer community workers, and of regional journalists, has been greatly appreciated by the Office. More than 400 people have been interviewed during these visits, and many more have learnt of the Office's work through the local media.

57. Treasury and the Ombudsman

Aspects of the 1982-83 and 1983-84 budget allocations to this Office were the subject of comment by the Ombudsman in previous annual reports. Treasury has a practice of reducing allocations by an amount equal to their assessment of savings which will be made on salaries where positions remain vacant for various reasons including delay in the filling of vacant positions. In 1982-83 the saving figure was $37,000 and in 1983-84 the figure was $17,000. The 1984-85 budget allocations in respect of salaries have again been lower than the amounts sought. The overall cut is about $48,000. $10,000 of that relates specifically to the provision for temporary assistance.

In a small Office with a rising work rate, positions cannot be allowed to remain vacant. In the past, the Ombudsman has used the temporary assistance fund to pay for the appointment of temporary staff. This practice has throughout 1983-84 given elasticity to the system and allowed the Office to meet peaks of public demand. For example, the rate of complaints against the police rose markedly in February - March 1984 and four temporary Investigation Officers helped cope with the workload. If, through lack of funds, temporary assistance cannot be employed, the Ombudsman may ultimately have no choice but to decline to investigate some classes of citizens' complaints.

Preliminary discussions have been held with Treasury and the Ombudsman has received an assurance from Treasury that if, as the 1984-85 financial year progresses, these reductions begin to cause problems the matter can be brought to Treasury's attention and supplementation sought.

The principal increase in funds sought for 1984-85 arose because of the government's decision to give the Ombudsman the power to reinvestigate complaints against the police. As a consequence of this decision, ten police officers have been seconded from the New South Wales Police Force. The salaries of these Officers have to be recouped to the Police Department quarterly. Also seven additional support staff have had to be employed and the cost of six additional cars with associated costs of petrol, registration, parking and maintenance will have to be met. Part of the $48,000 reduction in respect of the 1984-85 financial year was attributed to existing salaries and allowances of seconded police investigators and a further amount deducted from the Ombudsman's estimate of future adjustment to police salaries. Again the estimate of the Ombudsman for travelling and motor vehicles was reduced by $31,000. The Ombudsman's estimates were based in part upon Internal Affairs Branch experience. However, because of the difficulty of estimating costs in the area of police complaint re-investigation, Treasury has indicated that if these allocations cause problems as the year progresses an approach can be made to Treasury seeking supplementation.

58. The Public Service Board and the Ombudsman

The Ombudsman concept originated in Scandinavia and retains, despite differences from one jurisdiction to another, a number of widely accepted features. Among these is the need for the Ombudsman to be autonomous, or visibly independent. He is traditionally responsible to Parliament and not to any other agency.

The N.S.W. Public Service Act 1979 applies to the staffing of the Office of the Ombudsman, except for the statutory positions of Ombudsman, Deputy Ombudsman and Assistant Ombudsman. The Board delegates various of its powers to Department Heads and those exercising the powers of Department Heads. Since 24th February, 1984, the Ombudsman has been in this category. Some discussion of the relationship between the Board and the Ombudsman is warranted, given the unique position of the Ombudsman, who may on occasion be required to investigate complaints against the Public Service Board and who in traditional terms should not be subject to any agency other than Parliament. In some respects the powers of the two institutions are similar: they may both enter premises, require the production of documents, and require public servants to answer questions.

The Public Service Board's functions include oversight of salaries, job gradings, appointments, appeals and disciplinary actions throughout the public service. In New South Wales, the staff of the Office of the Ombudsman are public servants, while in most other States (Victoria, Queensland, Western Australia and Tasmania) they are not.

As the employing authority, the Board makes recommendations about maximum staff numbers and establishment figures. It acts as the employer in most industrial disputes brought by public sector unions. It issues guidelines on recruitment, staff appraisal, leave, and other personnel matters. No outsider can be made an officer of the N.S.W. Public Service unless the Board issues a certificate under section 63 of the Public Service Act. Its consent must be sought if temporary employees are to serve longer than twelve

months. It can arrange, with the consent of the Department Heads, for staff to transfer from one Department to another. It can conduct special inquiries with wide powers. With the approval or direction of the Minister, it conducts efficiency audits.

In addition to these powers, the Board may provide advice on management practices.

The Ombudsman has an open mind at this stage as to whether the efficiency of his Office is best served by having his staff subject to the Public Service Act, or whether the system which applies in Victoria, Queensland, Western Australia and Tasmania is preferable. Individual officers of the Public Service Board have been helpful in their dealings with this Office. A delicate balance is involved. Provided that the convention of respecting the Ombudsman's need for independence and his traditional responsibility for efficiency direct to Parliament is observed, no major difficulties need arise. Any moves to interfere with the Ombudsman's individual operation of the Office might tip the balance towards a need for exemption from the Public Service Act as in the case of the States mentioned.

At senior levels, staff within the Office are selected by the Ombudsman on the advice of a selection committee. At the base-grade level, however, a person can only be appointed under section 63 if he or she is the most successful available candidate in a competitive examination. Recent experience in our Office suggests that a person with aptitude and enthusiasm for a clerical assistant's position may prove unable to succeed in the exam, whereas a talented examination candidate may feel over-qualified and frustrated in the same position. Until the definition of "efficiency" in the Public Service Act is changed, the Ombudsman, like other Department Heads, has to tolerate such anomalies. By the same token, the Department Head is responsible for the efficient, effective and economical management of his Department, and may take any actions to achieve it which are not inconsistent with the functions of the Board. A competitive exam may be largely irrelevant to effective work performance.

A sensible application of the convention that the Ombudsman selects his own staff and is responsible to Parliament for the efficiency with which his Office is operated should enable the Board and the Ombudsman to exercise their respective powers harmoniously.

SECTION B: LOCAL GOVERNMENT

59. Council Should Require Firm Recommendations from Senior Officers

In the topic "Building Overshadowing Hyde Park", reference has been made to a finding by the Ombudsman that the Sydney City Council was wrong in that it unreasonably failed to ensure that the City Planner made a recommendation to it on a major development application. As this question has wider implications for councils throughout the State, it is proposed to set out here the general considerations which led to the Ombudsman's conclusions. The following extracts from the Ombudsman's report deal with this matter

"6.2 .... Councils deal with a very large number of applications in which they must be able to rely upon the considered, professional advice of their staff in making decisions. The Environmental Planning and Assessment Act requires Councils to consider a comprehensive range of matters in dealing with development applications including an assessment of whether a proposal will harm the environment and, if so, what measures are required to mitigate that harm. Some controls are included in existing Council codes and policies; in the case of car parking for example the Sydney City Council has developed a general formula to determine how many car spaces should be provided. The present Council expects that its staff should determine which codes and policies are relevant, how they affect each application, and recommend accordingly. Where there are no existing policies or controls, the Council submitted that it would not expect its officers to make recommendations. Yet in my view, it would seem all the more necessary where existing controls and policies do not adequately deal with some aspect of a development, that Council's professional staff should make positive recommendations. Professional expertise comes into its own precisely when standard measures cannot or do not fully apply and where an assessment and judgement of several, possibly conflicting, factors must be made. If the Council sees its staff as simply examining development applications exclusively through pre-set formulae and leaving the Council without the benefit of advice (which Council is entitled to accept or reject) in difficult, grey areas, then I do not think the Council will be able to fully and competently discharge its statutory duty. It is not reasonable to expect Council to weigh particularly complex matters cut off from the considered view of its staff.

6.3 Another reason why it is desirable that professional staff should make recommendations, where it is appropriate and they are competent to do so, is that it should always be possible to determine the basis for any Council decision: be it professional advice or Council's own judgement. There is nothing inherently wrong in a Council's deciding to reject advice and recommendations from its officers; there may be sound, overriding policy reasons for doing so or there may be an alternative reasonably open for Council to adopt. But it should be clear to Council and to any person having to review Council's actions that such a judgement has been made. In an extreme case, if Council consistently rejects, say, the advice of its Building Inspectors, then the Council may need to consider whether the inspectors are really competent or whether Council is departing from requirements in the Ordinances and statutes. The ele tors would also have to consider these questions. Even in the present case where a judgement was made on the harm a development may cause to Hyde Park, by leaving out a recommendation one way or the other Mr. Doran in effect lessened the weight placed on the adverse comments contained in his report. Council might

> reasonably have concluded that he was ambivalent about whether the harm caused was serious, even though Mr. Doran has said he was not ambivalent. In this sense, Council did not have the opportunity of considering the true strength of his views.
>
> 6.5 ... For the reasons explained in 6.3 above, considered recommendations of Council officers ought to be obtained so that ultimately the public can see where Council, rightly or wrongly, chooses a different course and so the public can make its own informed judgement.
>
> 6.6 As a general administrative practice, I believe Council should expect its staff to state their views clearly.
>
> ... Where Council officers genuinely feel ambivalent on a matter, there need be no objection to their saying so. Mr. Doran was not ambivalent. Thus in my view, the standard which Council has set in expecting recommendations from its professional staff is unreasonably low."

As indicated in the earlier topic, following the Ombudsman's report the Town Clerk of the Sydney City Council advised the Ombudsman that the Council resolved that council staff be instructed to make recommendations where matters are submitted to the Council unless there is a written explanation to council as to why a recommendation to council is not appropriate. This is highly satisfactory and the Council's attitude is to be commended.

It is interesting to note that the views expressed by the Ombudsman appear to receive some support from those of Mr. W. Henningham, the Secretary, Local Government and Shires Associations of NSW. In a paper which he gave on corporate planning Mr. Henningham said:-

> "I am a strong believer in the maintenance of the professional independence of Town Planners. I strongly disapprove of the attitude of some elected members that the town planning staff should not make a recommendation in a contentious letter, lest the council not favour the recommendation and feel embarassed on an appeal. The professional officers are there to do their jobs and should make their professional recommendations to the council without fear or favour. If a Mayor or President should tell an officer to recommend in a certain way, the Officer should make it clear that he will preface his report with a statement that he is making his recommendation in accordance with the direction of the Mayor or President. When faced with such a response I am sure the average Mayor or President will go to water."

60. Denial of Liability by Councils

The last Annual Report set out the progress of a general investigation by this Office of the procedures adopted by local government authorities for dealing with public liability insurance claims.

Amongst other things, the report mentioned the Ombudsman's suggestion made to the Local Government Association and Shires Association for amendment of recommended procedures circulated to all Councils. Having considered the response received from the Associations and the practical difficulties involved, the Ombudsman wrote to the Associations in the following terms:-

> "As I indicated previously I have appreciated the new constructive approach of the Association in this area. In terms of the Ombudsman Act my approach is required to be on a case by case basis. My present view is that the 'proposed amendment' of Clause 5(c) which I took the liberty of suggesting, represents a reasonable standard of conduct to be applied to local Councils by this Office. However, this is a provisional view only and where a case arises which involves the particular principle, I will consider whether in my opinion there has been wrong conduct on the part of the Council by reason of not having given the rejection of the claim by the Council's insurer reasonable scrutiny.
>
> It would have been preferable no doubt for there to be total consensus between the Ombudsman and the members of your Association on a reasonable standard to be applied. However, if this is not practicable, I am still sure the efforts made to date have been well worthwhile."

Over the past year, the general investigation has continued and further success has been achieved with a number of Councils. TABLE A sets out details. TABLE B set out details of investigations current at the time of writing this report.

Whilst the majority of Councils whose conduct in this matter has been the subject of a report by this Office have complied with the Ombudsman's recommendations, two notable exceptions occurred. In both cases, a report to Parliament was made pursuant to section 27 of the Ombudsman Act.

Merriwa Shire Council was prepared to implement administrative procedures aimed at avoiding unreasonable delay in the processing of claims. However, it was not prepared to alter its practice of denying liability without giving the claimant an adequate statement of reasons for such denial.

Randwick Municipal Council was not prepared to either implement administrative procedures to monitor the progress of claims, or to alter its practice of denying liability without giving the claimant an adequate statement of reasons for such denial.

Both Councils took the view that, in giving reasons, or ensuring that their insurer did so, they would jeopardise their contract with their insurer. Randwick Council felt that even the implementation of a monitoring procedure may prejudice Council's interests.

This attitude is in marked contrast to that of the 26 Councils who have agreed to implement the Ombudsman's recommendations in respect of the provision to claimants of reasons for rejection of a claim and to that of the 4 Councils who were already doing so.

The Ombudsman commented in his reports to Parliament that the attitude of both Councils in this matter was unreasonable in his view, and in the case of Randwick Municipal Council, intransigent.

In marked contrast was the response this Office received from the Mayor of Ashfield Municipality who, inter alia said:-

> "In an endeavour to improve the standard of service to its citizens, the Council has resolved to adopt your recommended procedures for the handling of claims against the Council as amended by the Local Government Association and further amended by your letter. To further complement the procedure the Council is establishing a register of Insurance Claims against the Council so that the progress of all outstanding claims can be centrally monitored. It is anticipated that the register would show the following information; file reference, date of accident, location, claimant, date acknowledged by Council, date referred to insurer, determination of claim, date claimant advised of determination, comments on review etc.
>
> To facilitate the review of any denial of liability by the Council's insurers delegated authority has been granted to the Town Clerk and also to the Deputy Town Clerk conjointly with the Mayor and Deputy Mayor to review each claim and to take action if deemed expedient in accordance with paragraph 5c of the recommended procedures. Further a quarterly report will be submitted to Council detailing the determination of each claim submitted and in the case of any conflict between the Council's Solicitors' determination of liability and that of Council's insurers, the same will be reported to Council as soon as is practicable."

Given the predominantly positive responses received from those Councils whose administrative procedures have been made the subject of investigation, it is difficult for this Office to accept the view that a Council's insurance cover would be prejudiced by its insistence that its insurer give reasons for rejection of a claim and that a brief statement of such reasons be provided to claimants. Nevertheless, some Councils still advance such a view during the course of investigation. One alternative open to such councils is to change their insurer.

The investigation by this Office will continue and, where necessary, further reports will be made to Parliament in the matter.

TABLE A

DENIAL OF LIABILITY BY COUNCIL

RESULTS ACHIEVED

(This Table includes results published in the 1982/83 Annual Report)

COUNCIL	PROCEDURES TO		
	Acknowledge Claims	Monitor Processing	Ensure claimant receives reasons if claim denied
Ashfield	Existed	Introduced	Introduced
Auburn	Introduced	Existed	Existed
Ballina	Existed	Introduced	*Recommended
Bankstown	Introduced	Introduced	Introduced
Barraba	Existed	Introduced	Introduced
Baulkham Hills	Existed	Existed	Existed
Burwood	Existed	Existed	Introduced
Concord	Existed	Introduced	Introduced
Dumaresq	Existed	Existed	Introduced
Grafton	Existed	Introduced	Introduced
Greater Taree	Existed	Introduced	Introduced
Great Lakes	Introduced	Introduced	*Recommended
Hastings	Introduced	Introduced	Existed
Hornsby	Existed	Introduced	Introduced
Hunters Hill	Introduced	Introduced	Introduced
Inverell	Existed	Introduced	Introduced
Kempsey	Existed	Introduced	Introduced
Kuring-gai	Existed	Existed	Introduced
Lane Cove	Existed	Existed	*Recommended
Lake Macquarie	Introduced	Introduced	Introduced
Maitland	Introduced	Introduced	Introduced
Manly	Existed	Existed	Existed
Marrickville	Introduced	Introduced	Introduced
Newcastle	Existed	Introduced	Introduced
North Sydney	Existed	Introduced	Introduced
Parramatta	Existed	Existed	Introduced
Ryde	Existed	Existed	Introduced
Sutherland	Existed	Introduced	Introduced
Sydney	Existed	Existed	Introduced
Tamworth	Introduced	Existed	Introduced
Willoughby	Existed	Existed	Introduced
Wollongong	Existed	Existed	Introduced
Wyong	Existed	Introduced	Introduced

*Recommended by this Office, Council's response awaited.

TABLE B

DENIAL OF LIABILITY BY COUNCILS

INVESTIGATIONS CURRENT

COUNCIL	STAGE	
	Enquiries Proceeding	Wrong Conduct Report in Progress
Albury		X
Armidale		X
Blacktown		X
Broken Hill	X	
Drummoyne		X
Gilgandra	X	
Gosford		X
Illawarra County		X
Mudgee		X
Nambucca	X	
North West County		X
Penrith	X	
Queanbeyan		X
Wingecarribee		X

61. Council Members : Potential Conflict of Interest : Suggested Code of Conduct

Last year's report (pp. 62/63) detailed the Ombudsman's approach to the Local Government and Shires Associations of New South Wales in relation to the adoption by Councils in New South Wales of a standard or code of conduct which might be seen as reasonable in overcoming potential "conflict of interest" situations faced from time to time by Council members.

The Associations circulated to their members the views expressed by the Ombudsman. This generated requests for information about the National Code of Conduct for Local Government adopted in the United Kingdom from, amongst others, Illawarra County Council, the Director of the (then) Office of Local Government and a consumer group, Australian Community Relations. In addition, a number of Councils wrote to the Ombudsman expressing concern that, inter alia:-

- the suggested standards were too stringent, or were otherwise inappropriate;

- the Ombudsman ought not to be able to find "wrong conduct" in terms of the Ombudsman Act where existing law had not been breached.

In response to the latter criticism, the Ombudsman wrote:-

> "The issue that I am required to deal with whenever a complaint is received under the Ombudsman Act is rarely whether conduct is illegal, but whether or not the conduct complained of is "unreasonable". In the U.K. the Ombudsman has found the existence of the Code adopted by Councils as a useful test to apply. I enclose a copy of pages 8 to 37 of the Report of the Commission for Local Administration (United Kingdom) the equivalent of a Local Government Ombudsman.
>
> It seemed to me that on the basis of the U.K. experience there was some advantage in attempting to achieve some consensual approach with the Councils' Association. However, even if this is not possible, my duty under the Ombudsman Act remains in each and every case about which a complaint is made to investigate the facts and circumstances and determine whether or not it is appropriate to make a finding of "wrong conduct" under the Ombudsman Act. The question is not one of "public images", to quote the expression in the third last paragraph of your letter.
>
> I appreciate that many councils believe there should not be an Ombudsman or that the role of the Ombudsman should not extend to Local Government. That is entirely a matter of policy for Governments. While the Act remains as it is the N.S.W. Ombudsman, whoever that may be, is faced with making decisions of whether conduct complained of is wrong or not."

According to the November 1st, 1983 issue of the newspaper "Western Suburbs Courier", the matter generated fierce comment at a meeting of Burwood Municipal Council. The press report (assuming it to be accurate) indicated that those Aldermen speaking on the issue were uniformly opposed to the

suggested code of conduct and, more particularly, to "the Ombudsman interfering" in the matter. By way of contrast (again, assuming the report to be accurate), the "The Glebe" newspaper on 23rd November, 1983 reported that neighbouring Strathfield Municipal Council saw the proposed code as "praiseworthy" and had accepted it.

On 13th April, 1984, the Secretary of the Local Government and Shires Associations informed this Office that the Executives of both Associations had resolved to invite councils to adopt the code of conduct set out hereunder to be read as supplementary to section 30A of the Local Government Act:-

"1. **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.

2. **Disclosure of Pecuniary and Other Interests**

The law makes specific provision requiring you to disclose pecuniary interests, direct and indirect. You should also bear in mind that you have a duty to interpret the word "interest" broadly so as to never give the impression you might be acting for personal motives."

The Secretary added that a majority of councils who had commented on the code were in favour of its adoption, subject to some modification to fit the New South Wales situation.

Quite recently Wyong Shire Council advised this Office that the Council had adopted the modified code of conduct. The Shire Clerk indicated that Council had written to the Minister for Local Government and Lands suggesting that a greater degree of consistency between the Local Government Act and the Ombudsman Act was desirable and, as this Office understands it, that appropriate amendments be made to section 30A of the former Act.

It remains to be seen, of course, the extent to which councils will adopt the modified code of conduct which, whilst it does not go quite so far as the United Kingdom code, appears to represent a reasonable approach to potential "conflict of interest" situations as seen from the perspective of the Office of the Ombudsman.

The Ombudsman appreciates the co-operative response of the Local Government and Shires Associations in this matter.

62. Complaints about Stormwater Drains through Private Property

Several complaints have been received in this Office from owners of land who have experienced flooding and/or erosion as a result of their local council directing stormwater run-off onto their property.

Section 240 of the Local Government Act authorises councils to construct drains or sewers to carry the water run-off from roads. Section 241 of the Local Government Act authorises councils to "make open, cleanse and keep open any ditch, gutter, tunnel, drain or watercourse or lay any pipe in or through" private land. However, a number of Court cases have held that these statutory powers require the particular council to take "proper care to prevent the collected and discharged water from being a nuisance to neighbouring land owners." (Carmichael v. Sutherland Shire Council (1972) 25 L.G.R.A. 435 at 436). In addition, it has been held that "If by reason of the development of an area by permission of the local council and the establishment by the council of a road and drainage system designed to serve the development by collecting and concentrating the run-off from the area so as to discharge it into a watercourse the watercourse becomes inadequate to cope with the flow and causes damage to and interference with the use and enjoyment of land the council will be liable in nuisance unless it can justify the nuisance on the ground that it had statutory authority to create and maintain the nuisance." (Rudd v. Hornsby Shire Council (1975) 31 L.G.R.A. 120 at 121).

A complaint received from Mr. McD. illustrates the problems some property owners have experienced.

Mr. McD. approached this Office with a petition signed by forty-five residents in the Byron Bay area. All were residents who lived in a valley which from time to time was flooded by water run-off from recently developed estates. Byron Shire Council and its Officers permitted the development of these estates on the higher slopes of the valley. Council had also permitted a private developer to fill in a natural watercourse. This, in conjunction with the development of the two estates had impaired the natural water holding and dispersion characteristics of the valley. The drainage provided by Council was insufficient to contain and disperse the collective run-off, resulting in frequent local flooding in the lower part of the valley.

The investigation revealed that the Council, in constructing the drainage, had not proceeded according to the standards it had originally set for the estate development. In particular, Council had failed to ensure easements of adequate dimensions were provided to allow sewerage and drainage pipes to run from both estates. In approving easements of less than six metres width, the Council ignored its own sub-division code, and as a consequence was not able to provide adequate drainage for the area, leaving stormwater to discharge onto private property.

The Ombudsman found the conduct of Byron Shire Council to be wrong in terms of the Ombudsman Act, in that it had permitted development in the area to take place in such a way as to cause flooding. It was clear that Council had allowed development to proceed by agreeing to the construction of drainage below the specifications of the plans submitted by the developers and even below its own existing minimum standards. Council, by its own actions, had created a nuisance to private property.

At least two other complaints of a similar nature were made to the Ombudsman during the course of the last year.

In one, the Ombudsman was satisfied that Maclean Shire Council had exceeded its powers under Section 241 of the Local Government Act in directing concentrated stormwater run-off onto private property. Its failure to complete a drain without creating a nuisance (constant flooding) was wrong in terms of the Ombudsman Act.

In the other matter, Parramatta City Council had been directing stormwater run-off into a natural watercourse that ran through the complainant's property. The amount of water channelled through the watercourse had increased substantially, causing erosion of the complainant's property during periods of heavy rain. After preliminary enquiries by this Office, and as a consequence of legal advice obtained by the Council, a report was prepared by the City Engineer. The report recommended the construction of a gabion wall along the bank of the watercourse at a cost of $19,300. Council adopted the report and resolved that the work be carried out as a matter of urgency.

63. Inability of Councils to Approve Existing Buildings

The 1981/82 and 1982/83 Annual Reports made reference to the legal requirement that building work must be authorised by Councils before a structure is built, as Councils are unable to grant building approval after work has been carried out.

This Office's interest in the matter arose out of investigation into several complaints and resulted in a recommendation being made in 1982 that the former Minister for Local Government and Lands consider certain suggestions, set out in the 1981/82 Annual Report, in conjunction with the examination that was then being carried out into the possible amendment of Section 317A of the Local Government Act, 1919.

A number of further investigations into complaints concerning the issuing of building approvals were undertaken during the year and, as a result of these, the Deputy Ombudsman has recommended that any amendment to Section 317A should include the following principles among its provisions:

(a) that a Certificate may be granted in respect of a building, a part of a building, or a specified contravention of the Acts, Ordinances, Instruments and/or Regulations, or departure from the approved plans and specifications by a building or part of a building, whether complete or under construction.

(b) that a Council for the purpose of assessing an application made pursuant to that Section, may require the submission of:

a survey report showing the location of the existing building in relation to the boundaries of the land; a floor plan to scale indicating the location and size of doors and windows, and/or other plans and specifications of the building as required; and a report or certificate from a practising structural engineer indicating the structural integrity of the building or part thereof, where considered necessary.

(c) that a Certificate may be to the effect that:

(i) in the opinion of Council, there are no contraventions or departures with respect to the Act, the Ordinances, and plans and specifications, if any, approved by Council, the Environmental Planning and Assessment Act, 1979, and any environmental planning instruments which are such as need to be rectified, so long as the building, or part, or contravention or departure remains substantially in the state it was at the date of inspection.

(ii) listed contraventions/departures have been noted with respect to which Council reserves its rights under Section 317B and that there are no other contraventions or departures which are such as need to be rectified so long as the building (or part of the building) or contravention or departure remains substantially in the state it was in at the date of inspection.

(d) that the production of the Certificate would be deemed to be conclusive evidence that at the date of issue the building complied with the requirements of the Local Government Act and Ordinances, and the Environmental Planning and Assessment Act, 1979, and any environmental instrument apart from any listed contraventions/departures with respect to which Council has reserved its rights as in c (ii) above.

The Minister for Local Government has advised that a draft revised version of Section 317A has been developed by a working party convened by the Local Government and Shires Associations in liaison with the Department of Local Government. The draft has been circulated to Councils and their comments have been reviewed. It is understood, however, that a number of problems remain outstanding, and that it may be necessary for Councils to again be consulted on a revised proposal. Following resolution of this stage of the proposal's development, it is apparently intended that interested organisations other than Councils will be consulted.

A period of approximately two years has elapsed since the first recommendation was made in this matter and it appears that the terms of the proposed amendment to Section 317A will not be settled for some time. Such a lengthy delay in remedying an acknowledged problem is clearly highly undesirable.

64. Capital Contributions for Electricity Connection

One of the problems facing County Councils servicing rural areas is how to apportion the capital costs of providing electricity equitably among intending consumers seeking connection to power.

In circumstances where the Council's procedures allow it, rural householders can wait until a neighbour bears the full cost of bringing power to their area and then apply to the Council for connection at relatively little cost. Recognising the inequity of this situation, a number of County Councils have adopted a practice of charging the initial

applicant the full costs of the extension, but giving rebates back to that consumer on an incremental basis, as further consumers are added to the line. The subsequent consumers are, in fact, "compelled" by the terms of supply, to contribute to the costs of the initial connection.

Councils vary in the practice adopted to deal with this issue. Most of the complaints received by this Office naturally enough are from citizens arguing that it was wrong that the Council in their area required them to pay more for their connection to supply than their neighbours were required to pay. However, a complaint was received last year in which it was argued that the local County Council should not have required a contribution to the costs of someone else's connection. The complaint illustrates the difficulties faced by a Council wishing, out of considerations of equity, to apply the "rebate" procedure.

The main issue in the complaint was that the Central West County Council required the complainants, Mr. & Mrs. N., to pay $8,034 for their connection to supply when more than half of this charge was to be rebated to two earlier-connected parties.

Following the Ombudsman's enquiries, the Council advised it had resolved to treat Mr. and Mrs. N. as if their application for supply had preceded the introduction of this practice of rebating and that, following their previous practice, Mr. and Mrs. N. would be charged only $2,729.

The Council further advised that it had made modifications to its policy in the light of Mr. and Mrs. N.'s complaint.

The Ombudsman's investigation of this matter showed that, under the terms of Council's original policy, the two earlier applicants, Mr. E. and the Public Works Department, would each have received rebates of $2,652.50. Mr. E., however, had originally paid Council only $3,100 for connection, reducing this cost, after the rebate was applied, to only $447.50 had Mr. and Mrs. N. not complained to this Office about it. Council's policy also required Mr. and Mrs. N. to pay a contribution towards the costs of transformers and service lines exclusively used by the other two parties, in addition to contributing to the costs of linework which ran some 4 kilometres "downstream" from the complainant's property. The Ombudsman concluded that Council's policy had the effect of seriously disadvantaging the complainants in relation to the terms of supply applied by the Council to the earlier-connected parties.

The Ombudsman was also critical of the fact that Council's "Application and Agreement for the Supply of Electricity" did not make any reference to the terms of its policy. It was the Ombudsman's view that all charges made by public authorities should be clearly stated on the "application for supply" document. This would create a contractual obligation on the first consumer or group of consumers to advance payment for all the costs of connection and on the Council to rebate portions of it, following subsequent connections. As neither of the earlier-connected parties entered into any arrangements to be later paid a rebate, the payment by a Council of more than half of Mr. and Mrs. N's contribution was arguably in the nature of a gift for which no authority existed under the Local Government Act. Drawing upon a legal opinion provided to this Office by another Council which had been advised that the procedure was contrary to law, the Ombudsman was critical of the failure of the Central West County Council to seek legal advice on the

matter. The Department of Local Government in a letter provided by yet another Council, has stated that "the Department was of the opinion that the County Council may not legally refund any portion of a capital contribution previously paid".

The Ombudsman concluded that the Central West County Council had breached the spirit, if not the letter, of the "no preference" provisions of Ordinance 54 of the Local Government Act and recommended that the Minister for Local Government consider the establishment of a Working Party to formulate future policy and perhaps, legislative change, to clarify the position for Councils.

65. Notification of Adjoining Owners in Relation to Building Applications

Over the years, more than thirty complaints against Councils have been received by this Office alleging (at least in part) that Councils did not consider the likely effect of a proposed building on the amenity of the immediate neighbourhood, when giving consideration to residential building applications.

These complaints were normally based on a claim that new buildings (or extensions/alterations to existing buildings) had significantly detrimentally affected the use and enjoyment of the complainant's property due to such things as: loss of views, light, amenity or privacy; the creation of drainage problems; and the creation of environmental or geological hazards.

The main aspects of these complaints were that Councils:

(i) failed to notify those persons who could reasonably and properly be considered to be affected by the proposed building;

(ii) refused to allow "properly interested persons" to inspect the relevant building application plans as a basis for deciding whether or not to lodge an objection with Council; and

(iii) failed to take into consideration any valid objections lodged by "properly interested persons".

Following extensive investigation (including surveys summarised in the 1981-2 Annual Report), a Report under the provisions of Section 26 of the Ombudsman Act, 1974 was made to the Minister for Local Government and Lands. It was recommended that the Local Government Act, 1919, be amended by:

(a) The removal of any possible restrictions on the inspection of building application plans showing the external configuration of a building in relation to the boundaries of the site, by "properly interested persons".

(b) The inclusion of a requirement under section 313 of the Act for Councils to consider the likely effect of a proposed building or alteration on adjoining properties.

(c) The inclusion of a requirement under section 313 of the Act for Councils to consider the views and opinions of "properly interested persons" prior to determining building applications for approval to erect buildings which could affect the amenity of an area. This requirement not to relate to building applications for approval to carry out internal alterations, or alterations which do not affect the external configuration height of a building.

(d) The inclusion of a requirement that Councils notify adjoining owners and other possibly affected persons of any building application for approval to carry out works which may affect the amenity of an area. This requirement not to relate to building applications for approval to carry out internal alterations, or alterations which do not affect the external configuration or height of a building.

In response to this Report, the former Minister for Local Government and Lands, the Hon. A.R.L. Gordon, M.P., advised that:

> "I have now completed my examination of the amendments of the law which you have suggested having regard to the supporting information submitted and comments made by the Local Government and Shires Associations and the Building Surveyors Institute on those suggested amendments.
>
> After careful consideration of the various issues involved I have concluded that your proposals relevant to a system of notification (i.e. your proposals (c) and (d)) would have significant cost implications for councils and building applicants and in many cases add substantially to the time involved in obtaining building approval. They would therefore run counter to the Government's policy objectives of reducing delays in housing costs. In the circumstances, I am not prepared to recommend that amendments be made to the Local Government Act regarding your abovementioned proposals.
>
> However, I have decided to support your proposals (a) and (b) relevant to inspection of building plans by persons having a proper interest and inclusion of a requirement that councils consider the likely effect of a proposed building or alteration on adjoining properties. These amendments will be recommended to Cabinet."

The present Minister for Local Government, the Hon. K.J. Stewart, M.P., has advised that amendments to the Local Government Act, 1919 in relation to this matter are proposed to be included in the next Local Government Amendment Bill, which is expected to be introduced into Parliament during the 1984 Budget Session.

66. Reports to Minister for Local Government in Council Matters

Reference was made in the 1982/83 Annual Report to the very real difference 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. The Minister's powers over Councils are limited and he is unable, even if he wishes to do so, to direct a Council in accordance with an Ombudsman's recommendation. The Minister's principal power over Councils lies in dismissal, and only very occasionally would a finding of wrong conduct by an Ombudsman justify that course of action. Thus, in many cases, the making of a report about the conduct of a Council to the Minister for Local Government is largely a matter of form, unless the report contains a recommendation that the matter be the subject of investigation or review by the Minister's department, or that legislative change be introduced.

The secrecy provisions of the Ombudsman Act greatly inhibit the effectiveness of the work of the Office of the Ombudsman in this and other areas. The most effective inducement to adoption by a Council of recommendations made in a report by the Ombudsman would be the power to publish reports in the media. The 1982/83 Annual Report referred to the South Australian Ombudsman's powers to publish his views in any manner he thinks fit. He has utilised this power very effectively in releasing his reports to the local media in a Council's district.

The Government is again urged to amend the N.S.W. Ombudsman Act, to give the Ombudsman full power to publicise his reports in Council matters.

SECTION C: OMBUDSMAN ACT: PRISONS

67. Introduction : Prison Statistics

Complaints to the Ombudsman must, by law, be in writing. Most complaints from prisoners are received through the mail. Letters to and from the Ombudsman are privileged and cannot be opened by prison officers.

Additionally, a number of written complaints are received during visits by officers of the Ombudsman to prisons. This occurs either on the initiative of the prisoner concerned (who has taken the trouble to write out his complaint) or on the suggestion of the Ombudsman's officer where he/she considers the matter warrants further enquiry by this Office.

Oral complaints made to officers of the Ombudsman during visits to prisons are, by and large, dealt with on the spot, usually by discussion with the Superintendent. Many such complaints relate to matters which, in the overall scheme of things are minor and/or related to "social welfare" issues affecting prisoners. Nonetheless, they are important from the prisoners' point of view. Those which cannot be resolved by

discussion with the gaol authorities can usually be resolved by brief telephone enquiries when the Ombudsman's officers return to the Office. In all cases, the prisoner is informed of the outcome.

A very small number of oral complaints may sometimes lead to a formal investigation under the own motion powers in the Ombudsman Act, but this is very much the exception.

During the year, 220 oral complaints received during visits to prisons were dealt with.

The disposition of written complaints against the Department of Corrective Services for the year ended 30 June, 1984 is set out below:

NO JURISDICTION	
No public authority involved	1
Conduct is of class described in schedule	29
DECLINED	
General Discretion	94
Insufficient interest, alternative means of redress, etc.	10
NO WRONG CONDUCT	30
WRONG CONDUCT	9
DISCONTINUED	
Resolved completely	99
Resolved partially	87
Withdrawn by complainant	21
Other	259
UNDER INVESTIGATION as at 30 June, 1984	179
TOTAL	818

68. Investigating Complaints from Prisoners

A major change occurred during the year in relation to the handling of complaints from prisoners by this Office. In the past prisoners' complaints were dealt with exclusively by the Assistant Ombudsman and two particular Investigation Officers. The Ombudsman was not convinced that this "specialisation" approach was always as effective as it should be.

With the resignation of the former Assistant Ombudsman, the opportunity was taken to review performance in the prisons area with the result that prisoners' complaints were allocated throughout the Office and were dealt with by the majority of Investigation Officers.

The new system worked well and has been retained. The Principal Investigation Officer, Gordon Smith, has adopted the senior co-ordinating role in the prisons area. The new Assistant Ombudsman, John Pinnock, deals with the major and

more urgent prison complaints and issues and reports directly to the Ombudsman.

As a matter of policy the Ombudsman believes that this Office should be highly visible in prisons. A system of regular prison visits has been introduced with good results. During the period January to June 1984, a number of prisons, that had either not been visited for some time or not visited at all, have been visited and the services of the Office made available to the inmates.

Particular officers have been given responsibility for particular prisons, as set out below.

PRISONS	OFFICERS
Goulburn Gaol Berrima Gaol Broken Hill Gaol Special Care Unit, Long Bay	John Pinnock Greg Andrews
Parklea Prison	John Pinnock Alan Hartigan
Emu Plains Training Centre Cooma Prison	Alan Hartigan Tony Lennon
Metropolitan Training Centre Bathurst Gaol Oberon Afforestation Camp	Graham Dare John Morrow
Metropolitan Remand Centre Norma Parker Centre Glen Innes Afforestation Camp	David Brogan Bruce Barbour
Parramatta Gaol	Geoff Walsh Jane Deamer
Silverwater Work Release Centre Mulawa Training & Detention Centre Grafton Gaol	Jane Deamer Gillian Scoular
Central Industrial Prison Mannus Afforestation Camp	Geoff Walsh Helen Hurwitz
Metropolitan Reception Prison Cessnock Corrective Centre Maitland Gaol	Bill Hayes Gordon Smith

69. Segregation of Prisoners

Section 22 of the Prisons Act provides that an order may be made detaining a prisoner away from association with other prisoners where that prisoner is considered a threat to other prisoners, prison officers, the security of the prison or to the preservation of good order and discipline in the prison. The section contains safeguards in the form of limits on the length of time for which a segregation order may be made by the Superintendent or the Corrective Services Commission. In addition, the section provides that a prisoner on segregation shall not be deprived of any rights or privileges other than those which the Commission may determine either in general or in particular instances.

In Annual Reports for the years 1981-82 and 1982-83 extensive criticisms were made of the misuse and abuse of the power to make segregation orders. Both reports referred to the essentially emergency nature of the procedure provided by Section 22, a matter noted by Mr. Justice Nagle in his Report of the Royal Commission into NSW Prisons. Both Annual Reports also instanced various examples of the wrongful use of segregation orders.

The Corrective Services Commission has taken further steps in an endeavour to ensure the proper use of segregation orders, including the publishing of a fresh Circular (No 84/16) in August 1984. (The publication of a previous Circular was noted in the last Annual Report.) Nevertheless, complaints from prisoners about the wrongful use of segregation orders and irregularities in orders continue unabated.

These complaints cover a wide range and include:

- use of segregation as punishment;
- failure to provide documentary evidence of segregation orders;
- denial of access to legal advisers to segregation orders other than on subpoena;
- unauthorised deprivation of amenities and privileges whilst on segregation.

This Office has in the past carried out investigations into complaints about segregation, as in other areas, on a case by case basis. Whilst this procedure has been effective in highlighting individual abuses of Section 22, it has had only marginal effect on the overall problems associated with the use of segregation orders.

In these circumstances, the Ombudsman decided in early October 1984 to exercise the power conferred on him by Section 13 of the Ombudsman Act to conduct an investigation, of his own motion, into the use of segregation orders. In order to combine the flexibility of a broad approach with the more specific nature of an individual investigation, the investigation will encompass a number of prisoners' complaints relating to segregation and will "target" a specific prison, Parklea Gaol.

It is the view of this Office that only a wide-ranging investigation of this nature can hope to be effective in an area where complaints have historically been running at a high level.

70. Transfer to Police Stations for Interview : New Legislation

In the last Annual Report, concern was expressed about the practices being adopted by the Department with respect to the issue of orders under section 29 of the Prisons Act to effect the transfer of prisoners to police stations for interview. Subsequent to the Crown Solicitor expressing the opinion that section 29 could not be utilised for that purpose, the Department issued a circular suspending the transfer of prisoners to police stations and setting out the procedures to operate when police wished to interview a prisoner. Despite this, such transfers continued to be made.

One such case occurred in August, 1983, when a prisoner at Bathurst Gaol was transferred to Bathurst Police Station for questioning in connection with an alleged assault on another prisoner. The conduct of the Executive Officer of the Custodial Services Division of the Department in issuing an order under section 29 of the Prisons Act to effect the prisoner's transfer was found to be wrong in terms of the Ombudsman Act. In her report on the matter, the former Assistant Ombudsman restated her view that the issuing of section 29 orders for this purpose was unlawful.

The matter was referred to the Minister for Corrective Services who later advised this Office that the government had amended section 29 of the Prisons Act to permit a prisoner, by order of the Corrective Services Commission, to be taken temporarily from a prison for the purpose of being interviewed by police in connection with any crime or offence. (1) In this regard, in the relevant second reading speech (2), the Minister, inter alia, said:-

> "Doubt has arisen about whether the provisions of section 29 can be properly used to remove prisoners to police stations to be interviewed, and a complaint was recently sustained by the Ombudsman concerning the use of that provision for these purposes. The proposed legislation will remove any legal impediment to the use of this section for the purpose outlined."

In its "Civil Liberties Agenda for the N.S.W. Parliament, August 1984" the New South Wales Council for Civil Liberties commented on the change in the following terms:-

> "Prisoners in N.S.W. shared in that right until the 1983 legislation permitted police to remove them at will from jail to a police station for questioning.
>
> The background to this recent change is disturbing. Prior to 1982, the Corrective Services Department had in fact permitted police to remove prisoners from jail for questioning whenever they wished. In that year the Ombudsman's Office and Redfern Legal Centre pointed out that the practice was illegal, and this advice was confirmed by the Crown Solicitor's Office. However, instead of thereafter requiring the Department to observe the law, the Government instead passed legislation that validated the former illegal practices."

(1) Section 29(1)(f), Prisons Act

(2) Prison (Amendment) Bill, 1983 - second reading speech - Hansard 24 November 1983, p.p. 3463

The Council went on to propose that the new section 29(1)(f) of the Prisons Act should be repealed forthwith, and the rights of prisoners not the subject of arrest to refuse to attend a police station or co-operate with police should be recognised.

Without being involved in this dispute the Ombudsman does have power to determine whether rights conferred by statutory provision are being reasonably exercised. The exercise of the power conferred by section 29(1)(f) to transfer prisoners to police stations for interview will be kept under scrutiny by the Ombudsman. Any complaints by prisoners claiming unreasonable exercise of this power will be promptly and vigorously investigated.

71. 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 any specific problems uncovered in each case.

In a judgement handed down in the Supreme Court on the 31st December 1982, Mr. Justice Waddell suggested that it would be appropriate for this Office to conduct an investigation into the medical attention available to prisoners, as it seemed to His Honour that the account given to him during the course of the proceedings, "does not really add up to a service which is as adequate as one would expect".

Following this judgement, this Office instituted a general investigation into the nature and quality of the medical services made available to inmates of prison institutions in this State.

The extensive Draft Report prepared as a result of this investigation considers the main areas of administrative concern in relation to the overall problem of provision of medical attention to inmates of NSW gaols.

Two public authorities were the subject of this investigation - the Department of Health because medical and dental services to prisoners are provided by the Prison Medical Service (PMS) of that Department, and the Corrective Services Commission because it provides the buildings occupied by the PMS, as well as the officers required to ensure the security of PMS staff, equipment and supplies.

Both the Department of Health and the Corrective Services Commission were forwarded copies of the Draft Report and in reply furnished extensive comments on the content of the Report.

A copy of a revised Draft Report has now been furnished to the Minister for Corrective Services and the Deputy Premier and Minister for Health and, pursuant to the provisions of section 25 of the Ombudsman Act, both Ministers have been requested to advise as to whether they wish to consult with the Ombudsman prior to the report being made final.

Having regard to the public interest, the matter may well be the subject of a Special Report to Parliament.

72. Peter Schneidas

The last Annual Report noted that Mr. Schneidas had been in one form of isolated detention or other since September 1979. This detention was by virtue of successive six month segregation orders made under Section 22 of the Prisons Act, following the murder of a prison officer by Mr. Schneidas. The Report highlighted various aspects of this detention and detailed a number of complaints made by Mr. Schneidas.

In April 1983 the Chairman of the Corrective Services Commission, Mr. Dalton, advised this Office of a proposal whereby the isolation of Mr. Schneidas would gradually be reduced by spending periods of time in less secure environments, subject to Mr. Schneidas exhibiting satisfactory behaviour throughout each stage. In May 1984 Mr. Schneidas was accepted into the Special Care Unit at Long Bay Gaol. This special unit is designed to assist inmates achieve certain personal and social goals and an understanding of their relationships with other members of society. Emphasis is placed on group discussion and personal responsibility. Inmates entering the unit sign a "Contract" outlining the conditions under which they are to be admitted. In the case of Mr. Schneidas, this Contract provided for an initial admission for a period of one month and subsequent admissions after periods in other institutions. Mr. Schneidas did not complete the later parts of the programme as he stated that he could not do justice to himself or the programme.

In June 1984 Mr. Schneidas was transferred to Goulburn Training Centre and placed on ordinary discipline. Mr. Schneidas stated that he regarded his placement on ordinary discipline as significant and felt optimistic about his prospects of ultimately achieving a lower classification and transfer possibly to Bathurst Gaol. He thanked the Ombudsman for his past assistance.

On 28 August 1984, the day on which he was married, Mr. Schneidas was allegedly assaulted by another prisoner prior to a muster in No 2 yard. This prisoner was said to be armed with a set of "Kung-Fu" sticks which he had apparently made in the carpentry shop. As a result of this incident Mr. Schneidas was transferred to Goulburn Base Hospital, treated and returned to the gaol. In a complaint to this Office, Mr. Schneidas also contended that the prisoner had not been charged with any offence though his identity was known to prison officers. On 31 August 1984, Mr. Schneidas applied to be transferred to the Special Care Unit and was accepted by the Unit on 3 September for a period of four weeks.

Whilst preliminary investigations have commenced into the above complaint, as well as other complaints made by Mr. Schneidas, these investigations cannot address the difficult problem of the ultimate placement of this prisoner. Mr. Schneidas is concerned that the Corrective Services Commission has apparently failed to resolve this issue.

73. Case History of Allegations of Drug Distribution in a Sydney Metropolitan Prison

In May 1983, a prisoner indicated to an officer of the Ombudsman that he had detailed information concerning the methods by which drugs were being introduced into a major Sydney metropolitan gaol. The Assistant Ombudsman, with the consent of the prisoner, decided to advise the Chairman of the Corrective Services Commission, Mr. V.J. Dalton, that the prisoner wished to have a confidential interview with the department's Director of Establishments, Mr. J. McTaggart, concerning the allegations. Separate detailed statements of the allegations were subsequently taken both by this Office and by Mr. McTaggart.

The allegations were precisely detailed by the prisoner. In both statements, names were given of officers considered to be involved in drug trafficking at the prison and those of prisoners who both regularly used and distributed the drugs. Details as to the times at which certain prisoners received drugs, the arrangements made between the prisoners and the officers to facilitate the movement of the drugs and the methods by which prisoners paid for the drugs were identified. More specifically it was claimed that a prison officer involved in the distribution of the drugs had suicided because of pressure from a prisoner when he had failed to make two deliveries. According to the prisoner, drugs were being introduced into the gaol by means of visitors throwing the drugs onto a balcony to which selected prisoners have access and on the underside of a fish truck that regularly made deliveries to the gaol. In his account of his interview with the prisoner, Mr. McTaggart concluded "without a doubt there is a drug problem in the (gaol)".

The Ombudsman decided in September 1983 to make enquiries as to the manner in which the information given was investigated and the results.

The Chairman of the Corrective Services Commission, Mr. V.J. Dalton, made available all the department's files on the matter. The Ombudsman personally interviewed all officers taking part in enquiries into the allegations.

The Ombudsman's enquiries showed that very few of the allegations were investigated directly by the department.

Despite the prisoner writing to Mr. McTaggart hours after his interview with him, making it clear that he should not be named as the source of the information, a memo containing his name was prepared and, outlining all allegations made, was sent to the management of the gaol. The memo sought urgent attention being given to three of the allegations. However, the files made available to the Ombudsman contained no information about action taken on the claims.

When the Ombudsman first approached Mr. Dalton, about the matter, he could give no information about the results of the enquiries. The Ombudsman was told that the allegations had been handed over to police seconded to the department's Special Investigations Unit and that the investigating officers had not given him their report. Mr. Dalton indicated that some of his officers may have been involved in enquiries into the claims and suggested he speak with them.

The department's files showed that Mr. McTaggart had assigned an Assistant Superintendent to liaise with the police

officers on the case. When this officer was interviewed by the Ombudsman, he stated that he was transferred soon after the assignment. There was no replacement liaison officer appointed. He said that he had no knowledge of the action taken on the prisoner's claims, but could recall telling another officer about the claim that a fish truck was being used to bring drugs into the gaol. When this officer was interviewed, he denied receiving such advice. While the suggestion was made that all vehicles are searched entering a gaol, there was no documentary evidence produced that any special action was ever taken to have the fish truck searched or showing the results of any such search.

The Coroner investigating the suicide stated to this Office that no evidence or submissions were presented suggesting that the suicide may have been related to drugs.

When Mr. Dalton received the police report, it was forwarded to the Ombudsman. The report contained four paragraphs and concluded -

> "while the information related ... may well be true, it does not amount to evidence that could be placed before a court and at best could only be used as intelligence to be borne in mind when special searches are carried out by officers of your department."

The report referred to the failure of the Corrective Services Department's drug dog detector unit to have located "any substantial quantity of drugs".

When the Ombudsman attempted to discuss the investigation with the police officer responsible for the case, he was referred to the Commissioner for Police as he had been instructed not to discuss the matter.

A meeting was then arranged between the Ombudsman, the investigating police officer and the Commissioner of Police. The Commissioner agreed that the officer's report to Mr. Dalton was too brief, and instructed that a further, more detailed report be prepared. The further report, a copy of which was provided to the Ombudsman, while three pages in length, added little to the information contained in the first. The prisoner's information was regarded as uncorroborated hearsay, only to be used for intelligence purposes.

Given the limitation of the Ombudsman's powers in the police area (and in particular the absence of any "own motion" power) the Ombudsman was unable to review the action taken by the Police Special Investigation Unit in relation to investigating the prisoner's allegations. The Ombudsman was refused an opportunity to discuss the matter with the police investigating officers.

The prisoner, in the Ombudsman's view, had no particular "axe to grind" in making the allegations. Indeed, Mr. McTaggart, in his memo on his interview with him considered that he "presented in a civil, genuine sort of manner". The prisoner has now left Australia.

74. Police Special Investigation Unit : Relationship to Prison Administration - Privacy Aspects

The Police Special Investigation Unit has been operating within the Department of Corrective Services since 1980. It comprises four seconded police officers who are under the direct control of the Chief Superintendent of the Police Department's Internal Affairs Branch.

The investigative work of these officers has embraced a range of areas including allegations of serious assaults, theft and drug trafficking within New South Wales prisons.

The Corrective Services Commission does not take any part in directing the course of enquiries made by the Unit.

The Commission refers allegations of a criminal nature to the Unit and awaits the results, which are by way of a report from the Commissioner of Police.

Problems underlying the relationship between the Corrective Services Department and the Special Investigation Unit were highlighted in the Ombudsman's enquiries of the matters raised in the previous topic note.

Reference was made a number of times by persons interviewed by the Ombudsman to the effect of the "rulings" of the Privacy Committee on the operation of the Unit. It appears officers of the police unit were able to convey information about their enquiries only through the Commissioner for Police to the Chairman of the Corrective Services Commission and even then, this had to be in writing. It also appeared that the Committee had suggested that any prison officer, the subject of any allegations, should immediately be advised in writing of the information disclosed to the Commission.

The Ombudsman made enquiries with the Privacy Committee to understand the effect of these "rulings". Enquiries revealed that there were, in effect, no "rulings" but a press statement issued by the Committee. The statement followed complaints made by the Public Service Association on behalf of prison officers to the then Chairman of the Corrective Services Commission, Dr. T. Vinson, who sought the Committee's advice on the complaints. The complaint centred around what details could be entered on the personnel files of prison officers as a result of police enquiries into allegations of criminal activity made against them.

Briefly, the press statement issued by the Committee expressed its view that -

* police should always be responsible to, and should always be under the direction of, the Police Commissioner;

* they should not be placed in a position of reporting to Government Heads on staff disciplinary matters;

* the four police officers concerned should be removed from the Department of Corrective Services;

* police officers should not be making recommendations affecting the employment prospects of prison officers.

The third matter was not adopted by the Police Department. However, procedures were altered to ensure that the results of police enquiries are conveyed only to the Chairman of the Commission. In addition, the former Chairman of the Commission had issued a press statement in which it was stated he had instructed police officers and other officers of the Department that "in all but the most exceptional circumstances, the officer concerned should be the first person informed that an investigation will take place". The Ombudsman took the view that such procedures unnecessarily inhibited the operation of the Unit.

Following correspondence between the Ombudsman and the Committee, the Acting Executive Member advised that a number of recommendations had been approved by the Committee to modify the terms of its press release. More specifically, he made three points in clarification of the Committee's views:-

"(i) ... It was never the Committee's intention to prevent the Police Commissioner from informing the Corrective Services Commissioner or any other body of the progress of an investigation."

(ii) the Committee was concerned that the communications should take place at a senior level where they concern results of an investigation. Only the results of such an investigation should go on the personal file where allegations of misconduct, criminal activities etc. are found to be substantitated and not the fact that an investigation is on-going;

(iii) while an investigation is on-going, it would seem, given the nature of the investigation under consideration, that the Committee does not object to an informal exchange of information between the Police Department and the Commissioner of Corrective Services, and it does not expect that an officer under investigation for criminal activities would be notified, as such notification would obviously hamper the investigation."

The Acting Executive Member went on to say:-

"It has always been Committee policy that a potential invasion of privacy can be justified by over-riding social benefits. It is quite apparent that the over-riding public interest in this case warrants this interpretation of Committee policy."

The Committee has now advised both departments of the modifications to its policy on this issue. While both departments have argued that the rulings did not adversely affect the operational liaison existing between the Unit and officers of the Corrective Services Department, the Committee's position on the matter, in the Ombudsman's view, required clarification.

75. Prisoners on Remand for Lengthy Periods

In the experience of this Office, lengthy delays in relation to trials of persons held on remand in custody are not unusual.

In April, 1983, after 17 months held on remand in Long Bay Gaol Mr R made a complaint to the Ombudsman about police corruption based on information he claims he received in gaol. Under the existing legislation this complaint was necessarily referred to the Police Internal Affairs Branch for investigation. Mr R who had no previous convictions, was facing a charge of conspiracy to murder arising out of a domestic situation. Subsequently, his trial did commence, but he was found dead in his cell in November, 1983. (A later inquest found suicide.)

Last year the media focused on representations made by the Minister for Foreign Affairs to the Philippines Government in respect of the delay in the hearing of the Father Gore case. All the experience of this Office indicates that the record of time for setting down trials for persons held on remand in NSW is not one we can be proud of.

In terminating the investigation of Mr R's complaint, the Ombudsman wrote to the NSW Attorney-General, the Hon. D.P. Landa, seeking an explanation for the delays in hearing matters of prisoners on remand.

The Attorney-General had become aware of the problem and had established the "Inquiry into the Methods and Procedures for Dealing with Cases Committed for Trial or Sentence". This Public Service Inquiry completed an interim report in December, 1983, and its final report in June, 1984.

The final report made recommendations in two general classes. Firstly, those affecting the structure and systems of the Office of the Solicitor for Public Prosecutions and secondly, those affecting staffing matters in that Office. It was recommended that "speedy trial" legislation should be kept under review, but should not be introduced in this State at this stage. The Inquiry found that their report was made during a time when recently introduced administrative changes appeared to be substantially affecting the rate of disposal of work. The Inquiry concluded,

> "In summary, we perceive that significant improvement is already on its way. We hope that the recommendations in this report will, if adopted, assist in the process of improvement, and result in a sustained raising of the standards of operations ...."

The Ombudsman welcomes any moves to shorten the delays of hearing trials of prisoners in custody on remand. The Ombudsman believes despite the sanguine hopes expressed by the Inquiry the issue should be subject to continued critical scrutiny.

76. Workers Compensation for Prisoners?

Approximately one third of prisoners in the custody of the Department of Corrective Services are engaged in some kind

of prison industry. The work performed by prisoners covers a diverse range of activities including light engineering, leather making, upholstering, cabinet joinery, logging and sawmilling. While these are not commercially-oriented ventures, the scale of prison industry has increased over the years and work-related accidents do arise from time to time.

A prisoner suffering work-related injury is not, however, covered by the Workers Compensation provisions. There is no legally-binding "contract of service" between a prisoner and the department. In any other work situation, the provisions of the Workers Compensation Act would enable an injured worker to obtain fair compensation, even if it was no fault of his employer that the accident occurred. Any prisoner injured at work in the department may only successfully sue for damages under Common Law if the department can be shown to have been negligent. In the absence of negligence, the prisoner has no legal right to compensation.

A complaint coming before the Ombudsman last year highlighted this problem. A prisoner, Mr. T., was permanently incapacitated as a result of an accident which occurred while he was felling trees at an afforestation camp of the Department of Corrective Services at Glen Innes. The complaint raised serious questions of principle regarding the department's practices in dealing with ex-gratia claims for compensation from prisoners who injured themselves at work in the absence of any negligence.

The Department offered Mr. T. the sum of $7,602.19. The offer was comprised of medical expenses of $5,000 incurred up to the time of the claim, a small allowance for the medical cost of a hip replacement and a further ex-gratia payment of $2,000.

An Inquiry under section 19 of the Ombudsman Act was held following preliminary inquiries which indicated the department, as a matter of practice, sought advice from the Government Insurance Office as to what it should pay under such claims. That advice sought to approximate what an inmate would have received had he been covered by the Workers Compensation provisions. To compare the offer made with a reasonable standard, the Ombudsman instructed a solicitor to brief Counsel experienced in the Workers Compensation jurisdiction to advise what sum Mr. T. would have been likely to receive had he been covered by workers compensation. The advice of Counsel, Ms. T. Kavanagh, was that Mr. T's entitlement under those provisions would lie in the range of $63,200 - $77,200. She advised the offer was "totally inadequate, even as an ex-gratia payment".

In her advice she helpfully referred to a number of general or policy issues, which the case raised. She listed these as:-

"(i) If a prisoner loses his capacity to work because of injury while in prison and while at work should he be as a matter of policy, compensated?

(ii) How should such compensation be calculated?

(iii) Should any such compensation payment be given a legislative base and be covered by the provisions of an act, such as the Workers' Compensation Act, 1926.

(iv) Should such compensation take into consideration -

(a) Past medical costs

(b) Future medical expenses

(c) Loss of future earnings

(d) Loss of use of limb

(v) How would the relationship between prisoner and prison be defined to make the injured person eligible for compensation giving consideration to section 46 of the Prisons Act?" (This section of the Act on its face appears to indemnify the department from legal action).

The Ombudsman fully agrees with this formulation by Counsel.

The particular complaint is the subject of continuing investigation and it is expected that a draft report will be submitted to the Department of Corrective Services shortly. However, whatever the result, the facts as well as general notions of fairness and justice demand that an urgent policy review should take place of the whole question of compensation for prisoners injured in work type situations.

77. Misuse and Invalidity of Gaol Superintendents' Disciplinary Powers : Prison Rule 5(b)

Complaints were received from a number of prisoners about the increasing use by Superintendents of Rule 5(b) of the Prison Rules to impose punishment on prisoners who are not willing to have a case of alleged breach of prison discipline dealt with by the Superintendent in accordance with the procedures set out in section 23A of the Prisons Act.

Prison Disciplinary Procedures

The Prisons Act, 1952, clearly spells out the procedures which should be invoked when it is alleged that prisoners have committed breaches of prison discipline. Section 23 creates a number of offences against prison discipline such as swearing, disobeying one of the prison rules, or disobeying an order from an officer. Section 23A of the Prisons Act provides that a prisoner who has committed certain of these offences may be dealt with by the Gaol Superintendent, provided that the prisoner either admits that the facts alleged against him are true, or else consents in writing to the Superintendent hearing and determining the matter. Where the Superintendent finds the offence proved, he or she is entitled to sentence the prisoner to cellular confinement for up to three days, or to the deprivation of certain rights and privileges for up to one month.

If the offence alleged against a prisoner is not one which may be dealt with by the Superintendent, or if the prisoner does not admit the truth of the facts alleged against him or does not consent in writing to the Superintendent hearing the charge, the matter must be heard and determined by a Visiting Justice. In a hearing before a Visiting Justice, the prisoner has the right to legal representation and is guaranteed the opportunity to present his defence to an independent arbiter. The Visiting Justice will hear the

evidence for and against the prisoner; determine whether the prisoner should be found guilty or not guilty; and, if appropriate, fix a suitable penalty. Visiting Justices have the power to impose more stringent penalties than Superintendents, and may order cellular confinement for up to twenty eight (28) days, and forfeiture of remissions or money earned by a prisoner.

Rule 5(b), Prison Rules

The Prison Rules are rules which are made by the Corrective Services Commission with the approval of the Minister in accordance with section 49 of the Prisons Act. Rule 5 reads as follows:-

> "Rule 5(a)
>
> An officer who sees, hears or otherwise becomes aware of an offence against prison discipline by a prisoner shall forthwith report the offence, on the form designed for the purpose, to the Superintendent of the prison. Such first mentioned officer may lock the prisoner in a cell or otherwise restrain his communication with other prisoners prior to making such a report.
>
> Rule 5(b)
>
> Upon receipt of such report, the Superintendent of the prison shall carry out such investigation as he may desire as to the truth of the report and the gravity of the offence. If he is not satisfied that an offence was committed, he may return the prisoner to the ordinary routine of the prison. If he be satisfied that an offence was committed but that such offence is not of sufficient gravity to warrant charging the prisoner, he may deprive him of participation in the amenities of the prison for such period as the Superintendent deems appropriate, provided that such period shall not exceed one month without the Commission's concurrence.
>
> Rule 5(c)
>
> If, in the opinion of the Superintendent, the report discloses an offence against prison discipline, as set out in section 23A of the Act, he may determine the matter in accordance with the provisions of section 23A of the Act.
>
> Rule 5(d)
>
> If the Superintendent of the prison be satisfied that the complaint or offence should be determined by the Visiting Justice, he shall charge the prisoner with the offence, inform the prisoner of the charge and bring the matter before the Visiting Justice upon his next visit to the prison."

In a draft report on the matter, this Office expressed the view that Rule 5(b) is invalid and that it is therefore not open to Superintendents to make use of the rule when imposing penalties on prisoners. The report contended that there were two grounds upon which Rule 5(b) would fail if tested judicially and outlined these in the following terms:-

> "The first ground is that section 49 of the Prisons Act entitles the Commission only to make rules '<u>not</u>

inconsistent with this Act ...'. In my view there is obvious inconsistency between the powers of Superintendents as set out in section 23A of the Act and as set out in rule 5(b). Section 23A strictly limits the power of Superintendents to punish prisoners by restricting it to those situations where a prisoner admits that the facts alleged against him are true, or else consents in writing to the Superintendent hearing the charge. The power to punish as set out in rule 5(b) contains no such limitation, and in my view is therefore ultra vires the Act. It should be noted that the punishment which may be given under rule 5(b) is quite substantial (deprivation of amenities for up to one month, or for greater periods with the Commission's concurrence), and indeed is the same as one of the two alternative punishments authorised by section 23A. In these circumstances I think it unlikely that a court would accept as realistic the statement in rule 5(b) that a prisoner made the subject of such deprivation has not been, for practical purposes, charged and found guilty of some offence against prison discipline which would render the rule inconsistent with the statutory provision.

In support of this view it may be noted that Sheppard J. in the unreported decision of Kennedy V McGeechan (NSW Supreme Court, 7 June 1974) observed:

> "I would agree that any rule which provided a lesser entitlement than any provided for in the regulation or which otherwise cut down the benefits provided there would be open to challenge ..."

The second ground for considering that rule 5(b) is invalid is that, over the years, courts have demonstrated an extreme reluctance to uphold the validity of administrative acts which do not adhere to the principles of natural justice. One of the basic rules of natural justice is that people liable to some punishment or deprivation are entitled to be heard in their own defence.

It is evident that rule 5(b) infringes upon this basic rule by permitting Superintendents to impose significant punishment upon inmates without affording them any opportunity at all to put forward and have considered their defence. Such a procedure is clearly repugnant to ordinary views of justice, and courts have proved reluctant to uphold such procedures without the clearest possible expression of legislative intent. In the leading case of Ex part Grinham; Re Sneddon (1961) SR (N.S.W.) 862 the NSW Supreme Court was dealing with the situation where the regulation at issue compelled people to provide information which might subsequently be used in proceedings against them. Herron J, as he then was, said in that case:

> "The power compelling persons to disclose information to their disadvantage or for the purpose of assisting in their prosecution or which may incriminate them is, generally speaking, viewed by the law with disfavour ... These general observations will yield only to the clear mandate of Parliament to the contrary

> effect when this is expressed in clear terms in statutes or regulations validly made under them. Laws which authorise interrogation under compulsion of persons in time of peace must always be scrutinised with care by the Courts although in some cases where the laws relate to members of the armed forces or disciplined services they may be more readily upheld."

> The situation at present under consideration is even more compelling in that it purports to allow the imposition of punishment on people without any charge, hearing, or opportunity for them to put forward a defence. Moreover, far from being a law or regulation which might be said to have the mandate of Parliament, rule 5(b) has not even been laid before the NSW Committee on Subordinate Legislation. It is merely an internal rule adopted by the Corrective Services Commission and approved by the Minister. In my view it is not open to the Commission to adopt, through this unscrutinised procedure, rules which are not only inconsistent with the Prisons Act, but are also repugnant to basic principles of natural justice.

> Even if a court were to hold the rule to be valid, I take the view that, in all the circumstance, it is a procedure which is 'unreasonable, unjust, oppressive, or improperly discriminatory ..." according to section 5 of the Ombudsman Act, and that adherence to its terms would therefore amount to wrong conduct under that legislation. Sections 23A and 24 of the Prisons Act set out a proper scheme for the hearing of prison disciplinary offences. This scheme, which has been approved by Parliament, ensures that all prisoners charged with offences have the opportunity to put forward their defence and have it considered, if appropriate, by an independent magistrate. It is wrong that these rights, which have been granted by Parliament, should be subverted by an unscrutinised decision made on an internal basis by the Corrective Services Commission."

The draft report recommended, inter alia that rule 5 be removed from the Prison Rules; that section 49 of the Prisons Act be repealed and the rules made under it be reviewed; and that regulations be made to deal with any matters or issues required to be dealt with as a result of such review. However, the Department of Corrective Services informed this Office that the issue of the validity of Rule 5(b) was the subject of proceedings brought by a prisoner before the Supreme Court and sought to defer making comments on the draft report pending completion of these proceedings. This was agreed to.

A Further Complication

Shortly after the draft report was referred to the Department, complaints were received from four prisoners at Parklea Prison that the Superintendent, Mr. A. Cerenich, had imposed punishment on them under Rule 5(b) without first having them appear before him in connection with a report of an alleged breach of prison discipline.

The punishment inflicted on the four prisoners by the Superintendent was their removal from contact visits and cancellation of their right to "buy ups". The complaints were

In a report prepared by this Office, the view was expressed that the imposition by a Superintendent of punishment on an inmate without the inmate first being given the opportunity to present his case in answer to the alleged offence was conduct which was wrong in terms of the Ombudsman Act. The report went on to say:-

> "That a penalty can be imposed by a Superintendent on an inmate without the inmate being made aware of the punishment, or of the reasons for which he is being punished, is tantamount to a denial of natural justice."

In the case in question three full days elapsed between the imposition of the punishment and the prisoners being informed of the reasons for certain of their privileges being taken away from them.

In commenting on the draft report the Chairman of the Corrective Services Commission said:-

> "Rule 5(b) does not require the Superintendent to interview the inmate, but that he "shall carry out such investigation as he may desire as to the truth of the report and the gravity of the offence ...". Natural justice suggests that part of his investigation would include interviewing the inmate and to inform him of the decision when the investigation was finalised. To this extent it appears that Mr. Cerenich erred.
>
> While the recommendations contained in the report are acceptable, the view is taken that it would be more appropriate to await the outcome of a recent Court hearing in relation to Rule 5(b) (Reidy v Corrective Services Commission) before acting upon them."

This suggestion was not agreed with. It was pointed out to the Chairman that the question of the validity or otherwise of Rule 5(b) was (at that stage) still before the Court and that, until a determination had been reached, no doubt Superintendents would continue to use the Rule.

The report was made final and found the Superintendent's conduct to be wrong in that his decision to punish the complainants without first informing them of the nature of the allegations against them and giving them an opportunity to speak in their own defence, was unjust and unreasonable.

The report recommended that the Department take immediate action to advise all Superintendents of the appropriate procedure to be followed in similar future cases and to ensure that prisoners are informed of the nature of the allegations against them and that they are given an opportunity to put a defence forward before any penalty is imposed pursuant to Rule 5(b).

The Minister subsequently informed this Office that the recommendations contained in the report had been accepted and implemented by the Department.

On 27 July, 1984, the Department by circular issued instructions in the following terms:-

"PROCEDURES FOR IMPLEMENTATION OF PRISON RULE 5(b)

> Superintendents are reminded that basic principles of justice and fair trial must be observed when dealing with breaches of prison discipline under the provisions of Prison Rule 5(b).
>
> The following procedures are to be strictly adhered to when dealing with allegations of breaches of prison discipline:
>
> 1. The accused inmate is to be informed of the allegations made against him.
>
> 2. He is to be given opportunity to put his defence to the allegations and have such defence properly considered before any deprivation of amenities is imposed pursuant to Rule 5(b) of the Prison Rules."

Supreme Court Decision

In the meantime, on 8 June, 1984, Lee, J. in the Administrative Law Division of the Supreme Court dealt with the matter of Maybury -v- Osborne and Corrective Services Commission of New South Wales. In his judgement, Lee, J. set out the facts in the matter:-

> "On 25 November, 1983, the prisoner was brought before the Superintendent of the Central Industrial Prison, Mr. Osborne, and charged with having contraband in his possession being three $50 dollar notes and a portion of a handcuff key. The plaintiff denied the charge. The defendants say the plaintiff agreed verbally with the Superintendent disposing of the matter himself rather than referring it to a visiting Justice. The plaintiff denies he ever agreed to the Superintendent dealing with the matter. The plaintiff was asked to sign the report form indicating that the (sic) consented to the Superintendent disposing of the matter. Maybury questioned the Superintendent on the finding of the contraband. The defendants say the plaintiff then withdrew his verbal consent for the Superintendent to dispose of the matter. The plaintiff says that no consent was ever given to the Superintendent and consequentially was not withdrawn. The plaintiff requested the matter to be dealt with by the visiting Justice. The Superintendent stated that the offence was not serious enough to go to a visiting Justice and that he would deal with the matter himself under Rule 5(b). The Superintendent asked the plaintiff if he wanted to say anything and the plaintiff asked some questions. After various discussions the Superintendent stated that he found the offence proved and sentenced the plaintiff to 14 days off amenities."

The Court held that Rule 5(b) was invalid. In his judgement, Lee, J. said:-

> "In the result, then r.5(b) is to be regarded as a rule which purports to give the Superintendent power to punish what is undoubtedly an offence against discipline under s.23(q) otherwise than in

accordance with s.23A because it gives him the power to deal with the matter whether the prisoner admits the facts of the offence or not and whether he consents in writing or not. It also provides for a greater penalty than s.23A allows. It is thus inconsistent with s.23A and therefore invalid.

The fact that the rule is expressed to operate only when the governor is satisfied that the offence is not of sufficient gravity to warrant a charge does not save it from being inconsistent with s.23A. Section 23A makes no distinction between trivial offences against discipline and offences that are not trivial, although of course it may be said that it applies only to the less serious of the offences against discipline listed in s.23. Section 23(q) has the result that breach of any regulation or rule becomes an offence against discipline within s.23A. If the governor considers that an offence is so trivial that a prisoner should not be charged with the offence (and the rules of natural justice would require that the prisoner be made aware of the charge in any case where it was proposed to punish him) then he will refrain from making any charge and refrain from imposing any punishment, but he cannot punish for what is in fact an offence against prison discipline except in accordance with s.23A."

"It follows from the above that the Superintendent acted unlawfully in seeking to deal with the plaintiff under r.5 and in imposing the penalty which he did. As the plaintiff disputed the charge and gave no consent in writing to it being dealt with by the Superintendent, the only course open was to bring the matter before the Visiting Justice."

"... it was submitted that the Court should not, in any event, intervene in the exercise by the Superintendent of what is in essence a matter of internal prison discipline. The Courts are indeed reluctant, and properly so, to intervene in the ordinary administration and discipline of prisons (R. v. Hull Visitors ex parte St. Germain (1979) 1 Q.B. 425, especially at 44-50) but that reluctance stems essentially from the fact that the Courts have no real role to play in regard to discipline in organisations such as prisons - effective administration and discipline in such cases depend so much upon the view of the responsible officer "on the spot". But in the present case there need be no reluctance in the Court to intervene, for it is a case involving the exercise of a power to punish contrary to the terms of the statute."

Lee, J. granted declarations that:-

(i) the decision of Osborne (the Superintendent) that Maybury be deprived from participation in the amenities of the prison was invalid; and

(ii) Rule 5(b) of the Prison Rules made pursuant to Section 49 of the Prisons Act is inconsistent with section 23A of the Act and invalid.

It is understood that the Department has appealed against this decision.

Future Use of Rule 5(b)

Given the views of this Office and the Court's decision in Maybury, notwithstanding that the Department had appealed, it seemed unreasonable that Rule 5(b) should continue to be used.

Accordingly, the draft report earlier referred to was sent to the Minister. The Minister advised that he did not require consultation on the report and it has been made final by the Ombudsman. The report recommended that, given the Court's decision in Maybury, Superintendents be instructed to make no use of Rule 5(b) pending the outcome of the appeal.

The Acting Chairman of Corrective Services, on 27 September, 1984, informed the Ombudsman that all Superintendents had been directed not to use the provisions of Prison Rule 5(b) when dealing with breaches of discipline. He added that the Department intended withdrawing its appeal against the Court's decision in Maybury.

78. Cells in Parklea Prison Segregation Complex

On 28 May 1982, the Prisoners' Action Group lodged a complaint with the Office of the Ombudsman about the Security Block at Parklea Gaol which was then in the course of construction. The Group, in an accompanying circular letter and pamphlet, complained that the facility provided for the solitary confinement of prisoners; that such confinement amounted to cruel and inhuman treatment of prisoners, (contrary to Regulation 100(1)(b)(iv) of the Prisons Act) and constituted "wrong conduct" under the Ombudsman Act.

The Security Block is more correctly described as the Protection and Segregation Unit and, as the use of the word unit suggests, is physically separate from the ordinary cell blocks in the prison. It is a two-storey facility with eight cells on the upper level providing accommodation for a similar number of "protection" prisoners, i.e. prisoners who for their own safety must be separated from the general prison population or from particular members of that population. A separate kitchen, workroom, exercise yard and storeroom are provided for this part of the unit. On the ground level are two groups of ten cells providing accommodation for twenty "segregation" prisoners, i.e. prisoners detained away from association with other prisoners in consequence of an order pursuant to Section 22 of the Prisons Act. (See Topic "Segregation of Prisoners"). Each group of cells has a workroom, games court and storeroom.

The twenty individual cells are identical in size and construction to the cells in the general cell blocks and contain a shower, toilet, handbasin and bed. At one end of each cell is a door opening onto the inside of the unit and at the other end a door opens onto an attached yard identical in size to the cell. Each yard is separated from adjoining yards by high brick walls; the roof and far wall of each yard are constructed of heavy steel bars with a gate set in the far wall. Beyond this is a covered walkway for the use of a prison officer and beyond this is the main wall of the gaol. There is no access between yards and a prisoner in a yard would have very limited visual stimuli.

The design of the cells thus allowed for the total isolation of prisoners and avoided the need encountered in segregation facilities at other gaols of moving a prisoner to and fro for the purpose of showering and exercise. It was this aspect of the design and ultimate construction of the cells and attached yards which led the Prisoners' Action Group to comment in its pamphlet:-

> "Never before have cells been joined to individual cages and prisoners specifically excluded from ever being together, working, talking or touching."

The complaint was investigated by the former Assistant Ombudsman, Susan Armstrong. In the course of this investigation the planning process which led to the formulation of the Architectural Brief for the construction of the gaol was examined. The investigation revealed that the Corrective Services Advisory Council, constituted under Section 7B of the Prisons Act, was not consulted in the initial planning of Parklea Prison and only obtained a copy of the preliminary Architectural Brief at its own request and at a late stage in the planning.

The then Superintendent of Parklea Prison, Mr. Cerenich, advised the Office of the Ombudsman that the Unit would not be used as a solitary confinement facility, nor would inmates be kept in isolation from each other. Mr. Cerenich based his assurance on two factors. First, Mr. Cerenich advised that prisoners on segregation would be expected to work, just as prisoners on normal discipline were expected to work. Segregation prisoners would thus associate during usual working times. Second, Mr. Cerenich advised that in practice inmates would not be confined to their own cells or yards but would associate with other prisoners at the discretion of the supervising officers e.g. in using the games court. These assurances, however, failed to consider the position of those prisoners who were considered an unacceptable security risk to other prisoners or prison officers or who, for other reasons, might be kept in isolation. Further, the arrangements for work to be done in the segregation area were unlikely to produce sufficient work to keep any number of prisoners fully occupied. Similarly, the exercise of an unfettered discretion by supervising officers as to which prisoners were to be allowed to associate with other prisoners offered little assurances for segregation prisoners.

In these circumstances the former Assistant Ombudsman prepared a draft Report under the Ombudsman Act as to possible "wrong conduct" by the Department of Corrective Services in the construction of this Unit. The issues highlighted by this draft Report received media publicity particularly in the Sydney Morning Herald in late 1983.

As the Ombudsman was of the view that there were doubts as to whether the construction of the cells and yards constituted wrong conduct under the Ombudsman Act, advice was sought from experienced counsel. In his opinion counsel concluded that the construction of the cells and yards could amount to conduct under the Act. Further, counsel was of the opinion that construction of this part of the facility was capable of constituting wrong conduct within the meaning of the Ombudsman Act. This opinion accorded with the view that the character of an act may be affected by the motive or purpose for which it is done. However, counsel also noted the investigation by the Office of the Ombudsman revealed that there would clearly be permissible uses of the cells and yards which would involve solitary confinement.

Without exhausting such instances, it was accepted that prisoners might be subjected to short periods of solitary confinement e.g. for a "cooling off" period and where an immediate security problem existed. Counsel also noted the provision of work and exercise facilities, together with the assurances of Mr. Cerenich referred to earlier. In those circumstances, it was counsel's opinion that it was not possible to infer directly from the fact that the cells and yards allowed for or were adapted for solitary confinement that there was an intention to use the cells and yards for that purpose in a manner which would amount to wrong conduct under the Ombudsman Act. Such a finding could only be made if there was evidence of the actual use of the cells and yards which would throw light on the intention or purpose for which the facility was constructed.

Accordingly, the Ombudsman decided that he should not proceed to finalise the draft Report. In notifying the complainant of his decision on 3 April 1984, the Ombudsman noted:

> "Upon the basis of counsel's advice and the practicabilities of the situation, I believe that the best course that I should adopt is to discontinue investigation of the present complaint - that is as to the construction of the cells, but to indicate a firm intention to investigate promptly and vigorously any complaint as to the use of the cells in a manner that is alleged to be unreasonable or wrongful in terms of the Ombudsman Act. I should add that a number of the principles in the draft report are clearly correct. The point of difference is that while the cells may be as the former Assistant Ombudsman states in her draft report "adapted for use" for continuous solitary confinement, the central question from my point of view is whether the cells are in fact used in a manner which can be described as wrong or unreasonable. If the cells were used for continuous solitary confinement clearly the conduct could be said to be wrongful."

Since the opening of Parklea Prison it has become clear that the number of prisoners on protection at any one time has exceeded the number of prisoners on segregation. For this reason one group of the cells and yards on the ground level of the Unit have been used to accommodate protection prisoners in addition to the upper storey. This development was not contemplated by the Architectural Brief and has occurred because of the number of prisoners requiring protection.

This change in use is a matter which is being monitored by the Ombudsman, together with the use of the cells and yards for segregation prisoners. As was noted earlier in this Report the Ombudsman has commenced an investigation of his own motion under the Ombudsman Act into the area of segregation generally. This investigation will include further examination of the use of the segregation cells at Parklea Prison.

PART II

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT

79. New Legislation governing Complaints against the Police

In November 1983, the N.S.W. government introduced into Parliament a series of bills which amounted to a package of proposals aimed at eliminating corruption and improving the mechanism for investigating complaints against the police. The bills were the Police Regulation (Allegations of Misconduct) Amendment Bill, the Police Regulation (Further Amendment) Bill and the Ombudsman (Police Regulation) Amendment Bill. Amendments to the Police Regulation (Allegations of Misconduct) Act were assented to on 31st December 1983, and the principal provisions were brought into operation on 17th February 1984. In essence, the legislation has strengthened the Ombudsman's role in relation to complaints against police officers. The Ombudsman and Deputy Ombudsman now have the power to question all parties to a complaint if statements made by a complainant and a police officer or officers are in conflict.

Introducing the second reading of the bill, the Police Minister, the Hon. P.T. Anderson, M.P., spoke strongly on the issue of police corruption, saying it would be naive for anyone to believe that any police force was totally free from corruption. He continued:-

> "Police chiefs from around the globe have agreed that corruption is endemic to policing. The very nature of the police function subjects officers to tempting offers. Police officers are susceptible to the same human failings as any other members of the community, but temptation crosses their paths far more often. Policing experts agree also that the answer to this complex problem is not easy; there is no overnight panacea. They concur that the solution lies in the police force accepting that corruption, if untreated, can become systemic, and that measures are necessary not simply to detect misconduct, but to prevent it. That is what the discipline package and the bills are designed to achieve. Corruption, at whatever level and to whatever degree, must not be allowed to permeate the ranks of our police force for reasons that are obvious and for other reasons that are less apparent, but equally important. Dishonest police officers must be detected and dealt with not only because they have abused their special powers as police and brought disrepute to the force, but also because of the consequences that their actions have had for policing generally. It is a fact that the existence of corruption in a police force can severely diminish its potential for dealing effectively with crime and maintaining law and order. To use the words of an American Professor, Herman Goldstein, whose book on police corruption has been published by the American Police Foundation:
>
> > The Police officer who accepts bribes is obviously doing what he is paid by the taxpayers to prevent.

> It must similarly follow that the activities and actions of dishonest officers will have grave consequences for the vast mass of their honest and industrious police colleagues, for officers pursuing the police task and objectives honestly and diligently run the risk of being frustrated in their endeavours by corrupt officers who either work directly against them or adopt an apathetic approach to their work".

The major features of the new legislation are described in Item 81.

80. Background to the New Legislation

Soon after the present Ombudsman's appointment in June 1981, he obtained legal advice on problems associated with the Police Regulation (Allegations of Misconduct) Act. This advice was that where, by reason of conflicting written statements provided in the police investigation, the Ombudsman was unable to be satisfied either that the complaint was sustained or that it was not sustained he was entitled to find the complaint against the police officer unable to be determined. The immediate adoption by the Ombudsman of this category produced the result that over 50% of the complaints were found unable to be determined. This contrasted with the previous figures which showed over 95% of all complaints as not sustained.

Following the completion of a 6 months review of the operation of the system, the Ombudsman reported to the New South Wales Parliament on the 4th March, 1982 that the role of the Ombudsman in relation to complaints against the police was "impracticable and ineffective". He described the Ombudsman's powers in relation to allegations of police misconduct:-

> "... as a dangerous charade likely to deceive members of the public into believing that there is a public watchdog with effective powers, when there is not."

The New South Wales Police Association supported a challenge in the courts to the Ombudsman's practice of finding complaints against the police "unable to determine". In the event, the Court of Appeal held that given the fact that the Ombudsman had no independent power of investigation he was justified in making this type of finding when there was a conflict of paper statements. In the course of the judgments of the court, reference was made to the deficiencies in the legislation. One judge, adapting a Canadian judgment, said that the Ombudsman's "lamp of scrutiny" burned brightly when it was held up to the conduct of New South Wales Government departments and authorities. He said, however, that because of the limitations in the legislation, that flame "only flickers uncertainly" in regard to police complaints.

In February 1983, Mr. Justice Stewart, who headed the Royal Commission into an extensive drug ring (known as 'the Mr. Asia syndicate') produced a report in which he strongly recommended that the New South Wales Ombudsman and Victorian Ombudsman be given an independent power to investigate allegations of misconduct in respect of their respective State Police Forces.

In the context of the Ombudsman's victory in the courts, the recommendations of the Stewart Royal Commission and allegations of corruption, the New South Wales Government introduced amendments to the Police Regulation (Allegations of Misconduct) Act which were described as "the new police discipline package". The amendments included the creation of a Police Board responsible for the general direction of the police force comprised of the Police Commissioner and two civilians (one of whom was the Chairman). They also conferred powers of independent re-investigation by the Ombudsman of complaints against the police, including anonymous complaints, provided in the latter case that the complaints were of a serious nature and contained sufficient information to permit investigation.

Explaining the new provisions, the Police Minister, the Hon. P.T. Anderson, M.P., said in his second reading speech:-

> "One aspect of the present mechanism for investigating complaints which has attracted considerable public and professional criticism in recent years is the lack of any provision for investigation by an authority other than the police force itself. The Ombudsman, in his 1982 and 1983 annual reports, and in a number of reports to Parliament on particular complaints, has pointed out the difficulty of coming to a determination without the benefit of interviews with the police or complainant concerned, or the authority to undertake independent investigation. As a consequence, the Ombudsman has been resorting to a finding of "unable to determine". In the period from 1st July, 1982, to 30th June, 1983, the number of complaints falling within the "unable to determine" category was 300, representing approximately 50 per cent of the complaints fully investigated in that period.
>
> The Ombudsman has advised me that the problem was not primarily a question of dissatisfaction with the investigation by police officers. Rather, it was an inability to decide whether a complaint was sustained or not sustained because the usual means of deciding credibility, namely personal observation and questioning of witnesses, were not available to him. This is particularly relevant in cases where there are conflicts in the statements by complainants on the one hand and the police officers on the other. The Ombudsman's right to make a finding of "unable to determine" was upheld recently in the New South Wales Court of Appeal following action by the Police Association to clarify the matter. To persist with the existing practice, under which half of the complaints remain unresolved, is unacceptable for either party. But it is particularly so for members of the police force whose conduct has been brought into question and who must carry the stigma of an inconclusive investigation and a finding on his or her record of "unable to determine".

81. The Elements of the New System

Basically, the new system which became effective in February 1984 involves two stages of investigation. As before, all complaints against the police are investigated by the Internal Affairs Branch or other assigned police officers. The results of that investigation are then forwarded to the Ombudsman. In those cases (which are significantly over 50%) where there is a substantial conflict of evidence and where, as a result, he is not satisfied that the complaint has been sustained or not sustained, the Ombudsman may carry out his own investigation. The second stage of investigation is conducted by the Ombudsman or Deputy Ombudsman with the assistance of police officers seconded to the Office of the Ombudsman on a two-year basis. The Office of the Ombudsman currently has ten such seconded police officers. No other investigation officers of the Office of the Ombudsman may be involved in the second stage investigation.

The specifics of the new procedures are as follows:-

1. Receipt of complaints. A person may lodge a complaint with the Commissioner of Police, at any Police Station or at any local Court as well as with the Ombudsman. Both the Ombudsman and the Commissioner of Police in turn receive copies of all complaints. The Commissioner is required to investigate all complaints which the Ombudsman requires him to investigate.

2. Conciliation of complaints. In suitable cases the Ombudsman agrees to an attempt by the Police to an informal resolution or conciliation. In these cases a police officer, other than the member the subject of complaint, interviews the complainant. Where the matter is conciliated, the Ombudsman is provided with details and can check with the complainant to ensure that the complainant is truly happy with the resolution of the matter.

3. Police investigation of complaints. Where the complaint is not conciliated or declined as trivial or otherwise, the Commissioner of Police arranges for the complaint to be investigated. The primary police body carrying out such investigations is the Internal Affairs Branch. In other cases where the Ombudsman agrees, a police officer not forming part of the Internal Affairs Branch may conduct the investigation. The investigator will interview the complainant, the police officer concerned and other witnesses.

4. The decision of the Commissioner of Police. When the police investigation has been completed, the Commissioner of Police, or his delegate, reviews that investigation and proposes either that:-

   (i) No further action is warranted.

   (ii) A criminal charge be laid against a police officer.

   (iii) Disciplinary proceedings be taken against the police officer.

   (iv) The police officer be counselled or cautioned regarding the conduct.

5. Review by Ombudsman. The Commissioner of Police sends the final Report, including copies of the various statements and other evidence, to the Ombudsman. The Ombudsman in turn forwards copies of this material (except where to do so would be prejudicial to the public interest) to the complainant and invites the complainant's comments and asks whether the complainant wishes to have a re-investigation of the complaint by the Ombudsman. Following the receipt of any comments forwarded by the complainant the Ombudsman reviews the matter and makes one or other of the following decisions:-

   (i) Order further investigation and review by the police.

   (ii) Find the complaint sustained.

   (iii) Find the complaint not sustained.

   (iv) Find that because of conflicting statements or otherwise, he is unable to be positively satisfied one way or the other whether the complaint is sustained or not.

6. Re-investigation by the Ombudsman. Under the new legislation operative from February 1984, where the Ombudsman reaches the conclusion that he is unable to determine whether the complaint is sustained or not on the basis of the police investigation report and statements, he may decide to re-investigate the complaint himself. In making that decision the Ombudsman takes into account any representations made by the complainant and the public interest. Where the Ombudsman decides not to re-investigate a matter which he is unable to determine on the basis of the police investigation, he is required to give the complainant his reasons; in that event the legislation deems the complaint to be not sustained.

   Where the Ombudsman decides to re-investigate a matter he advises both the complainant and the police officer concerned. The Ombudsman has broad powers to investigate. Documents must be made available and individuals can be required to answer questions. As indicated above, the staff of the Ombudsman carrying out the re-investigation are plain clothes police officers seconded to the Office of the Ombudsman.

7. Hearing by Ombudsman or Deputy Ombudsman. During re-investigation the Ombudsman may decide to conduct a formal hearing. At such a hearing the complainant, the police officer and any independent witnesses give evidence and are questioned by the Ombudsman. By the terms of the legislation such hearing is required to be private - i.e. in the absence of the press or other members of the public.

8. Final decision of the Ombudsman. Following the re-investigation and/or hearing, the Ombudsman decides whether the complaint has been sustained or not. Where he finds the complaint not sustained he gives reasons for his decision. Where he finds the complaint sustained, a report is prepared setting out the relevant facts, his conclusions and findings and his recommendations as to what action should be taken. A copy of this report is sent to the Minister for Police, the Commissioner of Police, police officers concerned and the complainant.

If the Commissioner of Police disagrees with the recommendations of the Ombudsman there may be an appeal to the Police Tribunal. The Ombudsman may also make a report to Parliament about matters arising out of the investigation of a complaint.

82. First Re-Investigations by the Ombudsman

The Investigations

As at 30th June, 1984, 19 re-investigations of complaints against police officers had been commenced, and six of these complaints had been investigated, in whole or in part, by means of a hearing pursuant to the provisions of section 19 of the Ombudsman Act. Only one investigation has been the subject of a final report to the Minister of Police, although draft reports have, in a number of cases, been forwarded to the Commissioner of Police, the police officers the subject of complaint, the complainant, and any persons in relation to whom adverse comments have been made in the draft report. The comments or submissions on the draft reports of these persons have been invited. Several of the reports have been submitted, following the Ombudsman's consideration of such comments or submissions, to the Minister of Police, who has been invited to consult with the Ombudsman on the reports before they become final. None of the complaints has been the subject of a report to Parliament.

The complaint which has become the subject of a final report to the Minister of Police related to the failure by members of the police force to notify the complainant of the hearing date of offences which the police had declined, and the complainant had agreed, to prosecute. This resulted in the charges being dismissed because of the complainant's failure to appear and prosecute the charges. The Ombudsman found that, while the actions of the police officers the subject of the complaint were in accordance with current departmental practice and "not personally blameworthy", the practice which they had followed was unreasonable, in terms of section 28(1)(c) of the Police Regulation (Allegations of Misconduct) Act. The Ombudsman recommended that "steps be taken to ensure that a formal document be drawn up setting out the hearing date and the responsibilities of a private citizen who lays an information against a private citizen at a police station". Constructive suggestions as to the form of this document and its usage were made by Inspector Shattles of No. 29 Division in his comments on the draft report prepared by the Ombudsman. These suggestions were endorsed in the Ombudsman's final recommendations. Mr. R.C. Shepherd, the newly appointed Assistant Commissioner (Internal Affairs), has indicated that "I do accept that there is merit in your proposed recommendation that formal notification be introduced to advise members of the public of the date of Court proceedings and their responsibilities, when acting as the informant in charge matters preferred by Police" and "Administrative action is presently in train within the Policy Secretariat of this Department for the introduction of new police procedure to prevent a recurrence of incidents of this nature and you will be further advised when this matter has been successfully concluded".

Of the five further complaints which had, as at 30th June, 1984, been the subject of inquiries pursuant to the provisions of section 19 of the Ombudsman Act, two related to allegations of assault by police officers on persons detained

under the Intoxicated Persons Act. One of these also involved an alleged denial of medical treatment and of a request that a legal practitioner be present. Another complaint related to the alleged wrongful detention of a person under the Intoxicated Persons Act and an alleged refusal to allow that person to notify his wife by telephone of his detention. The fourth complaint was of the alleged wrongful compulsion of a person injured in a motor vehicle accident to attend at hospital and have a blood sample taken for the purposes of conducting a blood alcohol test. The fifth related to the alleged failure of Special Gaming Squad officers to identify themselves as Police officers or produce a warrant when executing a warrant issued pursuant to the provisions of section 40(1) of the Gaming and Betting Act; the resulting property damage caused by their failure to so do; an allegation of the use of offensive or aggressive language by one of the officers; the refusal to allow the complainant to photocopy the search warrant and alleged provision of a false name when asked the name of the issuing justice; the searching of the premises, and the failure of a uniformed constable who attended at the scene to check and satisfy the complainant of the bona fides of the officers from the Special Gaming Squad.

Representation

The funding of legal representation for police officers who appear before the Ombudsman during the course of inquiries pursuant to the provisions of section 19 of the Ombudsman Act has been a vexed question. Of the inquiries held prior to 30th June, 1984, on two occasions the police officers the subject of complaint were unrepresented, on one occasion represented by a private solicitor, and on the remaining three occasions represented by the solicitor for the Police Association of N.S.W., Mr. G. Liddy of Messrs. W.C. Taylor & Scott. An initial application by that Association for government funding of legal assistance, or the provision of government employed legal practitioners to represent such police officers was refused, and the Government's policy is presently that legal assistance will not be granted. A fresh application in this regard has been made by the Association. However, the Ombudsman has been informed that no imminent decision on this application, nor one within a time span which would be relevant to current hearings, is expected.

The Association's application for a "blanket" adjournment of all such enquiries pending the making of this decision has been refused by the Ombudsman, who has indicated that he prefers to deal with all applications for adjournment at hearings and to rely on the sound recording of any hearing as a record of what took place.

Methods of Investigation

The amended legislation provides for two methods of re-investigation of complaints against police officers. The first involves the exercise of the Ombudsman's Royal Commission Powers in the holding of inquiries pursuant to the provisions of section 19 of the Ombudsman Act, at which witnesses are questioned by the Ombudsman and the seconded special officer(s) assigned to the investigation. These inquiries are held at the Office of the Ombudsman or at convenient country locations. The alternative method of re-investigation may be carried out by the Ombudsman, the Deputy Ombudsman, or seconded special officers, pursuing somewhat less formal inquiries.

Frequently, the holding of a section 19 inquiry into a complaint is preceded by preliminary inquiries conducted by the seconded special officer(s) assigned to the investigation.

83. Secondment of Police Officers to Office of the Ombudsman

a) The question of impartiality

Ten Police officers have been seconded to the Office of the Ombudsman to assist with re-investigations provided for under the new legislation. There has been some debate as to whether police investigators can be sufficiently independent, vigorous and impartial when investigating the conduct of colleagues. It is not easy for serving officers to set aside the shared values of a closeknit organisation. The Police Minister, the Hon. P.T. Anderson, spoke of this difficulty in his second reading speech, quoting the words of Professor Goldstein:-

> "There is no more formidable barrier to eliminating corruption than the blue curtain- the conspiracy of silence among Police. Rarely does an officer report the corrupt behaviour of a fellow officer."

The former Assistant Ombudsman, Ms. Susan Armstrong, was sceptical of the capacity of serving officers to investigate complaints against the police. In press interviews at the time of her resignation, she criticised the exclusion of the Assistant Ombudsman and other civilian investigation officers from the further investigation of complaints against police.

The question of whether civilian investigators should also be able to assist the Ombudsman and Deputy Ombudsman in re-investigations of police complaints was canvassed in the Legislatively Assembly. The Leader of the Opposition, Mr. N.F. Greiner, M.P., said on 23rd November, 1983:-

> "With respect to the Ombudsman (Police Regulation) Amendment Bill, a matter that concerned the Opposition was whether it was desirable to consider amending proposed new section 10(2)(e) in order to allow outsiders - in other words, persons other than those seconded from the internal affairs branch - to be able to work for the Ombudsman in particular cases. On balance the Opposition considers that the system is worthy of trial, though it is subject to the criticism that one does not really check one's prejudices when one gets to the door. Nevertheless, the Opposition is willing to accept the provision that it will be members of internal affairs branch who will be doing the work for the Ombudsman.
>
> ...
>
> The question really is whether one ought to consider adding words to proposed new section 10(2)(e) such as, "or such other person as considered appropriate by the Ombudsman in a particular case". On balance, the Opposition is of the view that this system deserves a trial in the first instance. It is sufficiently under the control of the Ombudsman to remove the regular criticism that arises of how can the actions of police investigating the police be seen to be beyond doubt in every way, which, of course, is the purpose of the exercise..."

The Ombudsman and Deputy Ombudsman both take the view that it is their task to lend their energies to attempting to

make the new legislation work as effectively as possible. If, after a reasonable trial they believe that there are real defects in its operation in practice, their duty is to draw the attention both of the Minister and Parliament to these defects. The present Ombudsman did this by successive reports to Parliament on 4th March, 1982 and 14th September, 1982 and will not hesitate to do so again if, in his opinion, the circumstances warrant it.

b) The selection of the seconded officers

Police Circular No. 84/9, 'Vacancies for secondment as investigators to the Ombudsman's Office' issued in January, attracted 30 applications from interested officers. Their ranks ranged from Inspector to 1st Class Constable, and their ages from 53 to 25. All but one, who was absent on sick leave, were interviewed by the Ombudsman. On the basis of the interviews and certain other enquiries, ten were nominated for secondment.

The applicants were predominantly senior officers. Six inspectors, seven 1st class sergeants, two 2nd class sergeants, ten 3rd class sergeants, four senior constables, and one 1st class constable applied. The Ombudsman's aim was to have a spread of ages and ranks, and those selected were one inspector, three 1st class sergeants, one 2nd class sergeant, two 3rd class sergeants, and two senior constables.

No women had responded to the circular, and, because the Ombudsman was keen to include some female officers in the group of secondees, steps were taken through the spokeswomen and equal opportunity networks of the Police Force to see if any were interested. Ultimately two women officers, Detective Sgt. Gwen Martin, and Acting Sgt. Barbara Fraser, a 1984 Churchill scholarship holder, were made available. The team selected by the Ombudsman included two police prosecutors, four detectives, a senior member of the Aboriginal Liason Unit, a highway patrol sergeant and a technical specialist. The senior officer is Det. Insp. W.J. Huff, but within the Office of the Ombudsman, there is no rank structure. Seconded police not occupy a designated area, but have been allocated rooms adjacent to civilian investigators. Each seconded officer reports directly to the Ombudsman in the discharge of delegated powers.

The capacity of seconded officers to be independent may be illustrated by this exchange between a senior police officer who was the subject of a complaint and a seconded officer.

"Young man, do you realise you eventually have to come back to the Police Force?"

"Yes, sir, I do, but while in this position I'm going to do my duty."

"You're not going to report this conversation to the Ombudsman, are you?"

"Yes, sir, I am."

c) Five years experience with Internal Affairs Branch: Legislative barrier to appointment.

Under the legislation governing the new police procedures, seconded officers must be made officers of Internal Affairs Branch before joining the Ombudsman's Office. Service in the I.A.B. is subject to a time limit of five years, under section 34(7)(b) of the Police Regulation

(Allegations of Misconduct) Act. The Ombudsman wishes to have the option of recruiting police officers who may have already served five years in the I.A.B. This is precluded at the moment.

The Police Minister recently has indicated a willingness to amend the legislation to remove this barrier.

d) Assessment of the effectiveness of the new procedures

The effectiveness of the new procedures cannot be assessed early in their operation. In the next Annual Report or in a Special Report to Parliament after one year's operation an assessment can be made of both trends in complaint outcomes and effectiveness of the new system. At the present time the Ombudsman considers that the seconded officers have made considerable efforts to become part of the Office of the Ombudsman in a real sense. A number of the re-investigations carried out in the limited period that the new Act has been in operation demonstrate both committment and efficiency.

84. New Assistant Commissioner (Internal Afffairs) : Robert Charles Shepherd, B.A.

Assistant Commissioner Shepherd is a Churchill Fellow and a graduate of Newcastle University and the F.B.I. National Academy.

During his 36 years service, in country and metropolitan areas, Mr. Shepherd has worked in many sections of the Police Force, including Criminal Investigation, Scientific Section, Courts, Internal Affairs and General (Uniform) Duties, as well as being a member of a number of committees and boards dealing with Police work, recruiting, adult education and planning.

Since Mr. Shepherd's appointment to his present position there have been profitable discussions and, although differences occur in some areas, there has been a marked improvement in relationships and communication between the Police Internal Affairs Branch and the Ombudsman's Office.

85. Data Relating to Police Complaints

During the year 1 July 1983 to 30 June 1984, a total of 1,550 complaints against the Police Department were received (201 more than for the previous year), and 1,155 complaints were finalised.

The following table represents the results of the complaints finalised in 1983/84:

RESULT	1983/84
Sustained	11
Not Sustained	56
Unable to Determine - (prior to 16/2/84)	127
Unable to Determine - Not Sustained (17/2/84 onwards)	70
	197
Declined	463
Conciliated	258
Not Proceeded With (prior to 16/2/84)	128
Discontinued (17/2/84 onwards)	40
	168
TOTAL	1,155

CATEGORIES OF COMPLAINTS

Sustained

The decision of the Court of Appeal in Moroney's case laid down the guidelines to be applied by the Ombudsman in determining whether a complaint should be found sustained under the old system where the Ombudsman had no powers of direct investigation. The complaint should be found sustained by the Ombudsman when there was no material dispute about the facts, that is to say in effect, where the police officer admitted to facts which constitued wrong conduct. The application of this principle in part explains the sustained figure of 11 complaints for the year ending 30 June 1984. Under the new system which commenced in the second half of the year (but in respect of which there were no sustained findings before 30 June 1984) sustained complaints will now also include matters which the Ombudsman has re-investigated and found to be sustained. Accordingly, next year's figures will give a more accurate picture of the workings of the system.

Not Sustained

Correspondingly, under the judgement of the Court of Appeal in Moroney's case, a complaint could only be found not sustained by the Ombudsman under the old system where the complainant conceded that the complaint was not valid or where on the material facts not in dispute, it could be said that there was no wrong conduct on the part of the police officer. The application of this approach in part explains that not sustained figure of 56 complaints. Again, next year not sustained figures will include the results of re-investigations by the Ombudsman where he has positively found a complaint not sustained as a result of his own investigations. Again, the figures for next year will give a more accurate assessment of the number of complaints not sustained.

Unable to Determine

Under the old system where material facts were in dispute between the complainant and the police officer (as was the case in the majority of matters) the correct finding by the Ombudsman as indicated by the Court of Appeal was that the Ombudsman was unable to be satisfied either that the complaint was sustained or that it was not sustained. As a majority of complaints fall into this category, this explains the 197 "Unable to Determine" findings shown by the above table.

This category will disappear as a result of the new legislation. Where on the paper statements provided by the police investigation the Ombudsman is unable to determine the matter, he may decide to re-investigate. If he does so re-investigate, his finding will either be sustained or not sustained. Where the Ombudsman does not re-investigate such a matter (primarily for the reason that the complainant does not request re-investigation) the complaint will be deemed to be not sustained.

Complaints Under Investigation

On 30 June 1984, 979 complaints were under investigation i.e. not completed, 68% more than the previous year's figure of 584. Some of the reasons for this are:

(i) the amendments made to the Police Regulation (Allegations of Misconduct) Act, allowing further investigation under the Ombudsman Act;

(ii) the Ombudsman's decision during the course of the year that certain complaints relating to the conduct of Highway Patrol Officers should be investigated. In previous years very few such complaints were accepted for investigation; and

(iii) the increase in the number of complaints received during 1983/84 as compared to the previous year.

The following table shows the breakdown of complaints received and complaints finalised on a year by year basis since the operation of the Police Regulation (Allegations of Misconduct) Act began.

Year	Complaints Received	Complaints Finalised
1978/79*	244	64
1979/80	741	618
1980/81	830	570
1981/82	1,121	1,277
1982/83	1,349	1,243
1983/84	1,550	1,155

* first year of operation of the Act which commenced on the 19 February, 1979.

Nature of Complaints

The nature of complaints made under the Police Regulation (Allegations of Misconduct) Act, which were finalised during 1983/84 are set out in the following table. It should be noted that the table lists the number of separate allegations, not the number of complaints. Often a written complaint contains more than one allegation of misconduct.

Complaint	Number of Allegations	
	No.	% of total allegations
Wrongful issue of Traffic Infringement Notices	339	21.0
Rudeness	221	13.7
Fail to take action	159	9.8
Assault	142	8.7
Harassment	85	5.3
Wrong Treatment (e.g. victimisation, provocation)	57	3.5
Misuse of Office	44	2.7
Fail to properly investigate	40	2.5
Threats	37	2.3
Fail to return property	35	2.2
Unnecessary arrest	33	2.0
Unnecessary detention	30	1.9
Refuse reasonable request	27	1.7
Abuse	26	1.6
Theft	23	1.4
Fabrication of evidence	20	1.2
Dangerous driving	20	1.2
Incorrect charges	15	0.9
Breach of Laws (e.g. dangerous driving, drinking on duty, non-compliance with tow truck rosters)	14	0.9
Bribery	9	0.6
Fail to identify/wear number	9	0.6
Other	230	14.3
T O T A L	1614	100.0

The following table gives the percentage of allegations investigated by the major categories of complaint. It is interesting to note that the smallest percentage of investigations were commenced into allegations contained in the two largest categories of complaint.

Complaint	Total No.	Investigated by Police	% Investigated
Unnecessary Actions (e.g. wrongful issue of TIN, unnecessary arrest or detention)	459	44	9.6
Rudeness	221	16	7.2
Neglect of Duty (e.g. fail to take action, fail to properly investigate)	209	42	20.1
Wrong Treatment (e.g. victimisation, harassment)	143	35	24.5
Assault	142	102	71.8
Wrong Administrative Conduct	76	11	14.5
Breach of laws (e.g. dangerous driving, drinking on duty, non-compliance with tow truck roster)	65	25	38.5
Information (e.g. providing unauthorized information)	54	18	33.3
Crime (major)	44	23	52.3
Misuse of Office	44	19	43.2
Fail to provide rights	39	18	46.2
Threats	37	20	54.1
Evidence (e.g. fabrication, perjury)	30	12	40.0
Errors (e.g. incorrect charges, accidental property damage)	26	12	46.2
Abuse	25	13	52.0
T O T A L	1614	410	25.5

While the "Unnecessary Actions" category of complaints is by far the largest, it is important to note that 339 of the total of 459 allegations related to the wrongful issue of Traffic Infringement Notices (TIN), an area that the Ombudsman feels is more appropriately dealt with by a court (although this Office may look at the conduct of the Police Officer who issued the TIN).

Apart from the wrongful issue of TIN'S, the largest single category of complaint was that Police Officers had failed to take action. The types of complaints that fall into this category include such matters as police failing to respond to information about a crime, or to a request for assistance. A very large percentage of these complaints is conciliated before any formal investigation commences. On the other hand, allegations of assault are considered to be more serious and the majority of these complaints are made the subject of investigations. Less significant allegations of assault are often made the subject of conciliation attempts.

Statistics on Complainants

Men constituted 72% of all complainants, while 21% were women (the remainder being solicitors, couples, corporations etc). Although this ratio is fairly common throughout the various categories of complaints, 85% of complaints relating to assault were made by men while only 11% were made by women. On the other hand, while 59% of the complaints relating to Neglect of Duty (especially failure to take action) were made by men, 29% were made by women.

In relation to the location of incidents, 70% of all complaints were said to have occurred in the Sydney Metropolitan Area. Of these complaints 22% occurred in the centre of the city and 16% in Sydney's Western Suburbs.

Aboriginals made 3% of all complaints, persons whose surnames indicated that their native language was not English accounted for 19%, and prisoners for 7%. While 9% of all allegations related to assault, 44% of Aboriginal complaints alleged assault.

Approximately 59% of complaints were made direct to the Police Department and approximately 10% were made to the Minister for Police, with 31% of complaints made directly to this Office. Reasons which might explain this include:-

- most of the large number of complaints relating to the issue of Traffic Infringement Notices are initially made to the Police Department, on the basis that that Department is responsible for the implementation of the provisions of the Motor Traffic Act, under which the tickets were issued.

- a natural reaction of a person wishing to complain about the conduct of a member of an organisation is to complain to a higher authority within the organisation, at least in the initial instance.

- many complainants are not aware at the time of lodging their complaints, of the existence and functions of this Office in respect to complaints about the conduct of Police Officers.

Of the complaints finalised: 75% were made by the complainants themselves; 10% were referred by a legal representative for the complainant; a further 6% were referred by Members of Parliament, while 5% were referred by family or friends and 1% were anonymous.

86. Unreasonable Detentions under Intoxicated Persons Act

The Intoxicated Persons Act (1979) came into effect on the 17 March, 1980. In 1981, the latest year for which figures are available, there were 71,480 detentions and receptions and this figure appears to be on the increase.

The Act provides that if a person is found intoxicated (seriously affected apparently by alcoholic liquor) in a public place and is -

i) behaving in a disorderly manner;

ii) behaving in a manner likely to cause injury to himself or another person or damage to property; or

iii) in need of physical protection because of his incapacity due to his being intoxicated;

he or she can be detained and taken to a proclaimed place by a member of the police force or an authorised person.

Any person who is taken to a proclaimed place (for example a police station) may be detained there for 8 hours or until he ceases to be intoxicated - whichever occurs first. Provision is also made to release the person sooner if a "responsible person" is willing to undertake their care.

Some confusion would appear to exist in regard to the application of this Act by both the detaining officer and the detained party. For example, people detained under this legislation must be "seriously affected apparently by alcoholic liquor"; since April 1983, detained persons have been allowed to make a telephone call; a person is not arrested and charged under this legislation, merely detained (this usually involves being placed in a cell); detentions under the intoxicated Persons Act are not subject to an independent review by a court or any body other than the Ombudsman.

Complaints received in this Office and detailed below are illustrative of some of the problems which can arise.

Case A:

Mrs. S. complained through her solicitors that she had been assaulted by two police officers Sgt. C. and Const. W. during which she suffered bruising, and her clothing was torn. Mrs. S. claimed that she was wrongfully detained by those police officers.

Sergeant C. advised that he had received a telephone call complaining that there was domestic trouble in Hill Street and that foul language was being used. Sergeant C. and Constable W. called at the scene at 10.05 am and found Mr. and Mrs. S. by the roadside. Sergeant C. apparently advised Mrs. S. "I think you should go home and sort this out later on with your husband, instead of carrying on out here in a public street, so everyone can hear you swearing". Mrs. S. refused and Sergeant C. advised "we are going to take you to ... Police Station where you will be detained as an intoxicated person".

A struggle ensued and Mrs. S. was eventually subdued and placed in the police car. At the Police Station Mrs. S. advised that she hadn't been drinking, nor was she drunk. Sergeant C. decided against detaining Mrs. S. and she was

taken home. Mrs. S. was later examined by Dr. T. who reported bruising, tenderness and an abrasion consistent with Mrs. S.'s allegations.

Three prequisites had to be met before Mrs. S. could be detained under the Act, namely

i) be intoxicated,
ii) be in a public place,
iii) be behaving in a disorderly manner.

Mrs. S. disputes she was intoxicated, however, Sergeant C. and Constable W. formed the opinion that she was; she was in a public place but at the time the two police officers saw her and formed the view that she was intoxicated her conduct did not really amount to disorderly conduct.

The opinion has been put forward that the Act does not permit a police officer to rely upon what he heard on the telephone prior to his arrival at the scene in reaching an opinion that a person is behaving in a disorderly manner. It was concluded that the three prerequisites must be fulfilled silultaneously; and the evidence of the police officers, even if accepted in its entirety, shows that the prerequisites for a lawful detention did not exist and that consequently, the force used to detain Mrs. S. was an assault and that, on the balance of probabilities, the bruising and other matters noted by her doctor did arise as a result of that assault.

Case B:

Mr. D., an invalid pensioner of Darlinghurst complained that at approximately 12 pm on 20 March, 1983, he was standing near his lodgings in Bourke Street when a Paddy Wagon stopped and two policemen got out. He was then put into the Paddy Wagon and taken to Darlinghurst Police Station where he was put into a cell and remained there until 5.00 pm when he was allowed to leave. He also complained of another incident on the 28 March, 1983, when he was outside the Wentworth Hotel about 10 pm waiting to see Prince Charles and Princess Diana leave. He was "arrested" and taken to Central Police Station. He asked to make a phone call to his solicitor, however, this was refused. He was released at 5.00 am the next morning. He advised that on neither occasion was he charged or arrested.

The general police response to his complaint was that due to past experience they were expert in determining an intoxicated person, that Mr. D. was staggering, that they could smell intoxicating liquor on his breath and his speech was incoherent. As well, the directive regarding the right to make a phone call had not yet been issued.

Mr. D.'s solicitor responded on his behalf and advised, amongst other things:

i) that Mr. D. strenuously denies that he was intoxicated;

ii) that Mr. D. suffers from Herspans disease and that this has the effect of making him clumsy on his feet. He tends to sway when standing and stagger when he walks. Due to the disease, he may have been unsteady on his feet when approached by Police and caused them to form the opinion he was intoxicated although he was not.

iii) Mr. D.'s two upper front teeth are completely missing. This causes difficulties with his speech and often he is difficult to understand.

iv) Mr. D. denies that police would have smelt intoxicating liquor on his breath on either occasion as he had not been drinking on those days nor the days prior.

Case C:

Mr. L. left a hotel, a short walk from his home, after 4 or 5 schooners and was subsequently picked up by Police at approximately 9.30 pm. Mr. L. complained that when detained by Police he was not intoxicated, that a Breath Analyser Test was refused, that his request to ring home was refused and although not charged, he was locked up and "treated as a common criminal".

Mr. L. alleged that the passenger police officer got out of the car and grabbed him and told him he was being taken into protective custody. The police involved, maintain he was stumbling on the footpath and onto the road, he was staggering and unsteady on his feet, as in the manner of an intoxicated person. Both Constables H. and M. expressed concern for the personal safety of Mr. L. walking on Parramatta Road, and the likelihood of him causing an accident. Mr. L. was detained and released at 1.35 am.

In his draft report of his investigation of this matter, the Ombudsman concluded that Mr. L. was detained in accordance with the Act. The Ombudsman in the draft report found, however, that Mr. L. had wrongly been refused permission to telephone his wife from the police station. The following general comments were made in the draft report:-

> "An alarming blend of confusion, ignorance and misunderstanding was exhibited by all parties to this dispute in relation to their understanding of their rights and duties under the provisions of an Act which has been in operation since 1980. It seems from this case and others that have come to my attention, that the Act remains, after 4 years, an enigma not only to those detained under its provisions but also to those policing it. None of the police officers who dealt with Mr. L. used the term 'seriously affected apparently by alcoholic liquor' as required by the Act, to describe his state. Some described Mr. L. as 'well affected', while others used 'moderately affected' and 'fairly affected' and still others admitted that they were not aware at all of the requirements that a person had to be 'seriously intoxicated' before coming within the scope of the Intoxicated Persons Act. One senior officer was not even aware that detained persons have a right to a phone call ...
>
> Finally, I would like to comment on the confusion expressed by the complainant Mr. L. and his friends in relation to his detention under the Intoxicated Persons Act. It is indeed unfortunate that citizens detained under this Act for their own protection end up feeling like they were 'treated as common criminals' and confused about what has legally happened to them. Mr. L. thought it odd that he had been locked up in a cell yet not charged (yet this is provided for in the legislation). He also thought erroneously that he should have been given a blood test or a breath analyser test to test the assessment of his intoxication by the arresting police officers (this is not required by the legislation). His friends,

Mr. M. and Mr. B. were surprised when Mr. L. told them that he had been detained. Obviously, if this very sensitive piece of legislation, one that deprives a citizen of his liberty without charges being laid, is to have any chance of working it must be administered professionally and with great care and the public must be informed about its provisions."

The following recommendations are made in the draft report:-

i) that steps be taken to ensure that Forms 1 and 2 under the Intoxicated Persons Act are re-drafted to include the words 'seriously affected apparently by alcoholic liquor' underlining the word 'seriously'. Further, space should be provided on the forms for the insertion by police officers of the reasons which led them to believe the citizen was 'seriously affected' by alcoholic liquor;

ii) that the Intoxicated Persons Act's provisions and procedures be once again the topic of lectures given by the Police Divisional Education Officers, attached throughout the State ...;

iii) that a poster be prepared explaining the rights of a citizen under the Act and be placed in each 'proclaimed place' in New South Wales to inform both police and citizens about the provisions of the Act;

iv) that the Police Department conduct a publicity campaign to inform citizens of their rights under the Act.

87. Delays in Police Investigations

In the 1982/83 Annual Report the Ombudsman noted that extensive delays were being experienced in the investigation of citizens' complaints by the Police. Details of a not untypical complaint were outlined as an example and the Ombudsman went on to state that should he be given the power to re-investigate complaints, such delays would not be tolerated.

In that report it was foreshadowed that if undue delays persisted to an unreasonable extent the Ombudsman would have no alternative than to make individual reports to Parliament detailing the delay.

Some examples to illustrate the problem include:

1)	16 March 1984	-	Complaint to this Office
	26 March 1984	-	Copy of complaint forwarded to Commissioner of Police for preliminary enquiries to be made
	6 April 1984	-	Acknowledgement from Deputy Commissioner of Police
	13 June 1984	-	Request to Commissioner of Police for progress report

27 July 1984	-	Further request to Commissioner of Police for progress report
30 August 1984	-	Further request to Commissioner of Police for progress report. Advice that legal proceedings and/or a report to Parliament would be contemplated if the requested information was not furnished by the 14th September 1984.
20 September 1984	-	Police report received.

Twenty-six (26) weeks elapsed from the time that a copy of the complaint was forwarded to the Commissioner, before a progress report was received by this Office, even though three separate requests were made for such a report over a fifteen (15) week period.

2)

8 December 1983	-	Complaint to this Office
13 December 1983	-	Complaint referred to Commissioner of Police for investigation
9 January 1984	-	Acknowledgement from Deputy Commissioner of Police
15 March 1984	-	Request for progress report
12 June 1984	-	Further request for progress report noting that legal proceedings and/or a report to Parliament would be contemplated if the requested information was not furnished by the 22nd June, 1984
6 July 1984	-	Report on investigation received from Assistant Commissioner (Internal Affairs).

In this case, after the acknowledgement had been received from the Deputy Commissioner of Police, a period of six months elapsed before any further communication on the matter was received from the Police Department.

3)

8 November 1983	-	Complaint to Police Commissioner
22 November 1983	-	Letter from Deputy Commissioner of Police to Ombudsman enclosing copy of complaint
1 December 1983	-	Letter from Ombudsman to Commissioner of Police agreeing to Police proposals for dealing with complaint
6 March 1984	-	Request for progress report

1 May 1984	-	Further request for progress report noting that legal proceedings and/or a report to Parliament would be contemplated if the requested information was not furnished by the 18th May, 1984
18 May 1984	-	Progress report received from Assistant Commissioner (Internal Affairs)
30 May 1984	-	Letter from Assistant Commissioner (Internal Affairs) requesting consent to discontinue the investigation on the basis that on the 6th March, 1984 the complainant advised that he did not wish to pursue his complaint.

As can be seen, despite two requests, no progress report was furnished to the Ombudsman until twenty-seven (27) weeks after the complaint had been received.

4)

22 September 1983	-	Complaint to this Office
22 September 1983	-	Copy of complaint forwarded to Commissioner of Police for investigation
5 October 1983	-	Acknowledgement from Deputy Commissioner of Police
9 January 1984	-	Progress report received from Police Department anticipating that the complaint would be finalised in February 1984
13 April 1984	-	Progress report received from Police Department advising of delay due to inability to interview a police officer on sick report
18 April, 1984	-	Progress report from Deputy Commissioner advising that the investigation had been completed and a final submission was being prepared
2 May 1984	-	Request to Commissioner of Police for advice as to the results of enquiries into the complaint
4 June 1984	-	Progress report from Assistant Commissioner (Internal Affairs) that the investigating officer was preparing his submission following his investigation

	10 July 1984	-	Progress report from investigating officer stating that the investigation had been completed and a submission was being prepared. It was anticipated that the draft would be completed by the 27th July, 1984.
	11 September 1984	-	Progress report received in this Office.

As can be seen, the progress report requested in this matter was not received in this Office until twenty-one (21) weeks after the investigation had been completed.

5)	20 February 1984	-	Complaint to this Office
	29 February 1984	-	Copy of complaint forwarded to Commissioner of Police for investigation
	13 March 1984	-	Acknowledgement from Acting Deputy Commissioner
	19 April 1984	-	Progress report advising that after experiencing difficulties in contacting the complainant, she had been interviewed on the 9th April, 1984
	13 June 1984	-	Request for a progress report.
	27 September 1984	-	Final report received from Police.

The final report in this matter was not received until 21 weeks after a progress report had been furnished by the Department.

6)	9 May 1983	-	Complaint received in this Office
	17 May 1983	-	Copy of complaint forwarded to Commissioner of Police suggesting that an attempt should be made at conciliation
	25 May 1983	-	Acknowledgement from Deputy Commissioner
	22 August 1983	-	Deputy Commissioner advised the Ombudsman that the complainant had withdrawn his complaint
	7 February 1984	-	Deputy Commissioner advised that an investigation should be carried out (after a period of confusion as to whether or not the complaint had been conciliated)
	7 May 1984	-	Request for progress report

14 June 1984	-	Progress report received from investigating officer advising that the complainant had been interviewed on the 17th April, 1984 and that he expected the inquiry to be finalised by mid June
30 July 1984	-	Request for progress report
5 September 1984	-	Further request for a progress report advising that legal proceedings and/or a report to Parliament would be contemplated if the requested information was not furnished by the 19th September, 1984
11 September 1984	-	Final report received in this Office.

Although the Police Internal Affairs Branch is taking steps to speed up the investigation and reporting process, the fact that the abovementioned cases are not isolated examples indicates that the problem is far from being resolved. The Ombudsman now has the power, in certain circumstances, to re-investigate complaints once the police investigation has been completed. As stated in the last Annual Report, for such re-investigations to be meaningful, they must be undertaken as soon as possible after the event complained of.

88. Progress Reports to Complainants

Owing to the length of time that is usually involved in Police investigations, the Ombudsman regularly requests information from the Commissioner (pursuant to Section 21 of the Police Regulation (Allegations of Misconduct) Act) as to the progress of the initial police investigation. The general procedure is to wait two months, and if no advice as to progress has been forwarded from the Commissioner, a request for information is sent to him from this Office.

In order to keep the complainants informed of the progress of the investigations, they are furnished with copies of the information provided to this Office by the Commissioner. It is normal practice to send the complainant copies of all of the information the Office has been sent. However, the Commissioner has the power to restrict the disclosure of the material, provided he has good reasons in the public interest.

The procedure for progress reports to complainants is both necessary and useful. It helps to prevent the complainants becoming disillusioned due to the often slow progress of investigation.

89. Anonymous Complaints

Effect of New Legislation

In last year's Annual Report reference was made to the manner in which the amendments to the Police Regulation (Allegations of Misconduct) Act passed in November 1983 would effect anonymous complaints. In effect the legislation was a compromise between the legal advice given to the Ombudsman by senior counsel that the existing Act already covered anonymous complaints and the stated position of the Police Commissioner that the existing legislation did not cover anonymous complaints at all. The effect of the legislation simply stated, was to preclude the Ombudsman investigating anonymous complaints made prior to the date of assent to the new legislation (31 December, 1983) or in respect of conduct occurring before that date (Section 6 (1A)) but permitted the Ombudsman to investigate fully complaints received after that date subject to certain restrictions. These restrictions (set out in Section 18 (1A)) were that the Ombudsman must be of the opinion that the complaint:-

a) contains sufficient information to enable an investigation to be carried out; and

b) alleges conduct which would either warrant the imposition of a substantial punishment, if a departmental charge was proved, or provide reasonable grounds to believe that a criminal offence had been committed by a police officer.

Number of Anonymous Complaints

Of the 990 complaints received between January and the end of August 1984, only 15 (1.5% of the total) were anonymous.

Of these 15 anonymous complaints: no action was taken in relation to 6, on the basis that they were not in accordance with the requirements of section 6(1A) or 18 (1A) of the Act; no action was taken on a further 2 on the basis that the complaint did not disclose any conduct which could be considered to be "wrong" in terms of the Act; and, formal investigations were commenced into the remaining 7 complaints.

In relation to the 7 complaints which were accepted for investigation, the most common allegations concerned misuse of office followed by allegations about crimes, including theft, bribery and use of drugs by police officers.

Anonymous Complaints Received Prior to the New Legislation Coming into Effect.

In last year's Annual Report reference was made to three anonymous complaints which were received prior to the new legislation and hence could not be investigated by the Ombudsman. The relevant extracts from last years Annual Report are as follows:-

> "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....

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 the 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..."

There were discussions between the Ombudsman and the Minister for Police as to these anonymous complaints. The Minister undertook to have the files on these complaints reviewed with the objective of determining whether steps subsequently taken were reasonable. By letter dated 9th April, 1984, the Minister advised the Ombudsman of the results of his enquiries as follows:-

"I refer to your letter of 17th October, 1983, in which you provide particulars of three anonymous complaints. In the course of discussions of the proposals for legislation to amend the Police Regulation (Allegations of Misconduct) Act, I undertook to have the files on these complaints reviewed with the objective of determining whether the police investigation of these matters was adequate and whether the steps subsequently taken were reasonable.

All relevant documents relating to these complaints were provided by the Commissioner of Police and these have been carefully considered by staff in my office. This review revealed that detailed investigations by the Police Internal Affairs Branch were commenced promptly in each of the

cases. I am also satisfied that the investigations of each complaint explored all the necessary avenues of inquiry which might have been expected in the circumstances. From the files I note that you were not informed of the results of the investigation into the allegation about the blank search warrants, however you were informed "as a matter of courtesy on the outcome of the other two investigations".

In the case of the "blank search warrants" complaint, a 3rd Class Sergeant was charged with one count of "disobedience" and two of "neglect of duty". The Sergeant admitted the two charges of neglect of duty and the Commissioner found the charge of disobedience proven.

The officer was dealt with by way of reprimand.

The Commissioner in ruling upon the charge of disobedience made the following observation:-

> "Whilst I can accept that it was not a deliberate action on the part of the Sergeant to obtain the Special Search Warrants signed in blank, that they had been inadvertently signed, as claimed by him, the fact remains that he had the documents in his possession and did not take all necessary action expected of him in those circumstances. Accordingly, and despite the arguments advanced by him, I find the Departmental charge of 'Disobedience' proved."

The Commissioner also referred to a number of other mitigating factors which were taken into account in deciding the penalty.

Having reviewed the file on this case I have formed the view that the action taken subsequent to the investigation was appropriate and fair.

I now turn to the subsequent actions taken in respect of the second and third complaints listed in your letter.

The review of the files on both of these matters supports the conclusion that the allegations are not substantiated.

Because of the seriousness of the allegations made against Inspector --- I would like to point out that the investigation revealed that many of the claims were without any factual basis whatsoever, and that the other claims appear to be gross exaggerations or the result of misinterpretation of the facts. The investigation revealed that the Inspector was involved in a car accident whilst driving a police car but the accident, contrary to the terms of the complaint, was the subject of a full and proper police report. Alco-tube tests were administered to both drivers. There is no evidence that the Inspector attempted to leave the scene or was chased. I concur with the decision that the Inspector's conduct did not warrant formal disciplinary action.

Notwithstanding the fact that the alco-tube test of the Inspector showed a negative result, the Internal Affairs Branch Investigation indicated

> that a small quantity of alcohol had been consumed by the Inspector prior to his being involved in the accident.
>
> Because of the special obligation which is placed upon members of the Police Force to set a good example in these matters, I have suggested to the Commissioner that consideration might be given to some action to remind the officer of his responsibilities, possibly by way of counselling. I have also asked the Commissioner to comment on the adequacy of the present Instructions concerning the consumption of alcohol by police whilst in charge of a police vehicle.
>
> Your letter raised the question of whether under the legislation, and in the public interest, the Ombudsman should scrutinise the results of the police investigations in the above three matters. Whilst I am only too pleased to inform you of the results of the investigations carried out by police into those matters, I am obliged to point out that under the provisions of the Police Regulation (Allegations of Misconduct) Amendment Act, 1983, these complaints, having been received prior to the date of assent to the amendment, do not fall within the scope of the Act. You can however, be assured that the complaints in question were taken seriously by the Commissioner and subjected to the usual investigation procedures."

The Ombudsman appreciates the personal interest taken by the Minister in reviewing the investigation in these matters.

Ballina Anonymous Complaint

On 12 January 1984, an anonymous complaint was received in this Office alleging that a police officer from the commissioned ranks of the force had placed improper pressure on a police prosecutor and a magistrate to ensure preferential treatment for a particular member of the public facing two drink driving charges.

The complaint was very detailed giving the name, address and licence number of the driver; day and time offences; results of two breath analysis tests; relevant departmental file numbers; plus the date, location and results of the court hearing. The anonymous letter was expressed to be from a police officer who feared the consequences should he supply his name.

As the subject matter of the complaint related to conduct which occurred wholly before the date of assent to the Police Regulation (Allegations of Misconduct) Amendment Act, 1983, the complaint did not fall within the scope of the Police Regulation (Allegations of Misconduct) Act, 1978 and the Ombudsman's Office could therefore not be involved in any investigation of the allegations.

A copy of the complaint was forwarded to the Commissioner of Police and the Ombudsman expressed a desire to be advised as to the result of any enquiries that may be made in the matter.

In reply the Commissioner of Police advised the Ombudsman in the following terms:-

> "I refer to your letter of 2 April 1984, concerning the abovementioned matter and advise that inquiries reveal that the decision by Assistant Commissioner... to direct the withdrawal of the charge was made honestly in the normal course of his duty. Further, there is no evidence of any wrongful influence being exerted upon the Assistant Commissioner in the making of such decision."

The Ombudsman replied to the Commissioner noting that minimal information had been supplied as to the results of enquiries and that as the complaint related to matters prior to the amendments becoming effective, he had no powers to enquire further.

The Ombudsman also wrote to the Minister of Police noting that:-

> "A letter in the above terms would be utterly unsatisfactory to me if the complaint related to matters since the amendments introduced by you last year took effect. As this was not the case, I have no alternative other than to merely acknowledge the Commissioner's letter.
>
> In the circumstances, I can only leave it to you or your personal staff to look at the Police papers to consider whether what, on the surface appeared to be a serious complaint, has been dealt with in accordance with the public interest."

At a meeting held on 31 August, 1984 the Minister advised the Ombudsman that he would have a member of his staff look at the Police papers.

90. Highway Patrol Officers and the Public

The activities of Highway Patrol Officers and of other officers involved in issuing Traffic Infringement Notices (TIN) has historically been an area in which the Ombudsman only required investigation of complaints of a serious nature.

In last year's Annual Report the Ombudsman mentioned his concern over the number of complaints that were received relating to the conduct of Highway Patrol Officers. It was noted also that under the then existing legislation investigation was pointless, as there would be an inevitable conflict of statements which could not be directly investigated by the Ombudsman. This led to findings of "unable to determine".

With the recent amendment to the Police Regulation (Allegations of Misconduct) Act, it was considered that selected allegations by members of the public against Highway Patrol Officers should be immediately investigated. Such investigation would not relate to any matter the subject of an Infringement Notice, but rather the associated subject matter of the complaint.

Although some of these complaints might be considered as "minor", a significant public interest is involved as members of the public come into contact with Highway Patrol Officers probably more than with any other section of the Police Force.

The following table represents the total number of such complaints received in this Office, and the number that were taken up for investigation during the year ended 30th June, 1984:-

Total complaints received mentioning TIN	390
Complaints mentioning TIN only	175
Complaints mentioning TIN and conduct	215
Complaints mentioning TIN where conduct taken up for investigation	68

The nature of the complaints (associated with Traffic Infringement matters) which were taken up for investigation include such conduct as rudeness, assault, failure to identify, failure to take action, harassment and dangerous driving by the the police officer.

The table below shows the breakdown of the nature of the complaints that were associated with Traffic Infringement Notices:-

Rudeness	33
Fail to take action	4
Fail to identify	8
Dangerous Driving	5
Administrative errors	21
Fail to reply to correspondence	6
Assault	3
Unnecessary use of Force	2
Arrest/Detention	3
Harassment	4
Misuse of Office	2
Victimisation	6

Examples of such complaints are set out below:-

- A woman who was involved in a motor vehicle accident claimed that one of the arresting police hit her and then indecently assaulted her.

- A young man was stopped by police while riding his motor cycle and reported for dangerous driving and speeding. It was alleged the Constable hit him in the left eye and knocked him to the ground.

- A man was stopped and issued with two TIN's which the Constable allegedly threw into the car and said "They're yours, asspaper".

- A man was stopped and given a TIN. He questioned the police officer as to the reason he was issued the notice. The officer allegedly became abusive, and taunting and threatened to give him more

notices, which he then did. The complainant states that all three were unwarranted.

- A woman was given a TIN after turning into her own driveway. The officer was allegedly abusive, both physically and verbally. She claimed he reacted to her resistance to his conduct by issuing another TIN for failing to wear a seat belt.

- A 17 year old youth was issued with a TIN. Police allegedly searched his car without permission and told him to go back to Queensland.

- A man, his wife and baby were stopped for a breath test. The wife who was driving was allegedly considered borderline and arrested to undergo a breath analysis in the 'Booze Bus'. After 10 minutes the husband went to see what was happening and was allegedly told to "piss off" by the police officer. He claims that when he attempted to open the door of the bus he was assaulted and detained as an intoxicated person. It was also alleged that the police would not allow the woman to go to the car to get her baby (12 weeks old), although after a while they apparently relented.

- A woman alleged that when she was stopped for speeding, the police were rude and refused to identify themselves.

- Members of a law firm alleged that they were being harassed by Highway Patrol police.

- A man contended that he was dangerously driven off the road by a police officer in an unmarked car. The officer apparently abused him and issued him with a TIN for 'Not wear seat belt' in spite of the complainant's protests that he was wearing the belt at the time.

- A motor cyclist was stopped for speeding. He claims that the police officer was so close behind him that the only way to prevent an accident was to drive onto the gravel verge which caused his cycle to fall and himself to be hurt.

- A complainant alleged that a police officer was rude and arrogant when booking him.

- A man was stopped for going through a red light - he claimed that he saw the police officer commit three traffic violations after issuing the fine.

Complaints against Highway Patrol police are many and varied. Not all allege rudeness, aggression; some tend to show how polite and efficient the police officer was at the time. The following conversation taken from a letter of complaint reveals how even a basically courteous conversation can still result in a complaint:-

"Police Officer (PO): Good evening. Have you got your licence there?

Me: Yes.

PO: You have been clocked at 86 kph in a 60 kph zone.

Me: Your kidding.

PO: Any reason why you were in a rush?

Me: I wasn't in a rush. I wasn't even speeding.

PO: I've clocked you since M Street at 86 kph.

Me: I'm pretty sure I couldn't have been doing over 60 kph, if that. I was already pulled over here before you even showed up.

PO: That just saves me from pulling you over anyway.

The officer then started writing out the ticket. His partner was standing back watching.

PO: Have you had one of these before?

Me: Yes sir I have.

PO: Well you've 21 days to pay this fine. If you don't think you were speeding just disregard this altogether.

Me: Thank-you sir. Just before you leave I'll just get down your badge number and number of your car.

PO: You can do what you like. My name is on that fine anyway.

(Please note the fact that these officers were NOT wearing their badges and would NOT give me their badge number)."

The new system of direct re-investigation by the Ombudsman has not been in existence for sufficient time to give an evaluation of the results. Such re-investigation will involve direct questioning by the Ombudsman or his officers of the complainants (and any passengers), and the police officers involved. Next year's Annual Report will give the findings of such re-investigations by the Ombudsman.

91. Investigation of Alleged Police Involvement in Tow Truck Rackets: The Wellington Story.

(i) The Continuing Saga

A complaint was received from Mr. K Wellington of Windsor that certain tow truck operators in his area were being assisted by Police, presumably in return for payments. The matter was referred, as required, to the Police Internal Affairs Branch, and a detailed investigation begun in 1980. The length of time taken to investigate these matters was previously documented in a report to Parliament in August 1982 and last year's Annual Report. The Police investigation into

Mr. Wellington's complaint has now been finalised and some 41 reports were prepared documenting the separate investigations carried out.

Mr. Wellington and Mr. Faber, an employee, commented on the investigation as follows:

> "The original document given to the Internal Affairs and labelled as complaints, was in the form of several different situations which were suspicious to us and the intention was to supply enough information to warrant an investigation into local Police activities.
>
> Our thoughts were that the Internal Affairs Department would conduct an investigation into the Police, however as the cases were drawing to a close and although several Police were reprimanded as a result of our evidence, the Internal Affairs failed in their efforts to find any new evidence of their own and seemed to go to lengths to investigate our staff and our customers. The only ones to suffer financially and mentally was ourselves.
>
> To an independent reader of the reports it is obvious that if at all possible Police were "let off the hook" and the anomalies in several reports are quite obvious."

Despite the fact that instances of impropriety and neglect by Police were disclosed during the investigation, particularly in regard to the failure of Police to strictly adhere to the procedures laid down for arranging rostered tows and/or maintaining the records expected of them, and that five officers were disciplined, three with a charge of 'neglect of duty' and two with the charge of 'disobedience', Deputy Commissioner Perrin was of the view that the findings of the individual reports did not lend credence to the overall claim of Mr. Wellington. However, no overall report was prepared by the Police examining the allegations as a whole. One of the reasons given for there being no 'overall' report was the establishment of a Ministerial Working Party to examine the regulation of tow trucks.

The Working Party was established on 3 March, 1983 and concluded its deliberation on 3 June, 1983. A report was submitted to the Minister for consideration. The Working Party reported, amongst other things, that it "had reasons to believe from information given it by various sources that improper practices were occurring in the tow truck industry" and detailed 14 such practices. As well, the Working Party recognised that:

> "complaints of abuse of the Police rostering system have been forthcoming over many years and that many of these have been substantiated. These complaints have taken the form of allegations that Police have accepted bribes for directing operators, other than the ones next on the list to attend, to the scenes of accidents, and of falsifying the tow truck book that the operator next in line was not available to attend or else had not been in attendance when the telephone call had been made to his address. In addition there have been claims that Police on receiving advice of accidents, alert operators from whom they can expect payment of a "spotter's fee"."

Various recommendations were made including one that "the Police authorities be urged to step up enforcement of the

Tow Truck Regulations both at the scenes of accidents, and at Police Stations, concerning the manner in which the authority forms are completed." (June 1983)

The report was considered by the relevant Ministers and in June 1984, a Tow Truck Advisory Council was set up to see if the recommendations in the report could be implemented. As at September 1984, these proposals are still being considered.

(ii) What is being done?

The recommendation of the Working Party that "the Police authorities be urged to step up enforcement of the Tow Truck Regulations" is very similar to that made by the Ombudsman in his report to Parliament some ten months earlier:

> "That as the investigation is unlikely to be concluded for some time, directions be given that the Tow Truck Act, 1967 be effectively policed and enforced". (11 August, 1982)

On 13 September, 1983, advice was sought from the former Commissioner, Mr. Abbott as to action taken to implement this recommendation and details of the number of prosecutions recorded under the Tow Truck Act for the twelve months and the comparative figure for the preceding twelve months. Mr. Perrin, Deputy Commissioner, replied in October 1983 advising that:

> "the actual administration of the Act and Regulations is the responsibility of the Commissioner for Motor Transport. No record can be found in this Office of any request having been received from the Commissioner or his Department for members of this Force to give any special attention to the enforcement of the legislation. Furthermore, there are no statistics available to indicate the number of prosecutions under that legislation for the periods you have nominated."

Enquiries made with the Department of Motor Transport revealed that there were no prosecutions listed for that period under the Tow Truck Act. The officer advised that the enforcing of the Tow Truck Act "would be wholly and solely a police matter". He used the analogy of the Motor Traffic Act: "although the Department set it up, the Police enforce it - we don't have to tell them to go out and book people".

Enquiries made with the Department of the Attorney-General and of Justice, NSW Bureau of Crime Statistics and Research, resulted in the advice that no statistics were being kept and there was a strong likelihood that there had been no prosecutions.

It should be noted that the Working Party commented:

> "Statistics relating to breaches of the Tow Truck Act 1967 are not available but it is understood that the detection of breaches of Regulations is small in number, even though there were approximately 74,472 vehicles reported towed away from accidents in 1982".

This issue as to what action has been taken to effectively police and enforce the Tow Truck Act will be followed up with the Commissioner of Police and the Minister.

(iii) The use of Police prosecutors

One of the reports received from the Internal Affairs Branch documented the activities of Sergeant 'X' and dealt with the claim that Sergeant 'X' received $150 for the remains of a motor vehicle which was in police possession. The Police Prosecuting Branch had decided against taking action against Sergeant 'X' who had since resigned from the Police Force. The Ombudsman, not satisfied with this decision, requested the Commissioner to seek advice from the Crown Solicitor's Office.

In November, 1982, the Deputy Commissioner advised that "the Crown Solicitor, the Solicitor General and the Attorney General were all of the opinion that sufficient evidence is available to sustain a prosecution against the former Sergeant for Larceny". However, he wished to examine in detail the advising furnished before any further action was taken. On 28 June, 1983, advice was requested from the Commissioner as to the steps taken to implement this advising. This Office was subsequently informed that summonses were served on 10 August, 1983 and that the matter would be heard in February, 1984.

The information was dismissed by the Magistrate as no prima facie case had been proven. The prosecution (a police prosecutor) had according to the Magistrate failed to produce evidence "that the person in whom the property is laid is an entity capable of an ownership, ownership being an essential ingredient of Larceny ..." However, when the question of costs was being discussed, the Magistrate was of the opinion that "there's clear evidence that (the Defendant) ... dealt with and was paid for property subject to his control through his Office and without any remittance to any Department to which he might belong. Now ... to cover the situation where you know a person in fact has brought about his own position, this certainly comes up as one of those cases and I don't propose to make any Order for Costs for those reasons".

Mr. Faber, an employee of Keith Wellington Pty. Ltd. who had been summonsed to give evidence in the above matter advised that the people who appeared for the police, such as himself and the person who bought the car, had not been re-interviewed before the matter went to court, they just received summonses to appear. Given that the event took place over four years ago, he felt that some instructions as to what to expect would have been helpful.

Coincidentally it was the same Police prosecutor had handled the Police case against Mr. Wellington on an alleged dangerous driving charge. Mr. Faber commented "At that hearing he'd been a real goer, at this one he didn't show his teeth at all".

Whilst not suggesting that the outcome of Sergeant 'X''s case would have been different had an independent prosecutor been used, it should be evident that the use of police prosecutors makes the Department vulnerable to suggestions that it failed to properly prepare its case or lacked enthusiasm or objectivity in pursuing the matter. Had an independent prosecutor been used, the performance of the prosecutor would not have been so readily open to question.

(iv) What has been achieved?

Mr. Wellington is now on fairly good working terms with the local Police. However, he is of the opinion that corruption is just as rife in the tow truck industry overall as it was before and that despite his pushing for amendment and change, nothing is happening.

A lot has been said and a lot has been written about the alleged corruption in the tow truck industry. However, little seems to have been done. Complaints were made, investigations were carried out, committees were set up and recommendations made, an ongoing saga. Four years of concentrated paperwork with little, it seems, to show for it. Legislation exists yet there seems to be a decided reluctance to use it. New legislation is proposed - will this be the solution?

92. Recommendation for Independent Prosecutor in Criminal Proceedings Against Police Accepted

In last year's Annual Report the issue of the role and position of police prosecutors in N.S.W. was discussed. Reference was made to Mr. Justice Lusher's report of the Commission of Inquiry into NSW Police Administration which recommended the phasing out of the Police Prosecutors Branch and its replacement by a Prosecuting Department through the Attorney-General or other appropriate Officer.

Last year Cabinet rejected this recommendation. However, the Chief Justice of NSW, Sir Lawrence Street, in his report of the Royal Commission Inquiry Into Certain Committal Proceedings Against K.E. Humphries (July, 1983), strongly endorsed the Lusher recommendation. Following the report of the Chief Justice the Premier, Mr. Wran, advised that the matter would be reconsidered by Parliament.

The Ombudsman presented his view in the Annual Report, that the reaons behind the Lusher recommendation were obvious in terms of the requirement that prosecutors both be seen to be and be impartial, detached and independent. It was suggested that the arguments against the use of police prosecutors were even greater where the accused is a police officer.

The Ombudsman recommended that there would be much less likelihood of criticism on the grounds of bias if in cases where police officers are defendants an independent prosecutor conducted the prosecution.

The Government's decision on the matter was announced by the Minister for Police, the Hon. Peter Anderson, at the NSW Police Association Annual Conference on 21/5/84 and was reported in the Sydney Morning Herald on 22/5/84. The Government decided to retain the Police Prosecuting Branch. However, in future all prosecutions of police are to be conducted by the Solicitor for Public Prosecutions instead of the Police Prosecuting Branch. In this context charges to be laid against police will be subject to review also by the Solicitor for Public Prosecutions.

93. Disciplinary Proceedings before Police Tribunal - Need for independent representation where brought as a result of Ombudsman recommendation

As indicated in the previous section the government has announced that in criminal proceedings against members of the Police Force, the prosecution will be conducted by the Solicitor for Pubic Prosecution or other prosecutor

independent of the police force. There remains the question of disciplinary proceedings before the Police Tribunal.

In a letter to the Secretary of the Office of the Minister for Police, in response to a request for comment, the Ombudsman stated his position as follows:-

> "Finally, may I say that I believe strongly that the involvement of the Solicitor for Public Prosecutions ought to extend to the carriage of disciplinary proceedings against Police officers before the Police Tribunal...Several Ombudsmen whom I met recently overseas commented on their experience that where proceedings are being brought against a police officer before a disciplinary tribunal as a result of a recommendation by the Ombudsman (and in opposition to the original recommendation of the police authority) there is a strong possibility in their experience that the police authority in their country may "run dead" or at least unconsciously not press the proceedings fully or vigorously. In my view the same principle that has led the Minister for Police to make the same decision you mention also applies to disciplinary proceedings before the Police Tribunal brought on the recommendation of the Ombudsman and that the Solicitor for Public Prosecutions ought to have the carriage of those proceedings."

To date there has been no response to this suggestion.

94. Need for new rules to avoid collaboration among Police under investigation.

In his Report to Parliament for the year ending 30 June, 1983, the Ombudsman expressed his concern at the significant numbers of cases in which collaboration between Police under investigation had occurred, and thus, the significant number of cases in which the then current guideline provided for Police officers conducting departmental investigations of complaints against Police was being ignored. This guideline provided that, "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 memoranda 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." The Ombudsman recommended that police procedures for the investigation of complaints of police misconduct under the Police Regulation (Allegations of Misconduct) Act, 1978 should as a matter of urgency be amplified or amended to include at least some of the procedures adopted by the Australian Federal Police in conducting investigations.

The 1983 legislative amendments to the Police Regulation (Allegations of Misconduct) Act have enabled the Ombudsman, in certain circumstances, to re-investigate complaints against Police officers after the conclusion of the initial Police investigation of such complaints and, in particular, to hold inquiries into such complaints. During these re-investigations, a large body of evidence has come to light which demonstrates that the attempts of investigating officers, (whether they be from the Internal Affairs Branch of the Police Force or otherwise) to avoid collaboration have been remarkably unsuccessful. In the majority of cases, it

would appear that police officers who are summonsed to report on or participate in records of interview in relation to complaints are placed in separate rooms for the purposes of providing these reports or records of interview. However, it has become clear that the majority of Police who have appeared before the Ombudsman during the course of his inquiries have, in advance of making such reports or participating in records of interview, a knowledge of the identity of the complaint to which the investigation relates. This has, as might be expected, led to discussions and the comparing of notes with other Police with knowledge of the incident complained about.

Indeed, on one recent occasion, a Police officer gave evidence before the Ombudsman that, not only had he known both that he would be summonsed to the Internal Affairs Branch to report in relation to a complaint approximately a fortnight in advance of the date on which he in fact did so, and the identity of the complainant, but also that he travelled to Police Headquarters in a car with three other police officers summonsed to report in relation to the same incident. As might be imagined, he discussed the matter with other Police with knowledge of the incident before the date of his attendance at Internal Affairs Branch, and the four discussed the matter during the journey to Police Headquarters. Upon arrival at Internal Affairs the police officers were placed in different rooms to make their statements. The whole procedure can be described as a solemn farce.

Since the Ombudsman's Report to Parliament for the year ending 30 June 1983, negotiations between the Ombudsman, the former Commissioner of Police, Mr. C. Abbott, and the newly appointed Assistant Commissioner (Internal Affairs), Mr. R.C. Shepherd, have resulted in agreement to the adoption by the Police Department of three of the amplifications or amendments to the procedures for the investigation of complaints against Police proposed by the Ombudsman in that report. These are:-

(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 matter 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.

Further, a satisfactory compromise has been reached on the terms of the fourth amended procedure. It provides that:-

(d) Only if the need arises for the purposes of the investigation and then only after the full account of the subject of the investigation has been obtained, may a statement, report or any part of a statement or report, not being of the type referred to in Section 19 of the Police Regulation (Allegations of Misconduct) Act, by Police or any other persons relevant to the complaint, be shown to

> or brought to the attention of any other witness or member. However, this procedure shall not inhibit the questioning of a member about any aspect relevant to the complaint contained in any other statement or report.

However, the Ombudsman's recent proposal that a fifth amended procedure, directed at the type of collaboration which his inquiries had revealed to be rife, be adopted, has been rejected by the Police Department on the basis that the procedures already agreed upon were sufficient. This additional provision suggested by the Ombudsman is as follows:-

> aa) When arranging an appointment with a member, the Police investigating officer should not reveal the name of the complainant or the nature of the complaint. (Documents required from the member should be requested in a manner that does not reveal the name of the complainant or the nature of the complaint.) The police investigating officer should direct the member not to discuss with other members the fact that such an appointment has been made and any belief he or she may have as to the name of the complainant or the nature of the complaint.

The Ombudsman regards this type of collaboration as a matter of concern and, as a result of the evidence given before him, perceives it to be a problem of considerable magnitude. The unresponsive attitude of the Police Department in this regard is unsatisfactory and displays, in the Ombudsman's view, a lack of concern for the effective investigation of complaints against Police.

95. Mr. Azzopardi's Complaint against the Police Internal Affairs Branch : Investigation of Parramatta Police Citizens Boys Club.

The previous annual report gave tribute to the energy, determination and strong sense of justice of two persistent complainants to a variety of Government bodies whose complaints were finally found to be justified.

One of those, Mr. Eddy Azzopardi, had made a series of allegations over the years relating to the administration of the Parramatta Police Citizens Boys Club and the actions of its one time secretary-supervisor, former Sergeant Christopher Jones.

There were several police enquiries which involved the Police Internal Affairs Branch. These enquiries were instigated in response to complaints by Mr. Azzopardi and questions asked in Parliament by several members based on information supplied by Mr. Azzopardi. The main inquiries were conducted by the then Executive Chief Superintendent of the Branch, Mr. Ralph Masters. Another senior officer of the Branch, then Detective Superintendent R.J. Lascelles had conducted a particular investigation into a report that appeared in the Sunday Telegraph of 12th April, 1981 concerning mysterious circumstances surrounding the delayed transfer of ownership of a house used by the Police Citizens Boys Club as an art union prize.

Reports prepared by these two officers were alleged to have been the basis of the Premier informing Parliament in

1981 that there was no evidence whatever of any form of illegal activity at the Parramatta Police Citizens Boys Club.

Following an investigation by the Ombudsman and a report of wrong conduct on Mr. Azzopardi's complaint that the Charities Branch of the then Department of Services failed to take action over his allegations concerning irregularities in art unions run by the Club, the Auditor-General carried out a special audit of the Club's art unions which revealed extensive irregularities in the conduct of art unions and in the financial affairs generally of the Club. Subsequent criminal investigations resulted in former Sergeant Jones being charged with forty (40) counts of criminal conduct and another police officer pleading guilty to 59 criminal charges.

Mr. Azzopardi then made a complaint that the inquiries made by former Executive Chief Superintendent Masters and Detective Superintendent Lascelles were inadequate; that the reports prepared by them were misleading; that they 'covered up' the situation; and that in general, their inquiries and reports led to Mr. Azzopardi's allegations being dismissed when in fact subsequent events have substantiated them. These reports led to the Premier giving inaccurate information to Parliament.

The investigation of this matter has caused serious concern to the Ombudsman. The Commissioner was directed by the Ombudsman to have the complaint investigated on 2nd December, 1983. The Commissioner's report on the investigation was received in this Office some five months later, on 5th April, 1984. Such delay seemed unreasonable in the context of the depth of the police investigation revealed by the papers received by the Ombudsman.

When the police report was received, the Commissioner had placed a section 26 (1) order on all the material and information supplied, preventing the Ombudsman disclosing and publishing the material. The Ombudsman subsequently asked for this order to be reviewed, but Deputy Commissioner Perrin (who was Acting Commissioner at the time) refused to lift the order on any of the material. This order precludes any adequate discussion of the results of the police investigation.

On 10th April, 1984 the Ombudsman requested additional information from the Commissioner in order for him to carry out his statutory functions in firstly, satisfying himself that the complaint was properly investigated and, secondly, in determining whether the complaint was made out or not.

On 2nd May, 1984 the Ombudsman was informed that the officer who had been assigned to investigate Mr. Azzopardi's complaint, Chief Superintendent Bunt, was on leave to late June. As he considered the matter to be of considerable importance and was concerned that there be no undue delays, on 8th May, 1984 the Ombudsman requested the Deputy Commissioner to give urgent consideration to assigning another officer to handle the additional enquiries.

On 24th May, 1984 Deputy Commissioner Perrin confirmed that Chief Superintendent Knight had been assigned to supply the additional information.

Following Mr. Azzopardi being informed of this by way of a progress report, he complained in writing seeking the withdrawal of Chief Superintendent Knight from the investigation on the basis that the Chief Superintendent was an officer who had been the subject of criticism by Mr. Justice Moffitt in the August 1974 report of the Royal Commission of Inquiry into Organized Crime. As the whole

question of the Parramatta Police Citizens Boys Club had been bedevilled by allegations of cover up, the Ombudsman was concerned that the selection of Chief Superintendent Knight for the task by Deputy Commissioner Perrin might only further fuel media and public interest and expressed this concern to the Police Board of New South Wales. Questions were subsequently raised in Parliament concerning the matter and the assigning of Chief Superintendent Knight to the investigation also received some media coverage.

On 29th June, 1984, some eleven weeks after his initial request for additional information, the Ombudsman received a report from the Assistant Commissioner, Internal Affairs, annexed to which was a report by Chief Superintendent Knight in response to part of his request for additional information.

All the additional information requested relating to former Executive Chief Superintendent Masters (which comprised the major part of the request) was not covered in this report as Chief Superintendent Knight was of the belief that those matters could best be dealt with by the original investigating officer, Chief Superintendent Bunt.

Assistant Commissioner Shepherd informed the Ombudsman at that time that the Departmental papers had been referred to Mr. Bunt for urgent attention in regard to the outstanding matters.

On 20th July, 1984 the Chairman of the Police Board informed the Ombudsman that he had been advised by the Commissioner of Police that Chief Superintendent Bunt had resumed the relevant investigation.

On 3rd August, 1984, at a meeting to discuss several other administrative matters, the Ombudsman expressed his concern to Assistant Commissioner Shepherd that Chief Superintendent Bunt's report be received as soon as possible.

In the absence of receipt of the report, the Ombudsman wrote to the Assistant Commissioner seeking an urgent report on the current stage of Mr. Bunt's further enquiries on 28th August, 1984.

Verbal requests for this information were subsequently made on two occasions by telephone.

On 31st August, 1984, this Office was informed by the Internal Affairs Branch that for some unexplained reason, Chief Superintendent Bunt had never received the Departmental documents and that they were now being sent to him urgently so that the further enquiries could be carried out.

The Ombudsman was greatly disturbed by this mishap which was only discovered after his further enquiry, some two months after the papers had been reportedly sent to Mr. Bunt for urgent attention.

Mr. Bunt's further enquiries were subsequently carried out expeditiously and a final report on the matter was received by this Office on 5th September, 1984.

Much of the additional information originally requested by the Ombudsman was not supplied as Mr. Masters had retired from the Police Force and had refused to either make a written submission or subject himself to interrogation (Mr. Masters' word).

Further details of the investigation of Mr. Azzopardi's complaint cannot be disclosed due to the continued existence

of the section 26 (1) order placed on all of the material and information originally supplied by former Commissioner Abbott.

Due to the nature of the Police investigation and the material supplied as a result of that investigation, the Ombudsman was unable to satisfy himself whether Mr. Azzopardi's complaint was either sustained or not. Consequently, under the new legislation he has decided to re-investigate the matter himself. The Ombudsman's investigation is currently in progress.

96. Public Mischief and Perversion of Justice : Inappropriate for complaints to Ombudsman.

In the Annual Reports for 1981-82 and 1982-83, concern was expressed in respect of prosecutions by Police against complainants to this Office for the offences of "Public Mischief" and "Attempting to Pervert the Course of Justice".

The offence shortly described as "Public Mischief" is created by Section 547B of Crimes Act, 1900 and provides that:-

"(1) Any person who, by any means, knowingly makes to a member of the police force any false representation that an act has been, or will be, done or that any event has occurred, or will occur, which act or event as so represented is such as calls for an investigation by a member of the police force, shall be liable on conviction before a stipendiary magistrate to imprisonment for six months, or to a fine of $500, or both.

(2) For the purposes of subsection (1), a person shall be deemed to make a representation to a member of the police force if he makes the representation to any other person and the nature of the representation reasonably requires that other person to communicate it to a member of the police force and that person does so communicate it."

The offence of "Attempting to Pervert the Course of Justice" is a common law misdemeanour and must be prosecuted as an indictable offence before the District Court. The punishment for a common law misdemeanour is by fine or imprisonment, but otherwise the penalties are at large i.e. no maximum penalty is provided. It is quite possible that in a serious instance of attempting to pervert the course of justice a sentence of imprisonment in excess of six months might be imposed.

On the other hand, Section 37(1) of the Ombudsman Act provides that 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 this or any other Act."

The penalty for such an offence is a maximum fine of $1000.

As a matter of policy, it is the view of the Ombudsman that the only penalty for making unfounded complaints to the

Ombudsman should be that provided by Section 37 of the Ombudsman Act. It is considered that prosecutions for "Public Mischief" or for "Attempting to Pervert the Course of Justice" are entirely inappropriate in this context. Quite apart from any arguments as to questions of statutory interpretation, the policy stance adopted by the Ombudsman recognises the particular position of the Office of the Ombudsman in the eyes not only of individual complainants, but of the community in general.

In this light, the Ombudsman wrote to the Premier, Mr. Wran, on 21 September, 1983 expressing his concern and stating:-

> "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.
>
> Although this legislative machinery exists to take action against persons who make unfounded complaints about the conduct of police, no use has ever been made of the provisions of Section 37 by the Police Department."

The Ombudsman in the last Annual Report, and in the letter referred to above, sought an appropriate amendment to Section 37 to provide that any prosecutions for false complaints would be confined to that Section.

The concern which has been expressed in the past has now been heightened in view of a noticeable rise in the number of prosecutions, or recommendations for prosecutions, for "Public Mischief" or "Attempting to Pervert the Course of Justice", over the last twelve months. Again, no prosecutions have been commenced under Section 37 of the Ombudsman Act.

Prosecutions for the common law offence highlight one unsatisfactory aspect of Section 37. As a summary offence, like the offence of Public Mischief, the time limit within which prosecutions must be commenced, in the absence of a specific provision to the contrary, is, by virtue of Section 56 of the Justices Act, fixed at six months from the date of the commission of the offence. Where this time limit has expired the only prosecution which is possible is for the common law offence of attempting to pervert the course of justice, prosecution for which is not subject to any limitation period. Many investigations conducted under the Police Regulation (Allegations of Misconduct) Act take in excess of six months and the Ombudsman therefore considers that Section 37 should also be amended to provide for an extended limitation period e.g. 12 months. In addition, provision could be made for prosecutions for attempting to pervert the course of justice to be subject to the consent of the Attorney General.

The Secretary of the Premier's Department advised this Office that the views of the Attorney General and the Minister for Police had been sought by the Premier and that further advice had been sought from the Attorney General. The question of suitable amendments is now being considered by the Director of the Criminal Law Review Division.

97. Notifying Next-of-Kin of Inquests

A number of recent complaints to this Office have concerned alleged failure by police officers to notify next-of-kin of the date and place of Coroner's inquests.

In two of these cases, one of which remains under investigation and one of which is the subject of a draft report to the Minister for Police, the complaint was that police officers had failed to notify a widow of the date of her husband's inquest. In two other cases, which also remain the subject of investigation, the complaints were respectively that police officers had failed to notify the parents of a deceased child of the date of the inquest into the child's death, and that police officers had failed to notify a man of the inquest into his late father's death.

The duties of police officers in matters of this nature are set out in Police Instruction 78, Paragraph 30(a). Prior to its amendment in June of this year, Paragraph 30(a) provided as follows:

> "30. Police will -
>
> (a) advise the next-of-kin and all witnesses of the time and date of the hearing of the inquest and of any subsequent adjournment thereof. Such information should be passed to the next-of-kin personally and in ample time before the holding of the inquest;"

However, a recent Police Department circular has advised of amendment to Paragraph 30(a), inter alia, as follows:

> "Prior to 1980, the Coroners Act made no provision for notification of interested parties and a practice developed whereby Police undertook the responsibility for ensuring such was done. The introduction of the new Act has therefore removed the necessity for Police to warn interested parties to attend the Coronial Inquest. However, if the Coroner directs that interested parties or next-of-kin be informed by Police in any individual case, they are to comply with such direction.
>
> Police Instruction 78, paragraph 30(a) will now state:-
>
> 'not be required to warn interested parties or next-of-kin to attend an inquest (Section 17 of the Coroners Act No. 27 of 1980), **unless** directed to do so by the Coroner'."

At first sight, the abovementioned amendment to Police Instruction 78 appears to be unsatisfactory. The respective obligations imposed by Paragraph 30(a), prior to amendment, and Section 17 of the Coroners Act were significantly different. Whilst the Police Instruction was mandatory in relation to advising next-of-kin and all witnesses of the time and date of the hearing of an inquest, and required that next-of-kin be advised personally, the Coroners Act provides that the Coroner shall give particulars to any person who has given notice in writing of his intention to seek leave to appear or to be represented and may give particulars to any person who has, in the opinion of the Coroner, sufficient interest in the inquest. The Coroners Act imposes no mandatory obligation to

advise next-of-kin and imposes no obligation to provide advice personally.

Whilst co-ordination of the roles of the Coroner and the Police Department, in notifying next-of-kin, or other interested parties and witnesses of particulars of inquests, is clearly desirable, the requirement that police officers notify next-of-kin personally provided a safeguard to ensure that next-of-kin were made aware of the details of an inquest, and in amendment of Paragraph 30(a) that safeguard appears to have been lost.

Section 17(2) of the Coroners Act provides that particulars of the time and place for the commencement of an inquest or inquiry "shall be deemed to have been given if a notice specifying the particulars is sent by post to the person to whom the particulars are to be given". Where such particulars are sent by post to a next-of-kin who has recently moved from the address to which the particulars are sent, or who is temporarily absent from that address, or where the notice containing the particulars is delayed or misdirected in the mail, or where for some reason the Coroner does not exercise his discretion to contact next-of-kin, there is a clear possibility that such persons will not become aware of the particulars of the inquest. Unless the coroner directs police officers to notify next-of-kin and other interested parties in all instances, in which case the amendment to Paragraph 30(a) would have little substantive effect, it appears likely that there will be circumstances in which those persons will not be given adequate notification.

It is the Ombudsman's view that any procedure for notifying next-of-kin of the details of inquests or enquiries should be designed to ensure that such notification does in fact reach those persons. Whether that purpose is achieved by personal notification at first instance, or by personal notification only where written notification is not responded to within a specified time, appears of less importance. However, the removal of the requirement that police officers give personal notification in all instances, without its replacement by further adequate safeguards to ensure that notification is received, appears to be quite unsatisfactory. The Police Department, with its comprehensive network of police stations, would appear to be much better placed than the Coroner to ensure that adequate notification of particulars of inquests and inquiries is given to next-of-kin and other interested persons.

The Ombudsman's views on this matter have been put to the Minister in the draft report referred to above, and his advice as to whether he wishes a consultation is awaited.

98. Unreasonable use of Arrest Procedure

The initiation of a criminal prosecution may be either by way of arrest and subsequent charging of an offender or by way of the issue and service of a summons requiring an offender to attend court on a specified date.

Section 352 of the New South Wales Crimes Act, 1900 as amended, gives to police officers in this state extensive powers of arrest without warrant.

For the great majority of people, and certainly for first offenders, arrest and the process entailed by it is

likely to be seen as a penalty in itself. For arrest involves not only a deprivation of liberty, however short its duration, but also a number of procedures which may embarrass and indeed humiliate. Thus, an offender will often be placed in a small "dock" in the police station whilst the process of charging is completed. He or she will be liable to be searched and often, even where allowed bail, may be placed in a cell until bailed out by an acceptable person, if such a requirement is imposed by the authorized officer under the Bail Act. In addition, every person who is the subject of such a process will be fingerprinted and the fingerprints sent to the Central Fingerprint Bureau.

As one complainant, Mr. M, stated to this Office after his arrest:-

> "I was then subjected throughout to the experience of being finger-printed and generally treated like a criminal."

There are compelling reasons therefore why the use of arrest should, in general, only be made in those cases where the issue of a summons would be, or likely to be, ineffective in the circumstances.

The Australian Law Reform Commission in 1975, recommended four criteria for the exercise of the power of arrest by a police officer. (See ALRC Criminal Investigation Report No 2 Interim Report, 5 September, 1975, paras 38-44.)

The first criterion is the need to ensure the appearance of the offender before a court. If a police officer is unable to establish the identity and address of an offender or has reasonable doubts about them, then obviously there are good grounds for arresting the person.

The second criterion involves consideration of the prevention or continuation of the offence. This criterion, while particularly relevant to offences involving public order, is not limited to that class of offences.

The third criterion is the need to preserve evidence of, or relating to, the offence.

The fourth criterion relates to various provisions under mental health, child welfare and similar legislation which embrace the concept of "protective custody" of the offender as opposed to the need to protect the community.

The Australian Law Reform Commission reaffirmed the above criteria for arrest in 1983. (See ALRC Report No. 22 Privacy.)

In the absence of circumstances involving these criteria, criminal proceedings should be initiated by way of summons and resort to the arrest procedure should be considered an unreasonable use of police powers. The significance of the power to arrest is recognised in the Rules made under the Police Regulation Act, 1899 as amended, and the Police Instructions issued in pursuance of Rule 7(f). Rule 56(b) provides:-

> "A member of the Force shall not arrest a person for a minor offence when it is clear that a summons will ensure the offender will be dealt with by a magistrate."

Instruction 31 provides:-

> "14. Arrests for breaches of the Motor Traffic Act, the Metropolitan Traffic Act, or the State Transport (Co-ordination) Act, should only be made in very serious cases, such as where some person has been injured through the negligence of the driver of the vehicle, or when requested by a member of the Police Force in the execution of his duty under those Acts or regulations thereunder, a driver refuses to give his name and address, or gives a false name and address."

The case of Mr M, whose comment on his arrest is noted above, illustrates an unreasonable use of the power of arrest.

> In June 1983 Mr M, was stopped by Senior Constable S while driving through a small country town. Senior Constable S had observed Mr M disobeying a "Stop" sign erected at a major intersection outside the town and then travelling through the intersection at a speed alleged to be approximately 90 kilometres per hour. Senior Constable S followed Mr M for approximately two kilometres during which time Mr M passed a number of intersections at speeds of between 70 and 80 kilometres per hour. At the time he was stopped Mr M was a resident of New South Wales and held a licence issued in this State, which he produced to Senior Constable S at his request. Travelling with Mr M were his wife and three children.
>
> Mr M. was arrested by Senior Constable S and subsequently charged with driving in a manner dangerous to the public, disobeying a stop sign and exceeding the speed limit. Senior Constable S sought assistance, via police radio, from another officer to complete the usual procedures with a minimum of delay. In all, Mr M was detained for approximately 45 minutes.

There is no doubt that the offence of driving in a manner dangerous to the public is a serious offence under the Motor Traffic Act, and one which carries, for a first offence, a maximum penalty of $1500 fine and/or nine months imprisonment together with a statutory disqualification of licence for a period of three years. Equally, it can be regarded as a minor offence within the calendar of criminal offences. Further, it should be remembered that the prosecution of quite serious offences is often commenced by summons, e.g. many prosecutions conducted by the Corporate Affairs Commission.

Instruction 31 does not require that an officer use the arrest procedure in every serious matter under the Motor Traffic Act, but rather that the procedure be limited to such cases. It is considered that the four criteria referred to above should govern the situation.

> In the case of Mr M it seemed clear that Senior Constable S was concerned about an offence committed at an intersection he regarded, rightly, as a dangerous one. This factor, of itself, does not constitute a good reason for arrest.
>
> There was no basis on which any doubt as to the identity of Mr M could have reasonably been held. Mr M was clearly travelling with his family; indeed Senior Constable S did not ask him for his name and address when Mr M. handed his licence to him, in order to confirm those details. Though Mr M was detained for only a short period, such

detention was unreasonable and the matter should have been disposed of by submitting a breach report and the subsequent issue of a summons.

It is the view of the Ombudsman that to the extent that there may be any conflict between Rule 56(b) and Instruction 31, the Rule should be amended to provide that an offence may be regarded a minor notwithstanding that it carries, as a maximum penalty, a sentence of imprisonment. Further, the Ombudsman considers that statutory effect should be given to the criteria for the use of arrest proposed by the Austalian Law Reform Commission, by the insertion of suitable amendments to the Rules made under the Police Regulation Act.

This Office is concerned that the case of Mr M highlights a practice that may be prevalent. In future, close attention will be paid to the issue of unreasonable use of the power of arrest.

99. Conciliation of Complaints

Under the provisions of Part III of the Act, where the Ombudsman or a police officer is of the opinion that a complaint about the conduct of police can be dealt with in a manner acceptable to the complainant, without an investigation being carried out, the complaint can be dealt with in that manner.

During the course of the year 258 complaints were conciliated, representing 22% of all complaints finalised. This is similar to the 1982/83 figure of 23%.

As noted in last year's Annual Report, the Ombudsman believes that he should endeavour to ensure that the withdrawal or conciliation of complaints is not accomplished as a result of improper pressure being brought to bear on a citizen. To accomplish this, complainants are forwarded photocopies of reports from the Police Department which suggest that complaints have been conciliated or withdrawn, plus copies of statements said to have been signed by them. Complainants are then invited to notify the Ombudsman if the information supplied is incorrect.

On several occasions over the past year, in circumstances where the Police Department has reported that complaints have been satisfactorily conciliated, complainants have advised this Office that they are unhappy about the way their complaints were dealt with.

A belief that the police have superior power can lead to a willingness to drop a complaint, or to agree to conciliate. To quote from a complainant's letter:-

> "I would now like to make a few points of my own in regard to the statement submitted by Inspector ...
>
> Inspector ... spent over 2 hours at our home, while we related to him exactly what had happened at the time of the accident. He then offered us the opportunity to settle the matter with the police, saying that he would make his recommendations. He gave several reasons for this.
>
> Firstly, he said, if we allowed the matter to get as far as a court action, it would cost us a lot of time and money, and he felt it wasn't worth it.

Secondly, he said, we are a business family, and it would not be good for our connections in the future to argue with the police.

Thirdly, Inspector ... told us that he would strongly admonish the policemen involved that they shouldn't do this sort of thing to us, or anybody else.

We accepted his suggestions that we felt would save us a lot of troubles and worries from the police. We felt that if we rejected his offer, it would cost us a lot more than need be. I also know from personal experiences that have happened between myself and the police since 1974 till now that it is very hard for a citizen to prove to a court how the police operate against him.

One reason for this is, that not every citizen is interested, or can't afford a Barrister or a Solicitor to go to court; and even if he wins against the police in court, he doesn't know what trouble the police could cause him at a later date.

It was because of the above reasons that we agreed to Inspector ... to settle the matter 'subject to no action taken'.

I know that in this country, or anywhere in the world, when a citizen makes an allegation against the police, the police making an investigation into the case will normally side with the police. This is because they feel that if they side with the citizen every time, it would put the police in a very weak position.

I am writing all this because I feel that all the people involved in this investigation made a weak claim for us because we accepted the offer to settle the matter without any argument. But they don't understand that the police are in a strong position in knowing the law, and how they can use it to make trouble for the citizen, and at the same time get themselves out of trouble."

Another complainant expressed her opinion of the conciliation process in the following terms:-

"I have returned home from Hospital today and am in receipt of the greatest load of codswallop ever presented in the history of modern man...

When I went to school 'conciliation' was defined as the overcoming of hostility and distrust. I can assure you that distrust and hostility have not been overcome.

I did not, to quote Inspector ..., 'agree that the circumstances of my accident precluded Police from protecting my property'. Listening to that which is said does not automatically constitute my acceptance of his explanation. Inspector ... spent most of his time here defending Sergeant ... in an effort to shift the burden."

Other complainants have advised this Office that they dispute the factual nature of police reports which allege that their complaints have been satisfactorily conciliated. In

this regard, one complainant expressed her view in the following terms:-

> "...the entire letter is false and full of untruths. I strongly disagree that the matter has been conciliated. It has not been conciliated."

Another complainant advised that:-

> "After receiving the photocopies of the reports by the police, I can clearly see that I have been had by the Investigating Officer for the police, Inspector ...
>
> I am now going through the report and writing down what actually went on instead of all the words twisted around to make the police look good ..."

In still another matter a complainant's solicitor wrote to the Commissioner of Police complaining about the attempted execution on the wrong person, of a warrant for arrest. The basis of the complaint involved the annoyance and shock caused to the client who was of advanced years and in ill health.

The client apparently signed a statement indicating that she was willing to conciliate the matter after the police officer conducting the investigation had apologized for the trouble which had been caused. He also advised that steps had been taken to assure that mistakes of this sort did not recur. The complainant's solicitors advised this Office that they were far from satisfied with the approach taken by the police officer involved. They felt that the client would have had misgivings signing anything without reference to her solicitor. A letter was sent to the Commissioner of police indicating that where a solicitor lodged a complaint on behalf of a client which included some comment of a technical or legal nature, this Office considered that initial contact should be made with the solicitor rather than the client. A reply was received from the Police Department indicating that in future contact will be made with a complainant's nominated legal representative before any contact was made with the complainant.

In cases where enquiry reveals that there has been no genuine conciliation and the complainant still requires investigation, the Ombudsman will direct that an investigation be commenced. In some cases the police officers manner of conducting the "conciliation interview" may constitute "wrong conduct" and itself be the subject of investigation.

100. Control of Search Warrants to Protect the Privacy of Citizens

A report was made to Parliament on 14th September, 1982, concerning the issue by a Justice of the Peace to a Police Sergeant, (a member of the Gaming and Betting Squad), of blank search warrants.

The investigation was commenced following the receipt of an anonymous complaint, enclosing blank search warrants and other documents, allegedly found in Centennial Park and pre-signed by a Justice of the Peace. Among other issues raised, the report to Parliament recommended certain amendments to the Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act.

On 6th June, 1984, the Attorney-General issued a media release announcing the Government's intention to introduce new laws to limit and control the issue of search warrants.

The aim of the new laws is to ensure that the privacy rights of individuals are adequately protected and to limit the number of people who could issue search warrants. Previously up to 100,000 Justices of the Peace in NSW could issue warrants.

New standard guidelines will be introduced to govern the terms under which a warrant can be issued. The guidelines require that a complete written record of all warrants issued, is maintained. Previously, warrants were issued after a verbal request had been made. Only Magistrates and Justices of the Peace who are Officers of the Magistrates Court administration of the Attorney-General's Department (approximately 800) will, in the future, be able to issue such warrants.

Under the proposed system, police officers and others seeking warrants will be required to give an oath as to their reasons for requiring a warrant. Once a warrant is issued it will only be valid for one month, thereby ending the system in use which put no time limit on the life of a warrant.

In regard to the person whose property is subject to a search warrant, the new legislation will require that they are entitled to a notice outlining the nature of the warrant and the powers it confers as well as setting out their rights of redress.

Finally, once a warrant has been served the police officer involved will be required to report back to the issuing Justice within ten days as to the success or otherwise of the search.

101. Poker Machine Investigation: Complaints against Special Task Force

Substantial media coverage has been given over the past two years to allegations made against members of the Police Task Force 2, based at Penrith, concerning their investigations into the activities of Australia's largest poker machine manufacturer, Mr. Len Ainsworth and the executive director of the Australian Club Development Association, Mr. Ted Vibert.

Between them, Mr. Vibert and Mr. Ainsworth have lodged 16 separate complaints or groups of complaints (some complaints contain up to ten separate and distinct allegations of misconduct) against members of the Police Force.

The common thread running through most complaints is that two Detectives in charge of the Police enquiries engaged in a series of acts and made a series of statements designed to discredit the complainants. It is considered by the complainants that the actions of the two officers greatly damaged their reputations and standing, and in the case of Mr. Ainsworth it was claimed that the action of the police officers and incorrect information allegedly provided by members of the New South Wales Police Force to the State of New Jersey, Department of Law and Public Safety, Division of

Gaming and Enforcement, resulted in the loss of multi-million dollar export sales of his poker machines to the American State of New Jersey.

Further notoriety fell upon the two police officers the subject of most of the complaints when they were named in the New South Wales Legislative Assembly by the Leader of the Opposition during a debate where members of the Opposition alleged police and political interference in the officers' investigation of Mr. Ainsworth and Mr. Vibert. Mr. Greiner named the two detectives as the source of his information and claimed that they had given his staff hundreds of pages of information, documents and Bureau of Crime Intelligence reports.

A substantial number of the complaints lodged by Messrs. Ainsworth and Vibert concern the leaking of confidential documents seized by the Police under search warrants to various Government inquiries, police, members of parliament and the media in other states.

Investigations into the complaints by the Police Internal Affairs Branch have been proceeding since June 1982 following the lodgement of the initial complaint. While the majority of the police investigations have been recently finalised, at the end of September 1984, final reports on the investigation of three complaints were still outstanding, and the Police were undertaking further enquiries at the direction of the Ombudsman in relation to another. That matter involved an allegation by Mr. Vibert that confidential documents seized by Police under search warrants had been improperly shown to interstate directors of the Australian Club Development Association. The Police investigation into this complaint consisted of obtaining a report from the Detective Sergeant in charge of the criminal enquiries. No attempt appeared to have been made to verify the information provided by the Detective by interviewing the directors concerned or by examining the documents in question.

The Ombudsman considers that the complaints are interrelated and should be considered as a whole. In view of the matter again surfacing in Parliament and references being made to his role in it, the Ombudsman made a Special Report to Parliament. This Report was tabled by the Premier on 25 September, 1984. The Report recommended that the outstanding police investigations be completed as a matter of urgency and that in future interrelated complaints be investigated and reported on as a whole by the Police Commissioner.

102. "Second Thoughts" on Disciplinary Action against Police Officers

In January, 1983 a number of citizen bystanders complained to the Office of the Ombudsman about an incident which allegedly occurred on 9 January, 1983 at approximately 11:15 p.m. outside the Flinders Hotel in Darlinghurst. While different complainants saw or reported different portions or versions of the incident, the sum of the allegations was that a police officer, after speaking to a crowd of people who were drinking outside the hotel, and apparently asking them to move to the footpath, shouted, inter alia, words to the effect "You shit. Get off the street. Here I am. Want to take me on ...". The police officer then allegedly took hold of a coloured man in the crowd and, with an open hand, knocked him to the ground and then struck him again.

The matter was investigated by a member of the Internal Affairs Branch. The officer the subject of the complaint reported that he formed the view that the coloured man (who attracted his attention by making an offensive remark to him) was heavily intoxicated and decided to detain him pursuant to the provisions of the Intoxicated Persons Act. When he took hold of him to detain him as an intoxicated person, the man broke free of his grasp. He said that when he took hold of him again, the man sat down in the gutter. He said that he tried to lift the man to his feet and at the same time asked him to get up. He said that the man then lay flat on his back, and that, due to his being much larger than the police officer, he was unable to get him to his feet. He was eventually assisted by another police officer to get the man to his feet, and they placed him in the police van. It appears to be agreed that, by this time, the crowd at the scene was becoming restive, and some witnesses indicated that beer cans and glasses were thrown.

The police officer denied all aspects of the allegation of assault. The police officer also denied using the words complained of or any similar words. The investigating officer was unable to interview the other police officer involved in the incident, as he was informed by the police medical officer that he was to undergo heart bypass surgery and that it was most unlikely that he would be well enough for interview until at least January 1984. The investigating officer was unable to locate the coloured man and formed the opinion that a charge of assault would be difficult to substantiate. However, he recommended to the Executive Chief Superintendent of the Internal Affairs Branch that a "Departmental charge of Misconduct [had] been substantiated against [the police officer]."

The Officer in charge of the Legal Advisings and Police Appeals Section of the Police Department advised the Executive Chief Superintendent of the Police Internal Affairs Branch that sufficient evidence existed to substantiate a Departmental charge of Misconduct against the police officer the subject of the complaint. He expressed the opinion that in view of the inability of investigating police to locate the person allegedly struck by the police officer, a charge of assault would "necessarily fail", "without the person ... to provide evidence of lack of consent".

Deputy Commissioner John Perrin wrote to the Ombudsman on 27 September, 1983, saying, inter alia, that "I believe that sufficient corroborative evidence has been forthcoming from the complainants to substantiate a Departmental charge of "Misconduct" against [the police officer] for bringing discredit upon the Force and, subject to advice from your Office, I will direct that such a charge be preferred".

The Ombudsman subsequently wrote to the Commissioner of Police, indicating that although (because of conflicting evidence in relation to the complaint) he was unable to be satisfied affirmatively either that the complaint had been sustained or that it had not been sustained, he did not "dissent from the proposal set forth in your letter of the 27th September, namely that you propose to direct a departmental charge of "Misconduct" against the [the police officer] for bringing discredit upon the Force".

That determination was made prior to the introduction of the amendments to the Police Regulation (Allegations of Misconduct) Act and the Ombudsman Act which enable the Ombudsman, in appropriate circumstances, when unable to determine whether a complaint is sustained or not sustained, to re-investigate such a complaint.

On 17 April, 1984, following upon his request for information in relation to the results of the Departmental charge of "Misconduct", the Ombudsman received a letter from Deputy Commissioner Perrin, dated 12 April, 1984, in which he said, inter alia, "Turning now to the matter of [the officer], I did indicate that it was my intention to prefer a Departmental charge of "Misconduct" against him. However, I later had second thoughts in relation to that course of action, and when your determination of 2 February 1984 was received, I made certain representations to the Commissioner in respect of the matter. The Commissioner subsequently agreed with my views, and on 16 February 1984 he directed that [the officer] be counselled by his Divisional Officer in regard to his conduct as opposed to having him Departmentally charged. That direction was complied with ... on 21 March 1984.

Having regard to the nature of your determination in respect of the abovementioned complaint, it was not considered that there was any obligation to advise you of the change in Departmental action."

In the Ombudsman's view, in light of the seriousness of the allegation, the abundance of evidence from bystanders that supported it, the advice received from the Legal Advisings and Police Appeals Section and the opinion of the investigating officer, the disciplinary action taken in this matter was utterly inadequate.

In the present circumstances (where, if the Ombudsman is unable to determine whether a complaint is sustained or not sustained, he is empowered, under the new legislation, to re-investigate the complaint), "second thoughts" of this type may have a much more serious effect. If, for example, it were to appear to the Ombudsman in a particular case, that the action proposed to be taken by the Police Department in relation to the matter was appropriate in the light of the evidence obtained in the course of the Departmental Investigation, this could, in the Ombudsman's view, be a reason, in appropriate circumstances, for his declining to exercise his discretion to re-investigate the complaint. The Police Tribunal would then have the opportunity of determining the matter in the event of the police officer involved continuing to protest his or her innocence.

This case suggests that the Ombudsman cannot rely unequivocally on statements of proposed police disciplinary action.

Accordingly, it is now the practice of the Ombudsman in such cases to defer a decision on the exercise of his powers to re-investigate the complaint until he has been advised by the Police Department of the result of any stated proposed disciplinary or other action.

This is not entirely satisfactory. However, in the light of the experience in this case there appears to be no alternative.

103. Police Cells : Visitors and Changes of Clothing

In May 1983 complaints from two prisoners were lodged with the Ombudsman's Office in relation to conditions applying to persons detained in Police cells. Arising out of this

complaint was the issue of prisoners being allowed visitors and changes of clothing whilst in police custody. Specifically, two prisoners claimed that they had not been permitted to change their clothing prior to court appearances, and that visitors had not been permitted to see them.

Paragraph 12 of Police Instruction 32 prevented Police Officers allowing "prisoners" (as defined under the Prisons Act) to change their clothing prior to a Court appearance, or for any other reason except where the prisoner's clothes were required as evidence. Paragraph 13 of the same instruction restricted the access of visitors to prisoners whilst being held in Police custody.

In his report, the Inspector who carried out the police investigation of the complaint, recommended that Paragraph 12 and 13 of Police Instruction 32 be redrafted to allow prisoners a change of clothing prior to court appearances, and to allow visitors in certain circumstances. The Assistant Ombudsman made similar recommendations in a draft report on this matter, prepared pursuant to Section 28 of the Police Regulation (Allegations of Misconduct) Act.

On receipt of the draft report, Deputy Commissioner Perrin sought the views of the Assistant Commissioner (General) in relation to the recommendations made. The matter was then referred to the two Executive Chief Superintendents of the metropolitan and country areas, who were of the opinion that the recommendations of the draft report could not be complied with unless certain sections of the Prisons Act were amended.

Upon referral to the Legal Advisings and Police Appeals Section, however, it was determined that the recommendations could be met without any such amendments being made. The Chairman of the Corrective Services Commission was of a similar opinion.

As a result of these deliberations, on the 18th June 1984, Police Department Circular No. 84/167 was issued, stating:

> "Following legal advice, it is now advised that Police may permit prisoners whilst in their custody to change their clothing."

It further stated:

> "Police are now advised, that where security permits, they may permit prisoners to receive visitors."

104. Section 26(1) Orders : Prohibition on Disclosure

A provision in the Police Regulation (Allegations of Misconduct) Act 1978 enables the Commissioner of Police to prevent the Ombudsman from disclosing designated material and information provided by the Police. This section provides that where the Commissioner is of the opinion that the publication of any material or information which the Commissioner or any other member of the Police Force is required to provide to the Ombudsman might prejudice the investigation or prevention of crime or otherwise be contrary to the public interest, the Commissioner shall inform the Ombudsman accordingly giving the reasons for his opinion.

Where the Ombudsman is provided with material or information in respect of which the Commissioner has given such an opinion, the Ombudsman is not able to publish the material or information. If he considers circumstances so warrant, he is able to make a report to the Minister for presentation to Parliament in relation to the material or information.

It is the experience of this Office that there has been a significant escalation in the use of this provision by the Commissioner and his delegated officers in the past year. This is particularly so in relation to material and information provided by way of progress reports to the Ombudsman in matters where the police investigation is not finalised.

Furthermore, there are cases where the use of the provision appears to be arbitrary and inappropriate. In the Poker Machine Investigations case (discussed elsewhere), for example, a section 26(1) order was placed on five documents provided to the Ombudsman in relation to the investigation of one particular complaint. Three of these documents had previously been forwarded to the Office in relation to the investigation of one of the other complaints made by Mr. Ainsworth and Mr. Vibert. No section 26(1) order had been placed on those documents at that time. Accordingly, they were provided to the complainants in order to obtain their comments prior to the Ombudsman making a determination in that particular matter. As the complainants are the only persons the Ombudsman is able to publish such documents to directly, it is difficult to see the reasoning for suppressing publication of those documents at a later time.

In a similar fashion, a section 26(1) order was placed on five different documents forwarded as part of the report on the investigation into another allegation of misconduct made by Mr. Ainsworth. In that case, one of the prohibited documents had been previously supplied to the Police by the complainant's Australian solicitor; another was a letter to Mr. Ainsworth's American lawyer; and a third was an affidavit by the American lawyer verifying that the copy of the first mentioned document was a true and accurate copy of the original. Thus, of the five prohibited documents three were derived from Mr. Ainsworth's own lawyers.

In these and other matters, the section 26(1) orders had been originally invoked with the only explanation given as "I am of the view that the release of any material or information contained herein will be contrary to the public interest".

The Act provides that the Commissioner must give the Ombudsman his reasons for being of the opinion that publication of material or information may be contrary to the public interest or might prejudice the investigation or prevention of crime. In such cases, the Ombudsman has required the Commissioner to provide his detailed reasons for invoking the section.

In some cases where reasons have been given, the Ombudsman has formed the view that there has been an inappropriate and prima facie invalid invoking of the section. In the last mentioned matter, when the Ombudsman sought the Deputy Commissioner's reasons for invoking the section in relation to the material and information provided, he was informed that it was considered that the release of the information contained in the five documents would be prejudicial to defamation proceedings that had subsequently been initiated against the Police Officer involved in the complaint.

In this case, an opinion from experienced counsel, with which the Ombudsman agreed, stated that a private interest had been invoked, rather than a public interest, and that a consideration of the specific material suggested that some error of law may have been made in claiming that publication might be contrary to the public interest.

In his monitoring and evaluation role in respect of investigations carried out by Police, the Ombudsman is unable to question the Police Officers involved in the complaint or other witnesses apart from the complainants. To properly carry out his statutory duties to satisfy himself that complaints have been properly investigated and to determine whether complaints are sustained or not sustained, the Ombudsman considers it necessary to present the evidence provided by the Police to the complainants for comment.

In many cases where section 26(1) has been invoked the order will refer to all the material and information provided to the Ombudsman. In such cases, the Ombudsman is prevented from having the benefit of such additional comments in exercising his statutory duties.

While there is no disputing that there are cases where the publication of material supplied to the Ombudsman by the Commissioner could prejudice the investigation or prevention of crime or otherwise be contrary to the public interest, the Ombudsman is obliged to question the validity of any section 26(1) order where its use appears arbitrary or inappropriate.

In this regard, the provision obliges the Commissioner and/or Deputy Commissioner of Police to perform a number of tasks when invoking the section. These include: clearly identifying the material and information the subject of the order; providing reasons for being of the opinion that the publication of that material or information might prejudice the investigation or prevention of crime or otherwise be contrary to the public interest; going through a process of weighing against each other the conflicting merits and demerits to arrive at a view about whether publication of the material and/or information would be contrary to the public interest; and generally, exercising the discretion according to the law and the rules of reason and justice, and not according to private opinion.

The use by the Police of section 26(1) of the Police Regulation (Allegations of Misconduct) Act 1978 to prevent the Ombudsman publishing material and information will be closely monitored in the future and vigorously questioned in cases where it appears the section has been inappropriately or otherwise invalidly invoked. If need be, court action will be undertaken to challenge Section 26(1) orders which the Ombudsman and independent counsel both believe have been wrongly made.

105. Administrative Errors in the Traffic Branch

Complaints received from citizens about the issuing of infringement notices generally express dissatisfaction with the fact that they were booked; the manner in which they were booked; or their frustration in dealing with the Police Department when trying to settle matters themselves. Leaving aside complaints based on dissatisfaction with the fact that a notice was issued (such complaints normally being declined)

and the manner in which they were booked, (discussed above in Highway Patrol Officers and the Public), the remaining areas of complaint related to:-

i) the issuing of a summons, court order and warrant despite payment having been made;

ii) delay by the Department in presenting cheques for payment;

iii) the failure of the Police Traffic Branch to reply to correspondence; and

iv) courtesy letters being received after the deadline for payment has expired.

Whilst recognising that a large number of infringement notices are issued each week, the complaints received in this Office, in respect both of volume and content, have been sufficient to cause concern regarding the administrative procedures employed by the Traffic Branch. Examples of the kinds of complaints received are documented below in their respective categories.

(Note: The complaints by Mr. B (i), Mr. D. (ii), and Mr. R. (iii), have not yet been finalised and are still being investigated by the Department).

(i) Mr. G. received a traffic infringement notice in May 1983 whilst on a country trip and incurred a fine of $100. Finding on his return to Sydney that he had misplaced the traffic infringement notice he wrote to the Superintendent of Traffic explaining the position and describing the events. He enclosed a cheque for $100. No reply was received and Mr. G. went overseas returning on 30 October. Awaiting him on his return he found two letters from the Police Department, one advising that there was no record of his infringement and returning his cheque, the other containing a summons for failure to pay the $100 fine.

He rang the Department and was assured that if he re-forwarded the cheque with an appropriate letter and the summons, the matter would be attended to. This he did. In May, 1984, he received another letter from the Department offering another opportunity to pay the fine. Telephone enquiries followed an he was advised that his cheque had not been received. He put a stop payment on the cheque and the next day attempted to personally pay his fine at College Street. However, after waiting some time, he was advised by the cashier that she could not accept his payment as he did not have his infringement notice. It was only after seeking the assistance of the Officer in Charge that he was able to pay his fine and receive a receipt.

Mr. G. was of the opinion that if a cost benefit analysis of this matter was carried out, one would find that for a net return of $100 to consolidated revenue, considerably more had been spent in administrative cost both within the Department and in the court system in collecting this fine.

The Department explained that the confusion arose due to two sets of papers being in existence which were handled by two different Officers. The

Department was of the opinion that this would be avoided in future due to the "introduction of a new on-line computer process with selected terminals strategically placed throughout the Traffic Branch allowing clerks to get instant access to infringements placed on system".

Unfortunately Mr. G's complaint is not an isolated occurrence. Complaints have also been received where payment has in fact been accepted by the Department yet court proceedings have still been instituted. Mr. B's experience is such an example.

Mr. B. complained that he was involved in a car accident in September 1983 and promptly paid his fine. He was advised several weeks later by letter that, due to a computer error, his case had been forwarded for possible court action and that, should he receive a summons, he was to return it with the letter to the Police Department. This he did prior to going overseas some weeks later on annual holidays. On his return to Australia, Mr. B. found in his mail a court fine amounting to $180. He contacted the Department and was told to write in and they would deal with the matter. Several weeks after doing so, he received a telephone call from the local police station advising that they had a warrant for his arrest for non-payment of fines.

Whilst making his own enquiries, Mr. B. has found that he is not alone in his predicament. He advised that "according to Police sources and the various court houses I have spoken to, this sort of situation happens frequently".

(ii) Mr. D's complaint concerned the fact that although he had promptly paid a fine issued on 1.2.84 he still received a notice advising him that unless he paid the penalty within a certain time, court proceedings would be instituted. Assuming that his first cheque had gone astray he stopped payment and sent another cheque on 3.4.84. He then received a letter dated 14.5.84 saying that as payment had been stopped on his cheque, his fine was regarded as unpaid and court proceedings would be instituted if payment was not received by 4 June. He wrote back on 22 May advising that he would not send another cheque until the cheque he had forwarded in April had been cleared. He then received a reply to his April letter dated 8 June returning his cheque of 3.4.84 and advising that payment had been accepted on 10.4.84. Mr. D. then received a summons to appear in court. He appealed to this Office for help in sorting the matter out.

(iii) Mr. R. received a parking infringement notice in November, 1983. As a resident of the area, he had a resident parking permit and had parked in the same spot since living there. On the occasion in question, he noted that a 'no standing' sign had been relocated 1 metre, causing his car to overlap into the 'no standing' zone resulting in a notice being issued. Mr. R. alleges that on the same day he wrote to the Department objecting to the infringement notice. When no reply was received

he apparently wrote again on 10 January, 16 January and 31 January with the last letter being address to the Assistant Commissioner and marked "Personal, Private and Confidential". A reply was received to this last letter which advised that there was no record of any other letters being received and requested that he supply further details. Mr. R. apparently did this on 27 February, 1984. However, as he had not received a reply by 14 May he wrote to this Office seeking assistance.

(iv) Ms. C. complained that she had received a courtesy notice dated the 7 May 1984 on 23 May, 1984, two days after the deadline for payment had expired. On a previous occasion, a courtesy letter dated 26 March had been received on 6 April, three days before the expiration of the deadline for payment.

Ms. C. was advised that the fact she had not received the courtesy letter in time to pay the fine did not relieve her of the liability to pay as it was evident that she had initially received notice and was aware of the existence of the offence. However, due to the procedures employed by the Department in issuing and posting mail, delays can occur and it is proposed to further investigate the general problem of offenders receiving correspondence after the due deadline.

The Ombudsman completed two detailed reports of investigation into complaints about the Traffic Branch. These reports were the subject of a report to Parliament tabled by the Premier on Tuesday 25th September, 1984. The report to Parliament noted that the investigation had highlighted a number of procedural inefficiencies and problems within the traffic branch. It brought to the surface a number of costs inefficiencies such as the use of field breaches, annulments and the loss of revenue due to time taken to reply to correspondence. The report noted that the issuing of a summons notwithstanding that the fine was being paid was far from being an isolated occurrence.

In reply, the Secretary of the Police Department Mr. L. Vineburg advised the Ombudsman of the steps taken to overcome the problems highlighted by the complaints. These steps included:

i) A proposed restructure of the Branch has been submitted to the Public Service Board.

ii) The Branch Managers in the Review Section, Traffic Penalties Section and the General Administration Sections have been replaced.

iii) The turnaround for representations has been significantly reduced and a turnaround period of one month established.

iv) An improved computer system has been implemented.

It is hoped that the action taken will significantly improve the situation. However, the experience to-date would not suggest that the problems have been overcome. This is an area which affects the average citizen and, the Ombudsman believes, one to which the resources of this Office should be applied in the monitoring and investigation of any further complaints that are received.

PART III

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Case No. 1

AUSTRALIAN GAS LIGHT COMPANY

Delay in replying to consumer

The Managing Agent of a townhouse complex wrote in March, May and June, 1982, to the Australian Gas Light Company (AGL) about problems being experienced with the gas lighting system at the complex. He asked AGL to investigate and report and to review the accounts, which varied greatly.

An inspection was carried out by AGL on July 27 and the results noted. Due to an "office error", AGL filed the Managing Agent's letter and the accounts query remained unanswered. The Managing Agent wrote again in February, 1983, requesting the results of the investigation and when no reply or acknowledgement was received, he wrote to this Office.

As a result of enquiries by this Office, AGL carried out a thorough investigation. It was found that although the three meters at the complex were metric, one had been incorrectly coded as imperial and therefore had been assumed to be measuring gas in cubic feet rather than cubic meters as was actually the case. The error had resulted in an overcharge of $1,385.05, which was refunded.

AGL explained that the problem had arisen due to the Managing Agent complaining about both Service and Accounts which are distinctly separate areas of operation. AGL has now established a register for all inward correspondence and records the department to which each letter has been forwarded. This should ensure more effective coordination of enquiries concerning one or more Departments and result in a better service to AGL customers.

Case No. 2

BUILDERS LICENSING BOARD

Failure to investigate complaints thoroughly

The complainant made two complaints to the Board about building work to his home; the builder performing the work was unlicensed.

As a result of the first complaint, the Board discovered that a licence had been issued but had expired. The Board overlooked the fact that the licence had expired, and took no action over that breach of the Builders Licensing Act.

After the second complaint, the Board realised that the builder was unlicensed and action was taken to prosecute the builder. A breach report was prepared. However, that report was misplaced and it was not until the Board received a letter from the complainant's solicitor that it followed up progress on the breach report. By that time, however, the statutory period for prosecution had expired.

The conduct of the Board was found to be wrong. In relation to the first complaint the Board failed to check that the builder was licensed, and failed to institute prosecution proceedings for that breach of the Builders Licensing Act. This conduct was found to be unreasonable.

The Ombudsman recommended that the Board institute administrative procedures to ensure that this situation did not recur. He also recommended a review of complaints to ensure that the builders concerned were licensed and that prosecution proceedings if appropriate were commenced. The Chairman of the Board responded that the particular matter was not typical of the Board's normal procedure in investigating illegal building work. He did not agree to analyse administrative procedures on the ground that all complaints received by the Board were already subject to a full licence check, but initiated a review of complaints. Over 1,000 complaint files were checked. Correct procedures were found to have been followed.

The Ombudsman decided that this action was satisfactory.

Case No. 3

DEPARTMENT OF CONSUMER AFFAIRS

Personal views of officer affecting decision to investigate complaint

The Department received a complaint that certain packets of tobacco purchased by the complainant contained "rubbish" and that the manufacturer had refused to take measures to improve the quality of tobacco.

The Department wrote to the complainant informing him that as it was New South Wales State Government policy to discourage smoking and to promote a healthy lifestyle, no action would be taken in relation to the complaint.

Investigation revealed that the officer concerned had strong personal views about the dangers of tobacco to a person's health, and felt that it would have been incongruous for the Department to investigate a complaint about the quality of tobacco while the government was spending large sums of money to dissuade people from smoking. This attitude ignored the Department's responsibilities under the Sale of Goods Act, 1923, the Consumer Claims Tribunal Act, 1974, and the Consumer Protection Act, 1969. At the very least, the Department ought to have advised the complainant of his rights under those pieces of legislation.

A wrong conduct report was prepared and forwarded to the Minister, and as a consequence of the report the Department issued a memorandum to its staff which stated,

> "I am bringing this matter to the attention of all officers in order to emphasize the importance of the policy that exists within this Department and all government agencies requiring that personal views or prejudices must yield to statutory or other responsibilities."

Case No. 4

DEPARTMENT OF CONSUMER AFFAIRS

Failure to provide correct advice

Section 18 of the Consumer Claims Tribunal Act provides that a Tribunal does not have jurisdiction in respect of any consumer claim if the contract from which the claim arose was made earlier than two years before the day on which the claim was referred to the Tribunal. In early 1981 Mrs. A. contracted with a builder for the performance of certain work to the roof of her home. In October, 1982 she lodged a formal complaint about the building work. In May, 1983 Mrs. A. decided to commence proceedings before the Consumer Claims Tribunal. She completed a claim form and sought to have it accepted by the Tribunal Registry. She was advised, however, that the proceedings could not be commenced because more than two years had elapsed since the date of the contract with the builder. Mrs. A. complained to this Office that she rang the Department at intervals of approximately six weeks from the

time she lodged her complaint in October, 1982, and at no time was she told of her entitlement to commence proceedings before the Consumer Claims Tribunal.

An investigation was commenced. Section 16(1)(a) of the Consumer Protection Act provides that one of the functions of the Department is to advise persons in relation to the provisions of the Act and Regulations and any other Legislation administered by the Minister and relating to the protection of Consumers. The Department freely admitted the failure to provide Mrs. A. with proper advice about her entitlement to commence proceedings. The Department sought to justify its position, however, by arguing that a close examination of the facts suggested that even in October, 1982, the time during which proceedings could have been commenced had expired. The Department also sought to argue that Mrs. A. could take her own legal action and have the matter resolved through the Court of Petty Sessions, or, alternatively, have the matter dealt with by the Builders Licensing Board.

The Ombudsman found the conduct of the Department to be wrong. By virtue of the failure to provide the advice the complainant was denied access to the proper forum for dealing with her complaint and the failure constituted a breach of the Department's duty to consumers as set out in section 16(1)(a) of the Consumer Protection Act, 1969. The argument that the complainant may have been out of time as at October, 1982 was rejected. The Ombudsman concluded that if the matter had been one that was manifestly outside jurisdiction then the failure might be justifiable. The facts were, however, that the subject matter of the complaint was one in respect of which the Consumer Claims Tribunal, on the face of it, had jurisdiction. The time during which proceedings could have been commenced in the Tribunal would not have expired until February, 1983 at the earliest and, at the latest, on 21st April, 1983. The Department had conducted no preliminary enquiries into the matter and on the basis of what was then known to the Department, there was no reason why the matter could not have been dealt with by the Tribunal.

The argument that Mrs. A. has access to the Courts of Petty Sessions and/or the Builders Licensing Board was also rejected. Indeed the failure to advise Mrs. A. was, in the view of the Ombudsman, made more serious by the fact that she was from then restricted to conducting proceedings in the Courts of Petty Sessions.

The draft report made certain recommendations all of which were complied with by the Department.

Case No. 5

DEPARTMENT OF CONSUMER AFFAIRS

Delay in determining a fair rent

The Landlord and Tenant (Amendment) Act 1948 provides that a lessee of prescribed premises may apply to the Rent Controller to determine the fair rent in respect of those premises. After certain inspections have been carried out the Rent Controller is required to determine the fair rent.

The complainant applied in November 1981 for a fair rent determination in respect of his premises at Redfern. In September, 1983 he complained to this Office that the

application had not been dealt with and a fair rent had not been determined.

Investigation disclosed that a fair rent determination had not been made. From July 1982 until August 1983 no substantive action was taken in relation to the fair rent application. In August 1983 it was realised by the Department, that the Departmental file had been lost but still no action was taken. It was not until February 1984, after intervention by this Office, that action was taken to determine the fair rent. That failure was found to constitute wrong conduct and a report in terms of Section 26 of the Ombudsman Act was sent to the Minister. The report contained certain recommendations, all of which were complied with by the Department.

Case No. 6

DEPARTMENT OF EDUCATION

Threat of possible tree root damage

The owner of a property which backs onto the grounds of a primary school complained that the Parents and Citizens Association had planted a number of trees in the school grounds close to his boundary. One tree had been planted on top of his connecting line to the sewerage main and another adjacent to it.

The trees were still quite young, but the complainant was concerned about possible tree root damage to his line in the future. He had sought to have the two offending trees removed.

He had made contact with the principal of the school and the Department of Education about the problem. A considerable time later, he had still not received satisfaction.

The Department investigated the alleged problem following enquiries by the Office. The trees were inspected by an engineer from the Department of Public Works, who indicated that damage by tree roots to the complainant's connecting line would be extremely unlikely. The Department of Education wrote to this Office:

> "However, if at some time in the future the tree's roots cause damage to Mr. W's sewer line or other property, the Department of Education would be prepared to compensate him for any damages sustained."

In view of this advice, the matter was considered resolved.

Case No. 7

DEPARTMENT OF ENVIRONMENT & PLANNING

Planning application reconsidered

Mr. B. complained to this Office on 13th July, 1983, alleging that the Department of Environment and Planning had unreasonably refused him permission to build a house on his block of land.

Mr. and Mrs. B. had applied to Coffs Harbour Shire Council for permission to build on their land. Such a development was prohibited by Interim Development Order No. 80 - Shire of Coffs Harbour. This Order prohibited the erection of dwellings on land of less than 40 hectares except in special circumstances.

On 25th November 1982 Council refused Mr. and Mrs. B's application for a dwelling on the land on the grounds that Council had no power under Clause 22 of Interim Development Order No. 80, to approve the proposal. Council also indicated that it would not support a submission to the Director of Environment and Planning for his concurrence to the building application under State Environment Planning Policy No. 1.

Mr. and Mrs. B. subsequently asked Council to reconsider its decision not to support a submission for concurrence of the Director of Environment and Planning under State Environmental Planning Policy No. 1. Their main argument was that when they had purchased the land they were under the impression that Council would permit building on the block. They formed this impression on the basis of correspondence between Council and the previous owners which was ambiguous on the question of building rights.

On 27th January, 1983 Council considered this submission and resolved that:

> "as the proposal is prohibited under Interim Development Order No. 80, the application be forwarded to the Department with a request for the concurrence of the Director under State Environmental Planning Policy No. 1 to the erection of dwelling on the land".

Council also resolved that the Department be advised that Council supported the proposal.

The Department of Environment and Planning responded to the Council's submission thus:

> "2. after consideration of a report by the Department, and pursuant to the provisions of clause 7 of State Environmental and Planning Policy No. 1, the Director of Environment and Planning has refused to concur in the variation of clause 22 of the Interim Development Order No. 80 (Coffs Harbour) to permit the subject development.
>
> 3. In reaching his decision, the Director had regard to advice that:-
>
> a) the approval of a house on this land would create a precedent for further approval for the erection of dwellings on areas of less

than 40 hectares in rural zones;

b) the application represents a major departure from the development standard and is inconsistent with the intention of the gazetted instrument."

After receiving this reply, Mr. B. complained to this Office.

To assist in deciding whether or not Mr. B.'s complaint should become the subject of an investigation, comments on Mr. B.'s letter of complaint were sought from the Department.

The Director of the Department, Mr. Smyth, replied in part:

> "the applicants sought a variation of the development standard under the provisions of State Environmental Planning Policy No. 1 and my delegate refused concurrence on 15th June, 1983.....
>
> The 'building rights' referred to in the letter refer to Council's ability to approve the erection of a dwelling on land in the Non Urban Zone if it existed in separate ownership at 20th October, 1967. In this case the land now owned by the B.'s was owned conjointly with another parcel of land. Council approved a dwelling on the combined area under the provisions of the planning instrument. The land was subsequently sold in two separate parcels. It appears that the B.'s did not seek adequate advice at the time of purchase to confirm Council's ability to approve a dwelling.
>
> However as a result of the conversation with the Regional Manager, Mr. B. has now forwarded a copy of a letter from Coffs Harbour Shire Council dated 13th August, 1980, to a former owner. This letter states that Council will approve the erection a dwelling on portion.....
>
> Whilst it appears that this letter was in error, clearly its terms would lead to expectations that a house could be erected on the land. Having regard to this and to other factors I have now agreed to my delegate reversing his earlier decision and advising Coffs Harbour Shire Council of my concurrence".

In view of the fact that this matter was completely resolved to the satisfaction of Mr. B., the preliminary enquiries by this Office were discontinued.

Case No. 8

GOVERNMENT INSURANCE OFFICE

Failure to deal effectively with correspondence

A complaint was received from Higgins Solicitors, Canberra advising that despite having written to the G.I.O. on 15 November, 1982; 8 April; 10 May; 15 June; 5 August; 4 November and 13 December, 1983, they had not received an answer to their inquiries. The correspondence concerned a

claim for compensation arising out of an aggravation of a pre-existing work caused injury.

The matter was raised with the G.I.O. who advised in a letter dated 6 March, 1984, that as the letters had evidently been addressed to "the Manager, G.I.O.", "it would be difficult for our Mail Room Staff to accurately sort mail inadequately addressed with so many departments potentially involved and in this regard we have been unable to determine the recipient of those letters".

Enquiries revealed that the G.I.O. had in fact responded to the letter of 15 November, 1982, with an undated, unreferenced, reply to the solicitors denying the existence of a policy. Higgins Solicitors ascertained the policy number and wrote again on 8 April. No reply was received and further reminder letters were sent. To one of these letters, the G.I.O. responded with a dated but unsigned form letter from the Third Party Claims Section requesting details of the supposed Third Party Claim (it was a workers compensation matter). To another the G.I.O. responded by telephone on 24 August 1983 and advised that "they had been dealing with this file as if it were a MVA (Motor Vehicle Accident) claim and that they would now forward it to the correct department". However, despite this advice, no reply was received and the solicitors lodged a complaint with this Office.

The Assistant Claims Manager, Workers Compensation Section, was interviewed. He stated that dates and references are usually put on letters and that the usual procedure is to create a file and place replies on the file. He suggested that rather than write so many letters, the solicitors should have rung the G.I.O.

No record of this correspondence could be located in the G.I.O. and it is not known what happened to it or why it was not attended to. A representative of the G.I.O. has since called on Higgins Solicitors to resolve this matter.

A wrong conduct report concluded:

"1. The explanation provided by the G.I.O. for these letters going "astray", namely, that the manner of address used by the complainant created difficulties in the mail sorting office, is not acceptable, nor does it explain why the letters which were attended to (it has been established that at least three of the seven letters were received by the G.I.O.) were not filed in a retrievable manner. An authority has a duty and a responsibility to look after the correspondence that it receives and to attend to it within a reasonable period of time. The failure of the G.I.O. to locate even the three letters which it is evident were received would suggest flaws in their system of handling and filing correspondence.

2. The opinion that persons experiencing difficulty in obtaining a response from the G.I.O. should telephone in preference to writing further letters has been expressed by another representative of the G.I.O. on a different occasion. This is not a constructive attitude and discriminates against interstate and country persons. The fact that telephones exist is no reason for the G.I.O. not to deal properly with correspondence in the first instance. The person who has not received any reference to refer to could waste a lot of time and money trying to locate the right person to speak to.

3. The Management of the G.I.O. has a responsibility of ensuring that mail staff know what to do with mail. This

should not dramatically reduce the letter's chance of being attended to but rather elicit a greater effort by the G.I.O. to see that it is. Most letters refer to the reason for writing within the body of the letter. It is suggested that where no reference exists, someone should undertake the task of reading the letter and, where confusion still exists, ringing the writer in order to obtain further particulars."

The following recommendations were made:

1. Mail sorters or some appointed person peruse letters without references in order that they be directed to the correct section and, if no reference to the subject matter is evident, that the matter be referred to the supervisor for follow-up action.

2. Letters or telephone calls requesting additional information be utilised in response to reminder letters which refer only to past correspondence and not to the issue in question.

3. In respect of unconnected correspondence, follow up action take place within seven days rather than the stated one month and that checks be carried out to ensure that follow up procedures are indeed being followed through.

The Managing Director, Mr. W. Jocelyn, stated that he did not intend to take any action in respect of these recommendations. One reason given for this attitude was that the Public Service Board was "carrying out an efficiency audit of our claim and complaint handling procedures".

The Treasurer, the responsible Minister, advised:

> "I would like to assure you that such incidents are of great concern to me. However, with an efficiency audit underway and development of computer facilities, these problems should be eradicated."

This and the matter covered by the next Case Note were the subject of a Special Report to Parliament under Section 31 tabled by the Premier on 26 September, 1984.

Case No. 9

GOVERNMENT INSURANCE OFFICE

Failure to reply to a reasonable request for information

A complaint was received from Ryan and Gilmore, Solicitors, on behalf of their client, Miss M., regarding alleged delay by the G.I.O. in forwarding payment to a doctor in Tamworth and the fact that, despite requests, no reply had been received explaining the delay.

The solicitors had written to the G.I.O. on 7 July, 1983, requesting clarification as to whether a cheque for $29 had been forwarded to Dr. B. and if so, the date of posting. As well, they requested that if the cheque had been overlooked, it should be forwarded to them. No reply was received to this letter, and reminders were sent on 19 August, 5 September, 26 September and 10 October. On 20 October, the Solicitors received a cheque for $29 from the G.I.O. However,

there was no explanatory covering letter, merely a cheque but notation "S -M - adjustment of settlement". The solicitors decided that this reply was inadquate and again wrote to the G.I.O. on 20 October expressing their dissatisfaction and requesting an explanation. No reply was received by 1 November, and on that date they made a written complaint to this Office. A reply was finally received on the 13 February, 1984, after the intervention of this Office.

The matter was raised by this Office with the G.I.O. and numerous requests for comments were made over a nine week period. These requests failed to elicit any response until the possibility of a formal inquiry was brought to the attention of the Managing Director's acting secretary. A reply was received on the 24 January, 1984, but it was considered inadequate. A formal inquiry was instituted requiring the attendance of the Acting Manager, Third Party Claims, the Secretary, and the Managing Director, at this Office. These persons attended on 10 February and were assisted by a barrister in making their submissions. 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 finalisation of the claim, the file had been referred to Redfern Repository on 20 July, 1982;

ii) letters (1) and (2) (7.7.83 and 19.8.83) were received in the G.I.O. and were referred to the 'Finals' mail girl. On 7.9.83, the file was requested from Redfern. However, it was not received until 4.10.83;

iii) letters (1), (2), (3) and (4) were attached and the file was referred to the relevant claims officer who arranged on 6.10.83 for a cheque to be sent without covering letter;

iv) letters (5) and (6) were received by the G.I.O. on 12.10.83 and 25.10.83 respectively but remained unattached in the mail room until February, a period of over three months, before being located a few days before the inquiry;

v) the Ombudsman's letter of inquiry was attached to the G.I.O. file and a draft reply was requested on 29 November. The file then apparently went missing until it was located on 24 January and a reply to this Office prepared. It was not known what happened to the file between 29.11.83 and 24.1.84 but it was apparent that the Ombudsman's request for information had been in limbo during this time.

It was submitted during the inquiry that positive steps had been taken to overcome the problems highlighted, by the introduction of new procedures for dealing with mail and files. However, it was noted that these new procedures had not been finalised until 7 February, that is, 3 days before the inquiry, and that the Managing Director had no knowledge of the new system.

The following conclusions were reached:

1. An error was made by the G.I.O. when settling the claim and this was unfortunate. However, once this error was recognised it should have been properly dealt with. The complainant made a reasonable

request for information and it should have been attended to.

2. It was apparent from the information available that there was no delay in forwarding payment to Dr. B. There was excessive delay though, in explaining that the cheque had been returned.

3. The intervention of this Office and the holding of a Section 19 inquiry should not have been necessary, nor should they be the pre-requisites, for obtaining a response from the G.I.O. to a reasonable request for information.

The conduct of the G.I.O. was found to be wrong in terms of the Ombudsman Act because it was unreasonable.

The following recommendations were made:

"1. That a report be made to this Office within 6 weeks detailing the steps taken by the G.I.O. to overcome the problems highlighted by Ryan and Gilmore's complaint namely, the delay in handling correspondence, the misplacing of files, delay in retrieval of files, the inadequacy of replies.

2. That the new system be monitored by the G.I.O. to ensure that it is dealing satisfactorily with the problems outlined.

3. That acknowledgements, with correct references to assist in any future correspondence, be utilised where it is not possible for the G.I.O. to reply to the matter raised within a reasonable time."

A Section 26 report was prepared and forwarded to the Treasurer. A consultation was held with the Treasurer and he expressed concern about the situation documented.

It is hoped that the efficiency audit presently being undertaken by the Public Service Board and the development of computer facilities will eliminate the problems highlighted by this complaint.

Case No. 10

DEPARTMENT OF HEALTH

Qantas and the New South Wales Pure Food Act

The Qantas Catering Centre at Kingsford-Smith Airport services about twenty-one international air-lines, and provides outward bound air-liners with approximately four million meals annually. It also removes from incoming air-liners unused foodstuffs and garbage all of which, because of a recognised risk of contagion by communicable diseases, is subject to rigorous quarantine procedures. Or, at least, it should be.

Union concern at alleged failure by the Catering Centre to observe adequate hygiene standards and practice ended in industrial action which in turn brought the Centre's practices under expert scrutiny including, in particular, the attention of Inspectors from the Food Inspection Branch of the Department of Health.

The incoming air-liners and the outward bound air-liners are, of course, one and the same. And, amongst other things, the Transport Workers Union was concerned that the meals for the latter were being conveyed in the same vehicle used for the removal of quarantined material from the former.

The expert inspection brought about only by the industrial action taken by the Union evoked such expert comment as:-

> "Qantas appeared here not to appreciate the minute amount of inoculum required for the transmission of Hepatitis A, Typhoid and Paratyphoid Fever and Bactillary Dysentery."

> "I would equate the delivery of food in the Qantas delivery vehicles with Sydney Garbage Trucks, concurrently collecting garbage and delivering bottles of milk."

> "In fact garbage from the previous day was on the floor of the food delivery vehicle, the same gloves were being worn by personnel handling the food and the garbage and the garbage bins were overfilled so that the lids would not close."

> "In summary, it is my opinion that there is a risk of contamination of food when the two operations of unloading waste and food delivery are combined so that they are carried out by the same individuals in the circumstances described ...."

These extracts are from four different expert reports and, it should be emphasised, relate to the calendar year 1980.

The conduct of Qantas is, of course, not open to comment by this Office. However, the failure of the reports prepared by the Department's own Inspectors to bring about effective action by the Department of Public Health under Regulation 77(8) under the Pure Food Act 1908, to remedy the above position, became the subject of a complaint under the Ombudsman Act, and the Department is within the jurisdiction of this Office.

Investigation confirmed that although the Department had been well aware of a continuing failure by Qantas Catering Centre over a period of years to adhere to essential good housekeeping practices and hygiene, it had not taken adequate action to bring that unsatisfactory state of affairs to an early end. Indeed, unsatisfactory reports over a period of approximately three years did not generate effective use of the Department's statutory powers.

Legal action was initiated by the Department in April 1981, over twelve months after the unsatisfactory state of affairs had been brought to its attention. However this was not proceeded with following a direction which issued from the Office of the Minister for Health. According to advice from the Acting Chairman, the reason for that direction was unknown to the Department.

Legal action was not pursued further until after the involvement of this Office. However, at this time the Catering Centre spent $250,000 improving its facilities and at last satisfied the Department's inspectors. In the meantime, three years had passed since the position had first been made known to the Department and about twelve million meals had

been prepared in what press reports have described as Australia's largest kitchen.

The Department's ineffective action over the three year period was hardly satisfactory, and a report was made under Section 26 of the Ombudsman Act to that effect. The conduct of the Minister, like that of the Qantas Catering Centre, is not open to comment under that Act.

Case No. 11

LEGAL SERVICES COMMISSION OF NEW SOUTH WALES

Extensive delay in dealing with an application for Legal Aid

The complainant, Mr. G., had applied for and was selected by the Electricity Commission for a position of Assistant Power Plant Operator at Liddell Power Station, and was to commence duty on 4th of January 1983. On the 3rd of December 1982, the Electricity Commission advised the complainant it was unable to meet its employment offer due to reduced demand for electricity. On 30th of March 1983, the complainant made an application to Newcastle Legal Aid Office, for legal assistance to bring proceedings against the Electricity Commission seeking damages for loss sustained as a result of the withdrawal of the offer of employment. The application was not dealt with until 16th of August 1983, and on 23rd August 1983 the application was refused as lacking in merit. The complainanat lodged a complaint about the delay of four and a half months in dealing with the application.

The conduct of the Legal Services Commission was found to be wrong. It was recommended that all applications being dealt with by the solicitor who dealt with the complainant's application be reviewed to determine whether any other applications had been unduly delayed, and also that administrative procedures be implemented with a view to ensuring that similar delays do not occur. The Acting Deputy Chairman of the Commission advised that he visited the Newcastle Legal Aid Office and inspected all the matters which had been assigned to the solicitor who received the complainant's application. He said he was satisfied that Mr. G.'s matter was an exception and that the solicitor had, in other cases, given proper attention both to the expeditious determination of applications and, in cases where legal aid had been granted, to the proper pursuit of the client's claim or defense. The Acting Deputy Chairman also indicated that existing administrative procedures requiring regular attention to files had been reinforced and one new procedure introduced.

The Ombudsman formed the view the first recommendation had been complied with satisfactorily, and indicated his intention to seek a report from the Commission as to the operation of the reinforced procedures after a reasonable time had elapsed. A report was subsequently obtained. It satisfied the Ombudsman that the second recommendation had been complied with.

Case No. 12

LOCAL GOVERNMENT BOUNDARIES COMMISSION

Conduct of Chairman

A complaint was received from the Secretary of the Local Government and Shires Association of NSW about the conduct of the Chairman of the Commission. It related predominantly to the examination by the Commission of the boundaries of the City of Sydney and the Municipalities of Woollahra, Waverley, Randwick, Botany, Marrickville, Canterbury, Leichhardt, Ashfield, Drummoyne, Burwood, Concord and Strathfield.

Four specific actions of the Chairman were to be the subject of investigation. These were:

1. the preparation of a new Commission brochure;

2. the commissioning of a public opinion poll;

3. the calling of public meetings; and

4. the procedures used for preparing the Commission's report.

In regard to the preparation of the brochure, it was concluded that there was a lack of consultation by the Chairman with the members of the Commission about to the preparation of the draft text of the brochure and that the brochure in its final form was not approved by the members of the Commission. However, apathy on the part of the Commission members was a significant contributing factor.

A public opinion poll was commissioned by the Chairman and was carried out between 18 May and 1 June, 1984. The Chairman advised the polling firms as to the Commission's requirements and also approved the questions and the form of the final questionnaire. The other members did not participate in the formulation of the survey.

The purpose of the survey was to provide information to the Commission about the attitude of the residents and ratepayers of the areas concerned. The study sought the opinions of selected people in the chosen areas on the proposed amalgamations but also included questions about their voting intentions. The questions apparently asked were:

- How did you vote in the last State elections?
- How did you vote in the last Council elections?
- How do you intend to vote in the next council elections?

The report of the Deputy Ombudsman concluded:

> "While an opinion poll would appear to be an excellent means of ascertaining the attitude of ratepayers and residents to Council amalgamation, it is dubious that such a survey, given the terms of reference, can justify the inclusion of questions relating to voting preference. The information regarding voting preferences did not appear in the section dealing with the 'Attitude Survey' in the Commission's report.

> Given the aims of the study, the inclusion of questions relating to voting preferences, which it is noted were approved solely by the Chairman, would appear irrelevant and, given the controversy surrounding the Commission's examination, could be seen as supporting the purported local government view advanced by the media that 'it (the Commission) is more concerned about ALP politics than boundaries'.

A public meeting was arranged for 19, 20 & 21 July, 1983, in the State Office Block Theatrette and invitations were issued to each of the 13 councils to attend. Telegrams were sent on 22 June withdrawing this invitation, changing the dates to 4, 5, 11 & 12 July and allowing Mayors only to present Council submissions. Attendance was restricted to those with this revised invitation.

The complainant alleged that the Chairman had made decisions relating to the holding of a public meeting and then changed the status of that meeting without the prior knowledge or approval of other members of the Commission, and determined who would and would not be invited to address the Commission at the meeting.

The Chairman advised that the decision to exclude the public from the meetings was made on the advice of the Director the then Office of Local Government. The report of the Deputy Ombudsman concluded:

> "While it is questionable whether the other members of the Commission would have wished to select other private individuals or community groups than those selected by the staff of the Commission under the direction of the Chairman, it would have been more equitable had they been given the opportunity to do so. The evidence available would suggest that the Chairman did contact members by telephone and advise them of her decision to exclude the public from the meetings. However, such procedure does not provide sufficient scope for dissension."

As to the procedures used in preparing the Commission's report, three reports to the Minister were prepared by the Commission's members. One report supporting the Chairman's suggestions and advocating amalgamation was prepared and was subsequently adopted on the casting vote of the Chairman. Two dissenting reports opposed to any alteration of boundaries with the exception of Marrickville were also prepared. The three reports were forwarded to the Minister for Local Government on 8 August 1983. There are four members of the Commission. Three of the members - Mr. Thompson, Councillor Woods and Alderman Percival - advised this Office that they did not write any part of the report in its draft or final form. Dissenting reports were prepared by Councillor Woods and Alderman Percival.

The report of the Deputy Ombudsman concluded:

> "Neither the Local Government members of the Commission nor Mr. Thompson participated in the drafting of the Commission's report to the Minister. The Chairman's suggestions became the official report and despite opposition was adopted on the Chairman's casting vote as the Commission's report. Given these circumstances, it is indeed questionable whether the report forwarded to the Minister can accurately be termed 'the Commission's Report'.

The usual procedure when a Committee is concluding its examination is to debate the issue, draft a report and if there is dissent, have included in the report the issues of dissent. It is not usual nor desirable to have 3 members of a 4 person Commission claiming that they took no part in the drafting of a report and 3 separate reports being submitted, two of which are dissenting minority reports, to the Minister with the one which supported the Government's alleged policy of amalgamation being termed 'the Commission's Report'...

Both the Chairman and Mr. Thompson stressed in their submissions the probability of a deadlock had the casting vote not been used. While this may have been so, it does not in my view, justify the existence of three (3) reports rather than one report which acknowledged a dissension. The cover pages of the report do not acknowledge any dissension, nor does the report itself. Given their separate nature, it is possible that the minority reports will not be considered by the public as part of the report, but merely dissenting reports. Due to the format adopted, it is possible to be unaware of the fact that they account for the views of 50% of the Commission."

The general conclusion was:

"In certain instances the procedures followed by the Commission has made it vulnerable to suggestions that it had predetermined the matter rather than held an impartial enquiry."

The Chairman when commenting on this and a previous conclusion (that in regard to the opinion poll) stated:

"I am surprised that your draft report should rely on such vague and insubstantial evidence as a 'purported' local government view 'advanced by the media', in support of such a serious charge as that inferred in your [Conclusion]. You must be aware that the exercise upon which the Commission was engaged was very sensitive politically, and that in such cases it is the nature of the news media to publish sometimes highly speculative and inaccurate comment...

I was not aware that any complaint had been made to you that I or the Commission was more concerned about ALP politics than boundaries. I am also unaware of any suggestion or complaint, from any source, that I or the Commission had predetermined the matter rather than held an impartial inquiry."

This issue was clarified in the Deputy Ombudsman's report as follows:

"It has never been suggested by this Office that any such complaint was made directly. It is, in my view, reasonable and in accord with the wider public interest to draw attention to the views and allegations which, at the time, were being given some coverage by the media and to suggest to the Chairman, as this report attempts to do, that both she and the Commission have a high public duty to act in such a way that no reasonable person could

give credence to such views or allegations irrespective of their media publication."

The Deputy Ombudsman made the following findings:

a) I find that there was a lack of consultation by the Chairman with the members of the Commission in regard to the preparation of the draft text of the brochure.

b) I find that the Chairman commissioned the ANOP survey without specific discussion of her intentions with the other members of the Commission and without obtaining their approval.

c) I find that the Chairman's decision to alter the status of the meetings was not wrong in terms of the Ombudsman Act. However, I believe it would have been reasonable for the Chairman to provide the other Commission members with the opportunity to become involved in the selection of participants.

d) I find that the report presented to the Minister as the Commission's report on "The Boundaries of 13 Metropolitan Councils" cannot be accurately described as the Commission's Report.

e) I find that the Chairman used her casting vote to have the report compiled by the Commission's officers, incorporating the Chairman's suggestions, referred to the Minister, notwithstanding the fact that the report could not ordinarily be termed the report of the Commission as a whole; and that this conduct was unreasonable, and therefore wrong in terms of the Ombudsman Act.

It was recommended that:

1. The Chairman of the Local Government Boundaries Commission should note that the position of Chairman is not analogous to that of a 'chief executive', and that the concept of chairmanship includes consultation with members of the relevant body on all but routine matters.

2. The Local Government Boundaries Commission should ensure that any documents sent to the Minister purporting to be reports of the Commission should accurately reflect the views of the Commission.

Case No. 13

LOCAL GOVERNMENT OFFICE

Retrospective change in qualifications requirement

Students who were nearing the end of a part-time course heard with dismay that the minimum standard to be reached had been raised by a major employer.

The students were completing an Autumn 1982 Semester Course, conducted at a New South Wales College of Advanced Education, for those wishing to satisfy the requirements of the Local Government Clerks and Auditors' Examination Committee under Ordinance No. 4 under the Local Government Act with a view to qualifying as a local government auditor.

The Committee had previously accepted a 'C' level mark of 50% to 64% at the College course as an equivalent of a pass mark at its own examination, and so far as the College and its students were aware, this remained so for the Autumn 1982 Semester course.

However, in October 1981 the Committee resolved that Ordinance No. 4 should be amended to require a 'B' level mark of 65% to 74% from students who elected to qualify through the College, and a recommendation to that effect was placed before the Minister for Local Government early in November of the same year by the Director, Local Government Office. Having been approved by the Minister the proposed amendment was referred to the Legal Branch of the Office for necessary attention in about the middle of November, 1981.

The Autumn 1982 Semester course commenced on 1st February, 1982 with the long established pass level requirement detailed above. The students had completed nearly two thirds of the course when the Committee's new and higher requirements were eventually published in the Government Gazette on the 30th April, 1982 with effect from 1st January, 1982. As 30% to 45% of the marks which might be achieved by students are allocated to the assessment of assignments set at intervals during the semester there was, in the subsequently expressed view of the College Registrar, no chance for students to adjust their studies in an attempt to meet the new standard.

Some students were informed of the change only three to four weeks before the course examinations were held, between 28th June and 9th July, 1982.

Investigation under the Ombudsman Act revealed that a major problem was delay which occurred when the Ministerial decision of November 1981 was referred to the Legal Branch of the Local Government Office.

The Director expressed the view that there was undesirable delay within the Branch between 17th November, 1981 and 15th February, 1982 and between the return of the draft amendment of Ordinance No. 4 from Parliamentary Counsel on the 25th March, 1982 and its submission for Executive Council action on 22nd April, 1982. The Director commented that during these periods and, indeed, on a continuing basis, the whole Office had been subject to very severe staffing constraints.

Nevertheless, both the Secretary of the Examination Committee and the Director contended that the College was the appropriate source of information for prospective students; that the College authorities were aware of the proposed change in pass level requirements before the end of 1981; and that in any event the adjustment required of students part-way through the Semester was not insurmountable. The College authorities denied having prior knowledge that the higher pass level requirements were to apply to the Autumn 1982 Semester Course.

Examination of the relevant minutes of the Examination Committee meeting held on 15th October, 1981 disclosed that the Committee when deciding to raise the pass level

requirements of the College course had recorded no discussion or decision on the timing of the change.

However, the submission placed before the Minister seeking approval of the necessary amendment of Ordinance No. 4 stated that:

> ".... the Committee also recommends that the amendment become effective as soon as possible so that it applies to passes gained in subjects completed in the Autumn Semester, 1982 and following Semesters".

The submission was prepared by the Secretary of the Examination Committee and placed before the Minister over the signature of the Director of the Local Government Office in his then role of Acting Under Secretary, Department of Local Government. No mention was made in the submission of any need to inform the College administration of the recommended timing of the proposed change in academic standards.

Questioning of the Secretary by the Ombudsman's investigating officer disclosed that the inclusion in the submission of a specific reference to timing arose, to the best of his recollection, from unrecorded consultation he had with the Chairman of the Committee some time prior to his completion of the submission and after the Committee meeting of 15th October, 1981.

There was, according to the Secretary, no other documentary reference to the time specified in the submission which was signed by the Minister on the 11th November and referred to the Legal Branch for attention on 17th November, 1981 the month in which the submission noted that enrolments for the Autumn Semester 1982 would close.

Clearly, the College authorities could not have been in a position to forewarn students enrolling for the Autumn Semester 1982 that those who wished to meet the academic requirements of the Local Goverment Clerks and Auditors' Examination Committee for registration as a Local Government Auditor would need to achieve at least 65% of the total available marks in the College course. The Committee itself had made no decision to introduce the raised level at that time and had no idea when it was to be introduced.

The Ombudsman found the inaction of the Director of the Local Government Office, in failing to ensure that the proposed raised academic requirement was communicated either direct to enrolled students, or through the agency of the College administration if the former proved impracticable, either at or before the commencement of the Autumn Semester 1982 on the 1st February in that year, to be wrong conduct in terms of Section 5(2)(b) of the Ombudsman Act. It was wrong in that it was unreasonable to allow students to enter into and proceed through a greater part of their course studies without knowing exactly what was expected of them to satisfy the academic requirement of the Examination Committee.

A draft report was prepared under Section 26 of the Ombudman Act, recommending that the Director take whatever action was open to him to rectify the disadvantage to the complainant and other affected students in the Autumn Semester 1982 Local Government Auditors' Course at the College of Advanced Education including, if necessary, action towards a further amendment of Clause 21(2) of Ordinance No. 4 under the Local Government Act, to allow acceptance by the Local Government Clerks and Auditors Examination Committee of pass marks of less than 'B' grade level achieved by students in

that Course, for the purposes of the Ordinance.

The draft report was conveyed to the Minister under cover of a letter dated 22nd August, 1983. On the 7th October the Minister addressed a reply to the Ombudsman to the effect that he saw no need for consultation in the circumstances and that the Ordinance would be amended as recommended. This was done on the 14th December, 1983 and, following the earlier publication of the necessary report under Section 26(1) of the Ombudsman Act, the matter was closed.

Case No. 14

MARITIME SERVICES BOARD

Port Kembla Coal Loader

A complaint was lodged by two local environment groups that the Maritime Services Board was operating its coal loader at Port Kembla outside the terms of the consents granted under the Environmental Planning and Assessment Act. Particular examples of breaches were brought to the attention of the Ombudsman's Office.

Investigation took the form of discussion with officers from the Board, the State Pollution Control Commission, the Department of Environment and Planning, the Department of Public Works and Wollongong City Council. Files were scrutinised and the coal loader itself was inspected.

Background

The Government decided in 1977 to construct a new coal loader at Port Kembla to handle increased tonnages of coal being exported from New South Wales. The new coal loader is situated immediately to the north of the old loader on land owned by the Board.

The new complex is described fully in an Environmental Impact Statement (EIS) No. PWD 78011. Its essential feature is that its design has been based on transport of coal primarily by rail. Coal can also enter the loader via a road loop where there is an unloading facility immediately followed by a truck washing station. The design expressly excluded trucks from driving directly onto the coal stockpiles. The machinery which transports the coal inside the loader is large and complex and its functioning is co-ordinated by computers. Apart from stackers, reclaimers and ship loaders, no other vehicles or machines are intended to come in contact with the coal in order to avoid excessive dust from direct dumping on the stockpiles by trucks. All coal entering the loader is intended to be automatically sprayed with an agglomerating compound crust which helps to hold the stockpile together in high winds. Another dust control measure consists of a water spray system to be activated in windy conditions.

Perhaps the most significant feature of the new loader in the minds of the local communities was the reduction in the amount of coal hauled by road. Of the 12 - 15 million tonnes per annum, only 2 million tonnes were to be hauled by road and the loader was constructed accordingly. Apart from the cost to the community in repairing and building roads carrying increasing numbers of coal trucks, public concern in the area was growing at the number of road accidents, traffic

In summary, the new loader as proposed by the EIS was to be more efficient, capable of handling larger volumes of coal with less pollution than the old loader, and more acceptable to the community because coal haulage would be principally off the roads and on to trains.

Summary of Development Consents in force

On 12 January 1989, the Department of Public Works, being the construction authority on behalf of the Maritime Services Board, applied to Council for development consent for the new coal loader. Since this was an application by the Crown, the Council, under the Illawarra Planning Scheme Ordinance, was not permitted to refuse its consent or attach any conditions to its consent without the concurrence of the Minister.

Council considered the application in detail. After assessing all the factors, approval was recommended "having regard to the wider public interest". The Minister's approval was sought to the attachment of 39 conditions. The Minister reduced these conditions to 17.

As part of the conditions attached to the Development Consent, the Department of Public Works and the Board had to obtain and keep to further conditions of approval granted under the Clean Air, Clean Waters and Noise Control Acts.

The latest regulatory instrument which consents to the operation of the coal loader is a State Environmental Planning Police (SEPP No. 7) made on 8 December 1982. The purpose of this consent was to permit the Board to receive any amount of road-hauled coal subject only to any limit imposed by the Minister for Environment and Planning. (No limit has been set.) The Policy also enables the Minister to add, by notice in the Gazette, additional mines from which road-hauled coal may be received, and to extend the hours of operation of the road receival facility beyond 7.00 a.m. to 6.00 p.m. Mondays to Saturdays if he is satisfied that an emergency exists. All other conditions, approvals and licences remain in force, and the loader is bound to operate only in the manner set out in the original Environmental Impact Statement prepared for the Department of Public Works. SEPP No. 7 was not exhibited in a draft form and thus could not be the subject of any public comment. It ended the 2 million tonnes per annum limit on road hauled coal.

The SEPP was introduced because of a policy that the original limit of two million tonnes per annum for road-hauled coal was unrealistic, due to various factors including increased export demands.

The Board made a study of the road receival station and concluded that an "absolute upper limit of 4 million tonnes per annum could be achieved within the times of 7.00 a.m. to 6.00 p.m. Mondays to Saturdays". Such an upper limit would "tax the road transport facilities to the limit and in practice may prove impossible to achieve for this reason". The Board also concluded that for technical and financial reasons it would not recommend the operation of both the old and new coal loaders to avoid amending the development consents. Accordingly, the SEPP was introduced, and the Premier announced that the amount of road-hauled coal would be about 4 million tonnes per annum.

Failure to employ or maintain Environmental Protection Devices

1. Agglomerating Agent. All coal received at the loader should be treated with a chemical agent to help bind coal particles together in order to reduce dust blown from the coal stockpiles. Investigation by the DEP's Regional Office showed that either only 13.8% of incoming coal had been sprayed, or else a larger percentage had been inadequately sprayed.

2. Truck Washing Station. This station is to remove all coal particles from the exterior, under body and tyres of the vehicles so that coal dust cannot be left on road surfaces. The washing equipment had been frequently out of service when inspected by SPCC officers.

   Additionally, the EIS, Council and the SPCC all required that the facility be designed so that no vehicle may by-pass the washer. In fact, the use of certain unauthorised stockpiles enables trucks to enter the loader road system, deliver coal to the stockpiles and by-pass the washer when leaving the site.

3. Conveyors. SPCC officers observed that spillage from the conveyors was not always effectively cleaned up.

4. Stackers. The stacking machines have both an automatic and manual height control which is designed to prevent coal from falling on to the stock pile from too great a height, thereby allowing coal dust to be blown away from the stockpile. The automatic height control developed a fault in the hydraulic system which took a long time to identify. Thus, dust has been often observed blowing away from the stream of coal falling to the stockpile.

5. Roads within the loader. Keeping the road swept free of dust and spilled coal is essential so that trucks do not grind the particles into a fine powder which is then caught in the breeze and blown towards the City. The DEP considered routine cleaning to be "totally inadequate".

6. Water Sprays. A system of water sprays directed at the stockpile is designed to keep the surface of the stockpiles wet and less likely to produce dust. A number of the sprays were damaged by one of the reclaiming machines, and others were not working properly, even in October 1983 when officers of the Ombudsman visited the loader.

7. Sludge Removal. Water run-off from the stockpiles containing the coal dust and from the washing stations is held in ponds. The northern pond was found to be above the approved water level. Additionally, the loader design did not incorporate any method of removal of the sludge.

8. General. Condition No. 14 of Council's development consent, still in force, requires generally:

   > "that the facility shall be operated at all times in such a way as to ensure that all equipment and procedures provided for the reduction of environmental pollution shall be maintained and employed."

   All evidence points to the fact that this general condition has been repeatedly breached.

Unauthorised Developments and Works

1. Use of old Coal Loader and Western Stockpiles. The EIS for the new coal loader envisaged that the existing storage-reclaim facility of the old loader would be phased out on completion of the commissioning of the new complex. Instead, coal stockpiles on the western part of the same parcel of land, owned by two companies, continued to operate without valid development consent in force.

   The consequences of using both these areas are significant in that a large number of trucks have direct access to the stockpiles contrary to the statements in the EIS, thus creating the same problems of dirt and dust as was evident in the old loader.

2. Alteration of the Rail Receival Facility. The rail receival facility was designed and approved exclusively for the use of unloading coal trains. A Council inspection revealed that this facility had been modified, making the rail receival facility capable of being used as a road receival facility. This was done without submission of a development application to Council.

3. Receipt of road-hauled coal from unauthorised mines. Road hauled coal had on occasions been received from mines other than the authorised ones without the required statutory approval.

Conclusions

The chief reason put forward for the Board's failure to operate the loader at the required standards was that the Board was asked to operate the loader's road receival facility at more than twice its design capacity.

It seems that at the time the Government agreed to the 4 million tonne proposal, it had no reason to believe that the Board would be other than meticulous in its compliance with the various environmental controls.

As events turned out, breakdowns were frequent and the use of the old loader area and western dumps became an integral part of the functioning of the loader. The pressure on the Board from the coal companies was constant. The threat to jobs in the area if the mines were closed was extremely serious. Moreover, to pay off the interest charges on the leased equipment in the loader, the Board had to maximise revenue and therefore the trough-put of coal.

The responsible Minister, Mr. Ferguson, pointed out in a letter to this Office that the Board's internal decision-making processes cannot be separated from Government actions or intentions. He went on to say:

> "While the Government took decisions which were well meaning in terms of preserving employment in the coal industry, there can be little doubt now that these decisions further complicated the difficulties which would have normally occurred with the introduction of a facility of this type. Also, in a practical sense, the Board did not have the option of rejecting coal shipments or associated receivals in order to achieve compliance with licence conditions. Under the economic circumstances pertaining to the coal industry during 1983, it would have been politically explosive even to consider such action. The Board was in tune with Government thinking in this regard. One only has

> to consider the massive infrastructure expenditures by the Government in recent years to appreciate the priority given by this State to coal export throughputs. This was clearly the prerogative of the Government, not the Board."

Such economic and political considerations are the proper responsibility of Government and the Deputy Ombudsman accepted that the Board reflected the priorities established by Government insofar as they related to the shipment of coal. However, the Deputy Ombudsman was dissatisfied with the Board's interpretation of Government policy. It seemed to him that the Government expected both jobs and environmental protection. If both of these goals could not be attained, then the Board had the duty of bringing this contradiction explicitly to the attention of the Government.

The Deputy Ombudsman concluded that, since November 1982 when the Board took over the coal loader, it had failed to observe the requirements and standards laid down for the loader's operation. Almost every aspect of the environmental controls had been plagued by breakdowns, resulting in non-compliance with SPCC approval and licence conditions. Efforts to cope with problems in operating new equipment without closing down the plant or cutting throughput caused unauthorised developments to continue and intensify.

The Deputy Ombudsman took the view that, whatever the Board or the Government decided to do with the coal loader, the citizens of Wollongong and Port Kembla were entitled to expect that the Board would operate it within clear guidelines and within the laws designed to protect the public from environmental pollution.

Finding

The Deputy Ombudsman found that the Maritime Services Board failed to ensure that the Port Kembla coal loader operated within the conditions of consent laid down under State Environmental Planning Policy No. 7 and this constituted "wrong conduct" in terms of the Ombudsman Act, being conduct contrary to law.

Recommendations were made that the board take action to

a) ensure that the conditions laid down in the SEPP No. 7, in Council's Development Consent and in the SPCC approvals and licence are met;

b) regularise the use of the western stockpile and/or the old coal loader area, or alternatively, cease their use if they are not considered essential for the purposes of operating the new loader.

This Office is now monitoring the progress of remedial action being taken by the Board.

Case No. 15

MARITIME SERVICES BOARD

Speedboats on the Georges River

"As residents of the foreshores of the Georges River, we write to you in desperation that you may be able to assist us in having the Maritime Services Board implement an 8 knot speed limit for boats on the Georges River in the East Hills-Picnic Point area." This was the first sentence of a complaint to the Ombudsman from some people at Picnic Point, in the southern suburbs of Sydney.

The Georges River is a fairly narrow waterway, but in the warmer months it is a popular area for picnickers and water skiers. There are numerous houses built along the very pleasant banks of the river, and the noise of the speedboats which tow the water skiers can shatter the peace of those people who thought they had found an idyllic life when they built their houses close to the river.

As early as 1978 some of the householders of Picnic Point complained to the Maritime Services Board about noisy boats and water skiers. The Board's reply set out the various controls on speed boats in the Georges River area, but noted that it was difficult to obtain evidence to support the prosecution of boat owners who did not observe the regulations. For another four years the residents wrote letters to the Board, to Members of Parliament, and to various Ministers of the State Government, failing to achieve what they considered to be measurable results. As they saw it, the problem was that speedboats towing water skiers were permitted to travel from uninhabited parts of the river to the settled areas. Even where speed limits were supposed to be in force, speeding boats often travelled far into the restricted areas as they turned back up the river, towing their water skiers behind them.

The investigation of this complaint showed that the Maritime Services Board had slowly moved to deal with the problem. In May, 1983, the Secretary of the Board noted, "Initially, the matter has been referred to the New South Wales Council for the Promotion of Safe Boating ... Following receipt of advice from the ... Council ... the Board will give consideration to the recommendation to vary the present speed limit restrictions on the Georges River ...". In June, 1983 the Secretary of the Maritime Services Board reported the progress - if it could be called that - of the New South Wales Committee for the Promotion of Safe Boating, as follows: "Council has informed the Board that it considers that, due to the length of waterway and the number of speed limits involved, it is imperative that representatives view these locations first-hand before any recommendation is made regarding changes thereto."

The use of the word "imperative", some five years after the complaint had first been lodged with the Board, suggested that some action might at last result. Indeed, in October, 1983 the Maritime Services Board advised the Ombudsman that the various restrictions on the Georges River had at last been changed. Water skiing had been banned from that part of the River where the complainants lived, but there would not be an 8 knot speed limit. The Board argued "that vessels travelling at 8 nautical miles per hour make little, if any less noise than vessels travelling at a greater speed and that modern planing hulled vessels cause considerably more wash at these

lower speeds and consequently there is more likelihood of damage being caused to the river banks and moored vessels if, indeed, a restriction on speed had been imposed."

The complainants decided that they would allow the changed boating conditions a trial. The Ombudsman decided to discontinue enquiries in the matter.

Case No. 16

METROPOLITAN WATER SEWERAGE AND DRAINAGE BOARD

Inadequate communication with ratepayer

The complainant wrote to this Office in December 1982, stating that the Metropolitan Water Sewerage and Drainage Board ("the Board") had incorrectly positioned a sewer main on his property despite his having notified the Board, in response to the Notice of Entry Sketch, that the survey pegs were not aligned with the boundary line.

Further, he complained that when he first noticed the survey pegs on his land his attempts to get information from the Board about the proposed work had been unsuccessful.

The complainant (Mr. G.) owned a vacant block of land at Minto which he had purchased from his parents who lived on the adjoining block. In August 1982 Mr. G. noticed survey pegs on his property and, whilst these pegs were aligned with the boundary fence, Mr. G. became concerned as he knew the boundary fence did not indicate the correct boundary.

Both Mr. G. and his father made enquiries of the Board to ascertain the purpose of the pegs. However, according to them, they were informed that the Board had no knowledge of the pegs.

On 22nd October 1982 a Notice of Entry Sketch arrived at Mr. G.'s address at Minto. His father forwarded it on to him. This Notice of Entry Sketch did not indicate the name or telephone number of a contact person with whom Mr. G. could discuss the proposed construction of a sewer main on his property. Therefore, on 29 October 1982 Mr. G. sent a letter to the Board by registered mail. This letter, in part, stated:

> "I must warn you that the fence line is not the boundary line. My father had the land surveyed years ago and found that the fence is about 7 feet out at the Francis Street end. Your pegs are therefore not aligned with the boundary."

This letter reached the Board on 9th November 1982, the same day work on the sewer line across Mr. G.'s property commenced. (The reason for this delay was that mail from the NSW town in which Mr. G. lives travels to Sydney via Ballarat and Melbourne, Victoria.)

The Board took no immediate action in response to Mr. G.'s letter. Instead the letter was forwarded to the Office responsible for the subject work on the sewer line. However, this letter did not reach this Office until 19th November 1982, the date the construction of the sewer line was completed.

As a result, the sewer line laid on Mr. G.'s land, was located 1.44 meters from the true side boundary line instead of the usual one (1) meter. Further, the Board's manhole was located approximately 9 meters from the front boundary.

This error occurred because the Board's surveyor assumed the fence line was a true indication of the boundary. As was stated by the Board:

> "Current practice is to accept "monuments" such as substantial fencing, as evidence of the location of boundaries....
>
> If fences are located in gross error this is usually realised in the plotting of the lines onto plans and the mistake can be corrected. Unfortunately, in Mr. G.'s case the surveyor was relatively inexperienced and accepted a fence of unsubstantial material as defining the boundary. As the fence was not grossly in error, plotting the lines on to the plan did not show the mistake at the scale used for the plan."

This incorrect positioning of the sewer line seriously interfered with Mr. G.'s plans for building a house on the block of land in question. To resolve this problem it was necessary to either encase the sewer pipe in concrete or have the eastern side of the house heavily piered.

To overcome the problems caused by the incorrect positioning of the sewer line the Board agreed to and did meet the cost of work to protect the sewer so that Mr. G. could go ahead with his building plans.

Further, in response to recommendations made by this Office in a report on this matter and to prevent a similar situation occurring again, the Board took the following steps:

(i) The telephone number of the Sewerage Enquiries Section was placed on Notice of Entry Sketches.

(ii) The Board implemented procedures to ensure that when pegs are placed on land to mark out the position of a proposed sewer main, the work is promptly referenced in the Board's files in such a manner that the inquiries of landowners whose property may be affected by the position of the sewer, can be answered adequately.

Case No. 17

METROPOLITAN WATER SEWERAGE AND DRAINAGE BOARD

Cost above estimate waived

A complainant to this Office found that the need to re-locate sewer pipe which transversed his homesite greatly increased his costs in constructing a residence.

The complainant had wanted to make his own arrangements to have the re-location effected by private contractors but, because of industrial considerations, the Board was unable to

accede to that request, and presented him with a tentative estimate of $4,180 for the cost of the work to be carried out by its own employees. The estimate was quoted on the understanding that the final settlement would be based on the actual cost of the work. This was accepted and, with some delay, the work proceeded to completion in September 1980.

In June 1981 the complainant was presented with a final account in the sum of $7,974, requiring payment of $3,794 in addition to the advance payment made on the above estimate. The complainant had prudently anticipated some increase, but was more than a little concerned at an increase of nearly 100%. Accordingly, his legal representatives protested to the Board seeking an explanation.

The Board's reply re-affirmed the final account, but as the explanation given did not seem adequate, the issue was made the subject of a complaint and investigation under the Ombudsman Act.

The Board's initial response to the enquiries addressed to it by this Office confirmed the reasons given to the complainant's solicitors, which included the wages loss incurred when the Board's employees arrived at the site to find they could not commence work because of obstruction of the site by scaffolding and building materials. The presence of any such obstruction was disputed by the complainant but, in any event, the Board conceded on reflection that prior inspection could and should have averted that loss, and so reduced the outstanding account by the sum involved, $1,257, leaving an amount of $2,536 to be paid for which a revised account was rendered.

The Board's reply, however, did not satisfy the Ombudsman's investigation officer engaged in the investigation of its conduct. In addition to confirming the explanation given to the solicitors, the Board drew attention to substantial cost factors which could and should have been identified before the work commenced and which could and should have been taken into account in the preparation of the estimate. These included a need for concrete bulkheads and sand re-filling due to the proximity of the new sewer pipe to the foundations of the dwelling.

The outcome of further investigation was that the then recently re-constructed Board, having reviewed the position in the light of that investigation, elected to reduce its final account to the sum of $4,180 already paid on the basis of the estimate. The new Board also indicated that it will in future give consideration to allowing work of this nature to be carried out by private contractors. Informed of the Board's decision in November 1983, the complainant was delighted.

Case No. 18

STATE BANK

Mismanagement of accounts

On June 30, 1981 Mr. T. was told by the State Bank that his mortgage repayments were to increase from $397.00 per month to $452.00 per month as from August 30, 1981. Mr. T. ensured that enough funds were in his account to cover the increase and thought the bank would automatically deduct the

In September, Mr. T. noticed on his bank statement that the wrong amount had been deducted. He immediately contacted his local branch and was told that the mistake would be rectified. The alterations were not, in fact, made until the December instalment.

The Bank, during the 3 months from August deducted the old amount $197.00 per month, and as a result Mr. T.'s loan instalments were not fully met between August and November, 1981 with additional interest accruing on the mortgage loan.

Enquiries revealed that the State Bank had failed to properly advise Mr. T. of the procedures for amending the bank's authority to deduct mortgage instalments from a borrower's account.

The following recommendations were implemented by the State Bank after this Office published a Report criticising their procedures and their treatment of Mr. T.

1. It was recommended that the State Bank implement administrative procedures ensuring that all customers who apply for periodical deductions by way of authority are advised of the established procedures, especially in relation to the way in which alterations can be made. Such information could be added to the authority form to be signed by the customer.

2. The Managing Director should issue a circular to all branch Managers, reminding them of the established procedures with respect to authorities and emphasising that they should be strictly adhered to and special attention should be given to the limited circumstances in which oral amendments can be accepted.

3. That the State Bank compensate Mr. T. for the additional interest he incurred on his mortgage loan between August and November, 1981 as a result of the Bank failing to deduct the correct instalments from his account.

Case No. 19

STATE CONTRACTS CONTROL BOARD

Failure to supply name of successful tenderer

Mr. B. complained that the State Contracts Control Board had refused to supply him with the name of a successful tenderer for a government contract.

Mr. B. was an unsuccessful tenderer for the contract "card punching - school supplies annual requisitions". He suspected that it may have been intended that the contract work be carried out overseas. On this basis, he sought from the Board, among other things, the name of the successful tenderer. The Board declined to release the name on the grounds that there is no Public Service Regulation that would allow the name to be divulged. The tender price was supplied.

It was found that the Commonwealth Finance Regulations require the names of successful tenderers plus the value of the tenders to be openly published in the Gazette. This information is also supplied to other tenderers on request.

That system appears to operate without problem in the Commonwealth sphere.

The Deputy Ombudsman considered that the reasons for the name of the successful tenderer being kept confidential were not strong. He believed that they were outweighed by public interest factors which supported the availability of such information.

On that basis, the Deputy Ombudsman recommended that the Public Service Regulations should be amended to provide that the name of the successful tenderer may be supplied on request by the Board to any bona fide tenderer or person who has submitted a quotation.

The Ombudsman considered that the need for such an amendment was a matter of public significance. Therefore, he decided to make his findings on this complaint the subject of a special report to Parliament.

The Office now awaits any action that the government may take to make the recommended amendments.

Case No. 20

THE URBAN TRANSIT AUTHORITY

Taxi Transport Subsidy Scheme for the Disabled

A complaint was received as a result of a doctor's patient with Downs' Syndrome being denied participation in the scheme. Preliminary enquiries revealed no evidence of wrong conduct in the handling of the application. However, it was not clear who was eligible for the subsidy, and this confusion, although recognised by the Authority, had not been overcome. This aspect was made the subject of investigation.

The scheme, which began on 1 November, 1981, was promoted as one which would "provide an efficient on call transport service for severely and permanently disabled people who are unable to use buses,ferries and trains." The scheme was to be reviewed after two years.

The brochure which explained the subsidy stated:

> "Disabled persons who are permanently unable to use buses, ferries and trains will be eligible for the subsidised travel by modified taxis."

Yet the U.T.A. took the view that persons unable to use public transport are not necessarily eligible to participate in the scheme, because there were other criteria to be considered. There was confusion about who was eligible.

The U.T.A. was aware that the brochure was "unsatisfactory and somewhat ambiguous" yet failed to correct the ambiguities in the brochure and the misconception these generated. The Ombudsman's report included this comment:

> "The Scheme is a commendable one and is of great assistance to the severely disabled person. However, the manner in which it has been promoted has created unreal expectations in the supposedly eligible disabled persons applying for inclusion in

> the scheme. The Authority has had ample time to correct this situation, yet has not done so with any tangible result. The brochure has been reprinted a number of times since it was first published, yet no clarification or amendment has been made. Given the expectations that the brochure in its original form continues to foster, it is imperative that action be taken to alleviate any ambiguity or potential misconstruction as soon as possible."

The conduct of the Authority was found to be wrong since the Authority's failure to effect clarification of known ambiguities in its brochure was unreasonable. It was recommended that a new brochure be prepared to clarify "eligibility" for the scheme and that some form of promotion take place so that relevant persons were informed as to the very real restrictions of the scheme.

As a result of the Ombudsman's report on this matter, the Minister advised:

> ".... the Review of the taxi scheme was recently completed by the Joint Committee on Transportation for the Disabled and at the present time I am giving the Committee's report close consideration.
>
> It is my intention to bring forward a number of the recommendations made by the Joint Committee in the Review to the attention of my Cabinet colleagues within the next month which, if accepted, will alter the eligibility guidelines of the scheme to include some disabled groups who are, at present, excluded from participation. At that stage it would be necessary to issue a new brochure and inform all those involved in or affected by the scheme."

It is hoped that the confusion which previously existed will now be resolved.

Case No. 21

VALUER GENERAL'S DEPARTMENT

Delay in providing valuation

The complainant's solicitors wrote to the Ombudsman after a Senior Valuer had been responsible for delaying a valuation advice required in respect of a drainage easement resumption.

The Senior Valuer admitted a five month delay between receipt of the request for valuation advice and an attempted call to discuss the matter. It was clear from evidence provided by the Senior Valuer that he was extremely busy in the relevant period, but the Valuer General conceded that the time taken to complete the report was excessive and that Department Officers were remiss in failing to keep the Council informed, both of the progress that had been made and the reasons for delays.

As a result of the investigation the Valuer General instigated a review of monitoring systems throughout the

Department to satisfy himself that instructions are properly implemented. The relevant Regional Valuer now requires all files for this type of work to be referred to him when action is not completed within two months.

The Senior Valuer's conduct was found to be wrong within the terms of the Ombudsman Act on the basis that he failed to give to the Regional Valuer specific advice about the delay in answering the Council's request during the relevant six month period. In view of the Valuer-General's intention to review monitoring systems throughout the Department, no recommendations were made.

Case No. 22

WATER RESOURCES COMMISSION

Providing out-of-date information

Ms. S. and Mr. B. complained to this Office that because the Water Resources Commission gave them inaccurate information about financial assistance for the completion of works on their property, they unnecessarily incurred expense.

The complainants made an initial telephone enquiry and received from the Commission a brochure, which stated that the Commission may advance up to a maximum of 90% of the cost of the works undertaken. The complainants made an application on that basis. However, that particular assistance policy had in fact been changed, well before the complainants made their telephone enquiry. The maximum possible loan is now 75% of the cost of the works.

Had Mr. B. and Ms. S. been advised accurately about the maximum assistance levels, they would not have continued with the application and would have withdrawn before any financial commitment to the Commission had been made. By this stage it had already cost the complainants $150 for the Commission's preliminary investigations.

It was recommended that:-

1. Employees of the Grafton Office of the Water Resources Commission should keep accurate and detailed records of verbal advice given to the applicants.

2. The Water Resources Commission should update its brochure in relation to the type of financial assistance available to farmers. The brochure could easily be altered by hand so as to convey the correct information.

3. The applicants should receive an ex gratia payment of $150 in compensation for costs incurred which would not have been incurred had accurate information been given to them in the first instance. This payment should not jeopardise any current application by the complainants which may be before the Commission.

All recommendations have subsequently been complied with by the Commission.

Case No. 23

DEPARTMENT OF YOUTH AND COMMUNITY SERVICES

Failure to reply to correspondence

Mr. M., a solicitor, complained on behalf of his client in relation to her dealings with the Department and his inability to secure a reply to his requests for information about the restoration of his client's children to her care. In his complaint Mr. M. stated, "we have written and telephoned the Department of Youth and Community Services on many occasions and have never received a reply."

Mr. M.'s letter was forwarded to the Department requesting an explanation for the failure to reply to Mr. M.

Mr. Langshaw, then the Director-General of Youth and Community Services, commented:

> "In hindsight it is obvious that Mr. M.'s letters could have been replied to earlier but up until the Minister's decision on restoration, which was of major significance, a reply would have by necessity been brief and would have indicated only that the matters raised were under consideration."

Mr. Langshaw also wrote to Mr. M. in the following terms:

> "Firstly I would like to extend my sincere apology for the fact that no written replies have been forwarded to you in answer to the various matters of concern. The major reasons for that were linked with the mislaying of your earlier correspondence and the lengthy use of the case papers in more recent times as part of the Minister's deliberations when examining the question of possible restoration."

A draft report was prepared and sent to the Department. Mr. Maddox, Acting Director-General, advised that the Department had taken action to ensure that the type of delay that occurred in this case would not be repeated.

This Office recommended that:

1. Correspondence from members of the public in relation to such sensitive matters as restoration of children should be answered promptly. If a full answer is not possible because of concurrent representations of the responsible Minister, then an acknowledgement should be sent providing reasons why a fuller response to the enquiry is not possible at that stage.

2. When files are referred to the Minister's Office for deliberation, the Department should ensure that procedures are adopted which do not prevent routine work being carried out by the Department.

The Minister for Youth and Community Services, the Honourable F.J. Walker, Q.C., M.P., has written to the Ombudsman:

> "I do not wish to consult with you on the report, but have noted the contents and recommendations. I

have been assured by the new Director-General, Mr. Heilpern, that every effort will be made to ensure that the recommendations are fully complied with."

Case No. 24

DEPARTMENT OF YOUTH AND COMMUNITY SERVICES

No wrong conduct in allegations against teacher at residential care unit.

In last year's annual report (Case Note 24) it was noted that a complaint alleging excessive use of physical punishment by a physical education teacher at one of the units visited by represented from the Ombudsman's Office was being investigated.

The investigation revealed that the teacher concerned had the authority to use corporal punishment in accordance with the school's discipline policy. Inspection of the punishment records at the School did not reveal an excessive use of corporal punishment by the teacher in question and the headmaster of the school stated that he had never seen the teacher manhandle children in the way in which it was alleged. The teacher himself denied the allegations, stating that he makes a special effort to be cautious in this respect.

Investigations were ultimately discontinued on the grounds that no evidence to suggest wrong conduct on the part of the teacher was found.

Case No. 25

ZOOLOGICAL PARKS BOARD OF NEW SOUTH WALES

Lack of First Aid

In March 1983 Mr. H. complained to this Office on behalf of Mrs. O. The complaint was that Mrs. O. did not receive adequate first aid treatment after she had broken her leg in an accident at the Western Plains Zoo, Dubbo. Further, Mrs. O. complained that no doctor or ambulance was called to the Zoo to assist her.

During the investigation it was revealed that Mrs. O. fell off a pushbike she had hired to ride around the zoo. As a result of this fall she suffered a fracture of the leg bone just above her ankle (Potts Fracture).

After the accident Mr. O. sought first aid for his wife. He went to the place indicated in the information booklet to visitors as being the place to obtain first aid. However, once there, he was informed that no one trained in first aid was present that day. (The zoo had one member of staff trained in first aid but it was that person's day off.)

Before Mrs. O. could be moved, her leg needed to be tightly bandaged to prevent further injury. However, the first aid kits at the zoo, for use in such situations, did not

contain a bandage wide enough for this purpose. Therefore, a member of the zoo staff obtained a bandage from his home which was within the Zoo grounds. This same member of staff claimed that he bandaged Mrs. O.'s leg. Mrs. O., on the other hand, has stated that she had to bandage her own leg to immobilise it as no member of staff present knew how to do it.

Mr. Throp, the Director of the Zoological Parks Board of New South Wales, informed this Office that the staff at the Zoo did not call a doctor or an ambulance as neither Mr. or Mrs. O. requested such. Mr. and Mrs. O. claimed that it should have been obvious that a doctor or an ambulance was needed.

Western Plains Zoo covers a large area of land. There are six kilometers of roadway at the Zoo. Visitors travel around the Zoo in one of three ways:-

(a) on foot, through bushland tracks;

(b) by car; and

(c) by bicycle or tandem which can be hired at the zoo.

Therefore, the very nature of the zoo makes it likely that accidents will occur from time to time and thus the need for first aid treatment will arise.

The outcome of the investigation was that the conduct of the Zoological Parks Board of New South Wales in:

1) not ensuring that a person trained in first aid was present at the Western Plains Zoo during the hours which the zoo was open to the public; and

2) not equipping the mobile first aid kits at the zoo with suitable bandages

was found to be wrong conduct in terms of the Ombudsman Act in that it was unreasonable for a zoo of that size, given the likelihood of accidents occurring, not to have been able to provide adequate first aid to Mrs. O. after her accident.

As a result of recommendations made by this Office the Zoo took steps to ensure that such a situation did not occur again.

These included:

(a) offering staff training in first aid in an attempt to ensure that a person trained in first aid is on duty during the hours which the Zoo is open to the public; and

(b) warning people hiring bicycles at the Zoo to ride on the sealed surfaces only.

Case No. 26

BOTANY MUNICIPAL COUNCIL

Delay in dealing with claim for compensation

The complainant, one of 14 owners affected by a Council road realignment proposal, wrote to the Ombudsman in December 1982. He complained that, although a notice claiming compensation and interest in respect of the affected land was served on Council in September, 1981, no compensation had been paid and Council had consistently declined to indicate when such compensation would be paid. The only information he had been able to obtain was that Council was unable to pay compensation until a valuation was furnished by the Valuer-General's Department which, the complainant was told, had a backlog of work taking precedence over this matter.

Following investigation, the facts and findings outlined below were reported:

a) Council had taken steps towards realigning the road in question under the Public Roads Act, 1902 and in accordance with the provisions of Section 262 of the Local Government Act, 1919. It was applying the realignment method of acquiring land as it became vacant.

b) Almost 10 years elapsed between the gazettal of the realignment proposal and the serving of notice of the realignment on owners of the affected lands. The fact that Council had omitted to serve notice only came to light after the Valuer-General had been approached for valuations.

The Ombudsman found that Council unreasonably delayed formally notifying Halex Four Pty. Limited and other affected owners of the road realignment proposal.

c) The notice served in August 1981 elicited a notice of claim for compensation by the complainant, served on Council in September 1981. Council received and noted the claim. Pursuant to Section 262 of the Local Government Act the complainant would have been entitled to interest payment from that date, if his land was clear of buildings and obstructions, by virtue of the fact that notice of claim was served within 90 days of Council's notice of realignment. Council, at that time accepted that the land was clear of buildings and obstructions and so notified the Valuer-General.

It was not until March 1983, some 18 months after receiving the claim, that Council discovered that, technically, the land was not clear, and further that the claim served by the complainant was not technically valid. Therefore, Council then argued that the complainant was not entitled to interest payment.

The Ombudsman found that Council failed to satisfy itself that the subject land was in fact vacant before so notifying the Valuer-General and failed to satisfy itself at the time of receipt of claim for compensation whether the claim was valid.

d) Council's approaches to the Valuer-General's Department in late 1981 for valuation of the affected properties met with advice from the Valuer-General that the type of valuation required by Council could not be given

priority by the Department and that, in order to avoid possible long delays, it was suggested that Council should engage a private valuer. In spite of the Valuer-General's advice, eleven months elapsed between receiving advice and actually instructing a private valuer.

This, in the Ombudsman's view, contributed to the delay and confusion in dealing with the claim for compensation.

e) The notification of realignment sent by Council to owners of affected land merely stated that Council intended to apply the realignment method of acquisition of land, pursuant to Section 262(3) of the Local Government Act. It did not in any way spell out the provisions of that Section.

The Ombudsman took the view that Council has an obligation to draw the attention of affected owners to the specific provisions of that Section as it relates to entitlement to compensation and interest.

He therefore found that Council failed to adequately inform the affected owners of the specific provisions of the Local Government Act.

Following the Ombudsman's recommendations aimed at expediting the matter, the complainant advised this Office in October, 1983 that a settlement agreement had been reached between Council and himself. Council on its part advised that other affected owners had been informed of the specific provisions of Section 262 of the Local Government Act.

Case No. 27

GOSFORD CITY COUNCIL

Improper imposition of sewer loan rate

In March, 1979, the complainant's land was zoned 7(b) scenic protection pursuant to the then current interim development order (IDO 122). In December, 1980 Council included the complainant's property within the Council sewer loan rate area. Council at the same time formed the opinion that the Gosford Regional Sewerage Scheme would be of special benefit to properties within that sewer loan rate area. In December, 1981, Local Environmental Plan No. 48 came into effect. This plan amended the interim development order and altered the zoning of the complainant's land to 7(C2) Scenic Protection Coastal North. In October, 1982 Council issued a Sewer Loan Rate Assessment Notice to the complainant for the year 1st January to 31st December, 1982, in an amount of $102.63. On 21st December, 1982, the complainant's property was deleted from the sewer loan rate area. The deletions were made on the basis that Local Environmental Plan No. 48 did not include the complainant's property as residential.

The owner wrote to Council saying that since they were zoned 7(C2) non-residential, they ought not to be billed for sewer loan rate. Council replied indicating that the boundaries for the sewer loan area had been amended to exclude the complainant's property, and that sewer loan rates would not be levied in the future. However, Council indicated that

it was unable to abandon or write off sewer loan rates already levied and asked that payment of those rates be made. The owner complained to this Office.

The conduct of the Council was found to be wrong. Local Environmental Plan No. 48 came into effect on 18th December, 1981, i.e. before the 1982 Sewer Loan Rate was imposed. Council of necessity was involved in the preparation of LEP 48 and therefore knew or ought to have known that once LEP 48 took effect, any review of the Sewer Loan Rate area definition would result in the exclusion of the complainant's land from the area to derive special benefit. The Ombudsman formed the view that the Council ought to have reviewed the sewer loan rate area definition as soon as LEP 48 came into effect, and certainly before the 1982 sewer loan rate was imposed. Also Council ought not to have imposed the 1982 rate until the definition of the sewer loan rate area had been reviewed in the light of changes brought about by LEP 48. Council's failure to redefine the area, and Council's refusal to withdraw the sewer loan rate assessment notice in respect of the period 1st January to 31st December, 1982, were found to be unreasonable and therefore wrong in terms of the Ombudsman Act.

The Ombudsman recommended that the Sewer Loan Rate Assessment Notice be withdrawn immediately. The Ombudsman also recommended that a review be undertaken to ascertain whether any other properties had been affected by LEP 48 in a similar way to that in which the complainant's property had been affected and in respect of those properties either withdraw the assessment or refund the value of the rates so paid. Subsequently Council advised that both these recommendations had been complied with.

Case No. 28

HASTINGS MUNICIPAL COUNCIL

Failure to prevent unauthorised use of land

The complaint was that Council failed to take action to prevent the unauthorised use of residential zone land for commercial purposes.

The investigation revealed that the Chief Town Planner was notified on 25 February 1982 that certain property was being used as a trucking depot and had an advertising structure erected upon it. One month later the owner was advised that the reported use was prohibited and a reply was requested within 14 days. The Chief Town Planner inspected the site twice during this period and observed no more than one truck. No record was made of either visit.

The 14 day period elapsed and no action was taken. In May, 1982, five weeks later, the owner wrote to say that the land was being used for off-street parking only. There is no evidence on the Council file to show whether this claim was verified, although the Chief Town Planner stated on oath that he inspected the property regularly in May and June 1982 and saw nothing inconsistent with the owner's claim.

Following further complaints, and one recorded observation by the Chief Town Planner, on 12 August, Council requested the owner to comply with provisions of the

Environmental Planning and Assessment Act, 1979 and Local Government Act within 14 days.

On 15th September Council threatened legal action if compliance was not immediately forthcoming.

Council records show the next inspection to have been conducted about 6 weeks later although the Chief Town Planner swore that he made inspections during this period, which inspections caused him to take the view that there was insufficient evidence of unauthorised use to successfully litigate under Sections 123 or 125 of the Environmental Planning and Assessment Act, 1979.

The Chief Town Planner, in a Community Development Committee meeting of 15th November, 1982, told of a verbal undertaking, made by the business operator one month earlier, to refrain from using the land in connection with his business. However, the operator had already recommenced commercial activities by this time and the Committee recommended cessation within 7 days or legal action would ensue. Council adopted this recommendation and issued the owner with a notice under Section 125 (supra) on 2nd December, 1982.

Council inspected the property two weeks later. The owner sought the opportunity to speak to a Council meeting and to delay proceedings pending that meeting. In the light of this representation it was recommended on 29th December not to proceed with the proposed legal action. Council resolved accordingly on 4th January, 1983, although the owner was never invited to speak to a Council meeting. It was reported at that meeting that re-location of the business would soon take place.

According to the Council file, no follow up inspections were made until four weeks later when residents again complained. The Chief Town Planner swears that he made inspections during this period and expected the operator to take action in accordance with the agreements which had been made.

Further recorded inspections revealed unauthorised use until February 7th when the property was restored. The Mayor submitted that it was reasonable to assume that the problem had been resolved at that time.

However, business continued the following week and the complainant successfully sought an injunction pursuant to Section 123 (supra).

The Ombudsman considered the Council to have acted wrongly in terms of the Ombudsman Act, 1974, in that it unreasonably failed to take effective administrative action to prevent the unauthorised use.

It was recommended that the Council review its administrative system to enable appropriate action, including legal action, to be taken immediately following the expiration of periods of compliance with Council directions unless firm evidence of compliance exists or specific written undertakings have been given.

It was also recommenced that Council officers be instructed to make adequate file notes on inspections and other actions carried out in the course of duties.

These recommendations were subsequently complied with.

Case No. 29

HORNSBY SHIRE COUNCIL

Failure to require completion of a re-located building

The complainant stated that an unsightly fibro structure in two parts was placed on a neighbouring block of land in November, 1980. He complained to Council, and was told that Council anticipated the structure to be completed within its stipulated four-month time limit. The complainant was also advised that, should there be an unforeseen hold-up, Council believed the home would, from outside appearances, seem to be complete and would not be of continuing concern to him. Almost two and a half years later, the structure had not been completed and its unsightly appearance was now said to be affecting the complainant's ability to sell his own house.

Following investigation, the facts and findings outlined below were reported:

a) A time limit of four months for completion, supposedly imposed upon the building application, was mentioned in Council correspondence to the owner of the structure and neighbours, as well as in Council reports. However, this time limit was in fact not made a condition of approval, due to an oversight, according to Council.

   The Ombudsman found that Council had provided misleading information as to when completion of the building could be expected.

b) The building was occupied by the owner around February 1981, prior to completion in accordance with approved plans and without permission by Council. It was not until February 1983, two years later, that Council drew the owner's attention to the fact that the building had been occupied in contravention of the conditions of approval which stated that the residence was not to be occupied until it had been fully completed. A further three months elapsed before Council considered its powers under the Local Government Act in relation to occupation without permission. Although approval to occupy was then granted subject to certain conditions, at no stage was the owner's attention drawn to the provisions of the Local Government Act; no application for permission to occupy, as required by that Act, appeared on Council file; and the owner was not made aware of the penalities which may apply where a person occupies a building without permission. The Ombudsman found that Council had failed to monitor the progress of building works adequately and failed to act once it became aware that work was progressing abnormally slowly.

c) Examination of Council's file in the matter revealed a paucity of information. In particular, the absence of any records for a two-year period led to the Ombudsman's findings that Council failed to document the progress of building works.

d) In general terms, Council explained the long delay in completing the building by stating that the owner was

suffering from a terminal illness and that he was experiencing financial difficulty. The Ombudsman concluded that it was eminently reasonable for Council to take such a special circumstance into consideration. However, the owner's illness (which was later revealed not to be terminal), far from being an excuse for inaction, should have been a reason for Council to pay particular attention to this project in the form of guidance and advice to the owner.

Recommendations aimed at achieving regular inspections and expeditious completion of the building were made. Council has since provided several progress reports indicating regular inspections and progress towards completion. Council further directed its building department staff to ensure that files and records of inspection are kept up to date with accurate information.

Case No. 30

MURRUMBIDGEE COUNTY COUNCIL

Confusion over rural electricity charge

Mr. G. had sold his property and then leased back the house and two acres of land. The new owner of the property which resulted from this transaction should have been subject to a rural electricity charge, rather than Mr. G. However, the additional charge was not made, as Council had not been notified of the change.

Council eventually queried the fact that this large property had no rural charge. Council officers made enquiries and determined that, since Mr. G. was paying a rural charge, no alteration was necessary.

When Mr. G. later learnt that it is the size of the property that determines whether a rural charge should be levied, he alerted Council to the land transactions that had taken place. He asked to be placed on the correct rate and sought a credit for past overpayments.

The Deputy Ombudsman found that Council did not make sufficient enquiries about the ownership of the property when the matter was first investigated by Council officers. It was reasonable to expect Council to have contacted Mr. G. to clarify the situation. Council's enquiries were too superficial.

It was recommended that Mr. G. be given credit for the rural charge levied over the period when he was charged on the wrong scale. That credit has been given.

It was also recommended that better information about electricity charges be shown on Council's electricity bills. Council now clearly shows the rural charge on all accounts.

Case No. 31

STRATHFIELD MUNICIPAL COUNCIL

Unauthorised car park in residential street

The complainants lived in a street zoned residential 2A. Properties in this street back on to commercially zoned properties on Parramatta Road. Business operators on the main road have been purchasing and demolishing houses in the complainants' street and converting land to commercial use (usually car parks). The complaint to the Ombudsman was the failure of Council to stop the commercial enterprises in the adjoining main road "creeping" into their street in contravention of zoning regulations.

Council noted in January, 1981, that a house had been demolished and replaced with a car park without approval. It deferred a re-zoning application for that property for 12 months.

In April, 1981, after representation from the complainants, Council directed that the use as a car park cease or legal proceedings might be instituted without further warning. The use did not cease however.

In July, 1982 Council re-considered this decision in the light of representation from adjoining residents and resolved not to take action pending a decision on the re-zoning.

In January, 1982 the previously deferred re-zoning application came up again and was postponed pending the Town Planner's report, which the Council required "when time permits". This report came six months later and Council resolved to prepare a draft local environment plan to allow limited development. The complainant objected to this proposal and in September, 1982, Council rsolved that the Town Planner make further investigation of the zoning in the street and provide a progress report by December, 1982.

A further breach of zoning was reported by the complainants in September, 1982. An inspection by an officer from this Office confirmed that the non-approved uses of residential land were continuing in December, 1982.

The Ombudsman found that Council had failed to find a solution to the obvious planning problem in the street in that it had delayed proper investigation and consideration of the matter and, in doing so, had effectively condoned and encouraged unauthorised use of residential zoned land.

Following these findings, Council resolved to obtain the services of consultants to investigate the planning problems evident in the street, and to prepare a local environment plan for the area.

Case No. 32

WARRINGAH SHIRE COUNCIL

Recovery of outstanding rates and charges

The complainant sold his property at Avalon in January, 1981. Council issued a certificate under section 160 of the Local Government Act indicating that $6.70 was due in respect of outstanding rates and charges. These were paid on settlement. Almost two years later, without prior notification according to the complainant, Council wrote to the complainant threatening legal action in respect of a charge said to have been outstanding at the time of the sale of the property, but not included in the section 160 certificate.

On investigation it was found that the section 160 certificate was inaccurate, in that it had failed to mention sullage charges in an amount of $485 which had become due over a period of 6 months prior to the issue of the certificate. Council did not deny the issue of the inaccurate certificate and offered no explanation for the error other than to say that it occurred "as a result of a clerical error".

The investigation also revealed that Council initially had sought to recover the outstanding monies from the new owners. However, after realising the mistake, Council sought to recover the monies from the complainant. In early 1981 some telephone conversations took place between Council officers and the complainant, and thereafter the matter was left for almost two years. The next action taken by Council was a letter threatening legal proceedings.

The conduct of Warringah Shire Council was found to be wrong. The issue of the section 160 certificate was conduct based upon a mistake of fact and accordingly wrong in terms of the Ombudsman Act. The issue of correspondence from Council threatening legal proceedings was found to be unreasonable and therefore wrong. The view was taken that as soon as the error in the section 160 certificate was dicovered the matter should have been put on a formal basis. Correspondence ought to have been directed to the complainant explaining exactly what had happened and why, and putting Council's view that there was a continuing liability. An offer to discuss the matter should also have been made. Instead, inconclusive telephone calls were made to the complainant and there the matter was left for almost two years. The next action was a letter from Council threatening legal proceedings.

The Ombudsman recommended that administrative procedures for correspondence threatening legal proceedings be reviewed so as to ensure that a proper assessment is made by Council officers as to the propriety of instituting such proceedings. The Ombudsman also recommended that Council communicate with the complainant for the purpose of reaching a settlement about the alleged outstanding charges. Subsequently Council advised the Ombudsman that administrative procedures regarding the follow-up of outstanding debts had been revised and an agreement had been reached between Council and the complainant in respect of the outstanding charges.

Case No. 33

WILLOUGHBY MUNICIPAL COUNCIL

Lane access to garage

The complainant on behalf of a local residents' group, wrote to this Office in July 1982 stating that Council's Chief Health and Building Surveyor, on 18th May 1982, had approved, under delegated authority, an amended building application for the repositioning of a garage. She alleged that this action was inconsistent with Council's resolution of 17th August, 1981, to refuse vehicular access to the adjacent lane, W.63 because the repositioned garage would be accessed via the lane.

However, perusal of Council's files on this matter revealed that Council's resolution of 17th August 1981 and its subsequent actions to have lane W.63 closed, were inconsistent with Council's original Building Approval in 1979, to the owner of the garage. This approval allowed the owner of the garage, Mr. F., to renovate his house and build a garage. Inherent in this building approval was permission for Mr. F. to have access to the garage via lane W.63. A condition of this approval was that Mr. F. bear the cost of upgrading a section of the lane so that it was suitable for vehicular access.

In 1981, before work on the garage had started, Mr. F. sought approval for vehicular access to his garage via the top end of the lane as opposed to access via the bottom end of the lane which had already been approved.

Council refused this application and resolved to place bollards approximately half-way up the lane "in order to ensure that the laneway maintains a pedestrian character and to minimise any conflict between pedestrians".

This resolution of Council was interpreted by Council staff as denying Mr. F. vehicular access to his garage only via the top end of the lane and not also via the bottom end of the lane. This interpretation was based on the fact that the resolution did not refer to the necessary procedures to achieve legal closure to all traffic. Further, the position indicated for the obstructing bollards did not prevent Mr. F.'s access via the bottom end of the lane.

Council subsequently maintained that the resolution was intended to prevent all vehicular access by Mr. F.

In April 1982 Mr. F. paid to Council $980 being the cost of upgrading lane W.63. By July 1982 Council had completed this work.

On 18th May 1982 Council's Chief Health and Building Surveyor, acting under delegated authority, approved the repositioning of the garage to a position similar to that approved of in 1979.

Council, in July 1982, whilst aware of

(a) the approval it had given Mr. F. in 1979 allowing access via lane W.63;

(b) the approval given to Mr. F. on 18th May 1982 by the Chief Health and Building Surveyor for the resiting of the garage;

(c) the work Council had done, at Mr. F.'s expense, to upgrade the lane; and

(d) the fact that clearing and excavation work for the garage were being carried out,

resolved to close lane W.63, removing Mr. F.'s access to his garage.

Council then proceeded to carry out all the steps required by law to close the lane.

Both Council's Traffic Committee and the NSW Traffic Authority rejected any proposal to close lane W.63 which would deny Mr. F access to his garage. Thus, Council appealed to the then Minister for Local Government and Lands Mr. A.R.L. Gordon, M.P. requesting his approval for the proposed closure.

By letter dated 4th August 1983 the Minister refused to accede to Council's request. Consequently, Council resolved in September 1983 not to proceed with any closure of lane W.63.

The conduct of Willoughby Municipal Council was found to be wrong in terms of the Ombudsman Act in that Council acted unreasonably in deciding to and pursuing its decision to close lane W.63 thus preventing access via the lane to Mr. F's garage, which garage Council had approved in 1979.

Case No. 34

YASS SHIRE COUNCIL

Pollution of the Yass River

Residents living near the Yass River, downstream from the town of Yass, complained to the Ombudsman that the sewerage treatment works and the town's garbage tip were polluting the river. During times of drought, such as that which occurred during the early 1980's, the river water was unusable, and the stench from rotting algae penetrated into nearby houses. The complainants maintained that the sewerage treatment works discharged too much treated effluent for the Yass River to absorb at times of low water, and that the garbage tip, located not far from the river bank on the downstream side of the town, oozed leachate into such water (or sewerage effluent) as remained in the river. (Leachate is the liquid that is produced by decaying organic matter, and which spills from containers thrown into the tip.)

The investigation of this complaint, which included a good deal of correspondence and a visit to Yass to discuss matters with those involved, showed that the sewerage treatment works had in fact been considerably improved in the late 1970's, and that the garbage tip was long past its useful life, to the point where new garbage was being buried in old garbage. Yass Shire Council strongly denied that the sewerage works contributed to river pollution, but there was general agreement that a new garbage tip was needed, the problem being to find a new site.

Sewerage treatment works

Yass sewerage treatment works was overloaded before it was augmented in 1978. In order to alleviate the problem,

Council arranged for treated effluent to provide spray irrigation for lucerne and other crops in paddocks adjacent to the treatment works. Spraying created its own problems, however. In warm, windy weather the smell of the sprayed effluent was most unpleasant; in wet weather the relatively small paddocks became saturated. Yet there is agreement on one point: so long as spray irrigation continued, there was little algal bloom downstream in the Yass River. When complaints were received about the algae, from mid-1980, the State Pollution Control Commission urged Yass Shire Council to re-institute spray irrigation, and that was the central point in contention during the ensuing years. On more than one occasion, the Shire Clerk wrote to land owners near the sewerage treatment works, asking whether they would be interested in using treated effluent for spray irrigation of their crops, but the tone of the relies was no more spirited than that of the Shire Clerk's enquiries. The lack of enthusiasm of nearby land owners was then used by Council as justification for its inactivity, notably in its replies to increasingly terse letters from the State Pollution Control Commission.

In December, 1982 the Director of the State Pollution Control Commission issued an order under the Clean Waters Act that Yass Shire Council install effective spray irrigation within ninety days. On 2nd March, 1983 the Shire Clerk requested an extension of the notice, stating "it is very difficult to make quick decisions in this matter as the procedure to direct treated sewerage effluent away from discharge into the Yass River cannot be achieved 'overnight' ... As Council is doing all in its power to achieve a satisfactory solution to this problem which has existed for forty-five years, it is requested that suitable time be allowed to enable such a solution to be determined and implemented."

During this investigation it became clear that Council and its officers disagreed with the assessment by the State Pollution Control Commission that treated effluent led to the growth of algae in the Yass River. In letters to the Ombudsman, Council argued that its improved sewerage works produced high quality water. However, the purpose of this sewerage treatment is to convert organic and other forms of nutrients to nitrate and phosphate. The latter contribute to the growths of water plants, including algae, which later rot and create foul smells of the kinds that existed in the lower Yass River during dry weather. The key factor in algal growth is the concentration of nutrients in the water, not the "quality" of water in terms of bacteria and organic residues.

Council also argued that agricultural chemicals entered the Yass River during times of rain from the farmlands along its length. However, research in other areas has shown that "point" sources of discharge, such as sewerage works, make a much larger contribution to water pollution than do "diffuse" sources such as farmlands. The Yass sewerage works discharged into a weir in the town. When the river was reduced to a trickle, little more than treated sewerage effluent flowed to the properties downstream (and, eventually, into Burrinjuck Dam). Hence the heavy growth of algae.

Garbage Tip

Before 1980, Yass Municipal Council dealt with Yass township and Goodradigbee Shire Council with the surrounding district. Negotiations between these Councils and with various State government bodies proved fruitless over a number of years, and a brief summary of those negotiations will show how elected representatives, and their employees, failed to

resolve a basic problem affecting the health and amenity of their community.

In late 1975 the then Yass Municipal Council began negotiations, through the Pastures Protection Board, the Department of Lands and the Health Commission (as it then was), with a view to extending the garbage tip on to land owned by Goodradigbee Shire Council (as early as April, 1967, the Municipal Council had sought an extension on to land owned by the Yass Pastures Protection Board). In October, 1976 the Shire Council refused to cede land to the Municipal Council, and the Shire Council and the Electricity Commission objected to any extension of the tip on to other land, including an area containing Electricity Commission easements. In August, 1977 a joint committee of the two Councils was set up to consider the future disposal of garbage, but that committee did not meet until March, 1978. At that time, Shire Council representatives told the Municipal Council that the Shire would only grant a small extension to the garbage tip if the Municipal Council immediately looked for another site. Negotiations seem to have broken down, for in April, 1978 the Municipal Council took its problem to the local member of parliament, who in turn referred it to the Ministers for Local Government, Planning and Environment, Lands and Health.

The main effect of the approaches to the various Ministers was to involve their Departments in the affairs of Yass Municipal Council and, to a lesser extent, of Goodradigbee Shire Council. During 1978 Yass Council came under pressure from the Health Commission to re-locate the garbage depot. It responded, firstly, by seeking to re-open negotiations with Goodradigbee Shire Council, but was rebuffed. Yass Council then sought approval from the Lands Department to dump its garbage in a quarry, but permission was refused in December, 1978. Council continued to seek solutions through State government bodies by asking the Department of Lands, in January, 1979, whether there was Crown land in Yass suitable for a garbage tip, to be advised that the only possible area was under the control of the Pastures Protection Board. To this point, then, Yass Council had had resort to a number of government bodies, to arrive back at the authority with whom its negotiations had begun almost 12 years earlier!

Meanwhile, the State Pollution Control Commission had been added to the list of authorities enmeshed by Yass Council, and in February, 1979 the Commission's representatives entered direct negotiations with those from the Council, on the site of the garbage tip itself. In the following month, the Health Commission proposed a further meeting to discuss "all aspects" of Yass garbage disposal. No action ensued, and in August, 1979 the State Pollution Control Commission issued an order under the Clean Air Act because of fires at the tip, and threatened to issue an order against the runoff of leachate under the provisions of the Clean Waters Act. By this time Yass Municipal Council was awaiting amalgamation, and it appealed to the Local Member of Parliament in the following terms:

> Pending amalgamation, it is the considered view of Council that funds should not be expended at this stage to counteract problems which have existed for many years. It may well be that the Provisional Council will resolve to remove the Garbage Depot to a more desirable location such as Murrumbateman, or to any area where pollution of the Yass River will not cause concern.

> Council request that you take up the matter of the Yass Garbage Depot with the Minister of the Environment, with particular emphasis being placed on the provision of the notice pending.

The new Yass Shire Council referred the garbage tip question to yet another committee. Following further pressure from the State Pollution Control Commission in the early months of 1980, Council took the first positive step for several years by arranging an inspection in June, 1980 of three alternative garbage tip sites with a Health Commission inspector. Correspondence with the two Commissions occupied several more months, and in late November, 1980, Yass Shire Council advised land owners in an area known as Yellow Creek Road that theirs was the preferred site. The notification brought immediate objetions from the land owners, together with a petition from 22 other residents who believed that they would be affected by the re-location of the garbage tip.

The flurry of protests brought on by Council's notification of the site chosen for the new garbage depot served to obsure matters to the point where, in March, 1981, Council's Health Surveyor saw fit to return to the old proposal that the existing tip be extended. Both the Health Commission and the State Pollution Control Commission objected, with negotiations continuing for another six months.

By late 1981 the State Pollution Control Commission had become so impatient with Yass Shire Council that it had taken to sending its letters by Certified Mail. The Commission was informed in October, 1981 that Council had narrowed its choice of alternative sites to two. During the first six months of 1982 negotiations took place between Council and the land owners for the purchase of the alternative site, while the Health Commission and the State Pollution Control Commission asked for advice of further action. However, organised protests to Council led to more correspondence, additional reports, and a good deal of agonising in Council meetings. Council resolved to site the new garbage tip at a second alternative site, then rescinded that motion in favour of a decision to adopt the first alternative. By October, 1982, Council had finally had the new site valued, and had drawn up resumption documents, when the land owners complained to the Ombudsman and to the National Parks and Wildlife Service that the site contained Aboriginal graves, which should not be disturbed. The likely presence of graves was confirmed by the Service archaeologist, and the resumption proceedings came to a halt.

The discovery of Aboriginal graves caused Council to look in other directions, when a further complication arose. For some years the Department of Main Roads had proposed to build a Hume Highway by-pass around Yass. It was discovered that the proposed by-pass was likely to pass through the grave site, and so further study was required.

By early 1984 Yass Shire Council had found land for both a new garbage tip and the spraying of treated sewerage effluent, but only after a report from the Ombudsman finding wrong conduct on account of unreasonable delay, and after the issuing of a summons by the State Pollution Control Commission. Council's progress in reducing the pollution of the Yass River has been monitored by the Ombudsman. Most recently, Council has advised that the necessary works required by the State Pollution Control Commission are to be subsidised by the State Government.

It is clear from Council's replies to enquiries from the Ombudsman that it still does not concede that a serious problem has ever existed, particularly as far as the sewerage treatment works is concerned. The Shire Clerk wrote in August, 1984:

> "Council is still concerned that this large capital outlay (for a rural shire such as Yass) plus operating expenses, will not improve the water quality downstream of Yass but acknowledges that it cannot convince the appropriate State Government departments of this and will proceed as expeditiously as possible."

In correspondence to the Ombudsman and to the State Pollution Control Commission, Council has also pointed out that it has had to liaise and negotiate with at least six other agencies; the implication has been that these agencies have made life more difficult for Yass Shire Council. It can only be noted that modern public administration usually involves detailed liaison and negotiation. Perhaps if Yass Shire Council had realised this some years ago, pollution in the town would have been reduced long since.

Case No. 35

YASS SHIRE COUNCIL

Drainage problem resolved

In February 1984, a Yass businessman complained that for some considerable time he had been requesting the Yass Shire Council to complete some drainage work to prevent his premises from being flooded every time a heavy storm filled the local sewer line, causing a surcharge.

Initial enquiries were made with Council and a reply received, including a detailed Engineers report on the effluent surcharge.

In the report the Shire Engineer stated that a solution to the complainant's problem was the excavation of an open drain at the southern corner and along the south east wall of the shop, on land owned by Council.

The approximate cost of the work would not exceed $500 and the Engineer recommended it as a short term solution to the problem.

This information was passed on to the complainant who indicated his acceptance of the proposal.

Council subsequently met and agreed that the work proceed. The matter was then concluded.

(c) PRISONS - DEPARTMENT OF CORRECTIVE SERVICES

Case No. 36

GRAFTON GAOL

An embarrassing incident

An incident took place on 29th July, 1983 between an inmate of Grafton Gaol and the Department of Health Visiting Psychiatrist, during visiting hours.

The inmate was sitting talking to his visitors and children when the doctor walked past making certain comments. The complainant's recollection of the conversation was as follows:-

> "At approximately 2:30 p.m. Dr. F... (the Visiting Psycniatrist) and the inmate alighted from the Welfare Workers Office and as they walked past our table, Dr. F. stopped and interrupted my visit by saying quite loudly: 'Is your name Trevor?' I replied, 'Yes, Why?' He replied, 'Are those people your relatives?' I replied, 'Excuse me that is none of your business, I am having a visit here, you have no right to interrupt us like this, this my visiting time!' He replied, 'Oh, oh well, I just thought that I'd inform your visitors that I am greatly concerned for Trevor K.' He then turned and began walking away as I replied - 'I beg your pardon!' He did not reply and continued walking out of the visiting section and across to the 'gaol clinic', opposite the visiting section."

This exchange upset the prisoner and his visitors and he said he had no idea of what the exchange was about.

Later during the afternoon he, with the Deputy Superintendent of the Gaol, approached Dr. F. and he stated that the following further conversation took place:-

> 'I would like you to explain what you meant by saying 'I am greatly concerned for Trevor K.' He replied, 'Well I've got the reaction which shows need for concern.' I said, 'What do you mean, you came over to my table, interrupt my visit and say, 'I'm greatly concerned for Trevor K., then walk away. You've never even spoken to me before in the time that I've been in this institution.' He replied, 'I have, on several occasions, you just don't recall.'
>
> I said, 'I beg your pardon! You've never spoken or interviewed me in the time I've been in this institution until you just came over to me on my visit.' He replied, 'I have - I've spoken to you in here before.' I said, 'You have not!' He replied, 'I have - I've seen you out in the yard.' I said, 'You may've seen me out in the yard, but you've never spoken to me.' He replied, 'I have'. I replied, 'You have not, you've never spoken to me in the time that I've been in this institution!' He replied, 'I have', and walked over to the Depts Office doorway and entered."

Trevor K... then sought further information about the matter, discussing it with the Director of the Prison Medical

Service, who happened to be in the gaol, and with the gaol Superintendent.

After this Office commenced an investigation of the complaint, the doctor provided the Regional Director of Health with the following letter:-

> "It is with more than a little embarrassment that I write in reply to your letter of 14th September, 1983, relating to Trevor K.'s complaints. Firstly, I am very embarrassed about the whole incident and secondly I am sorry that I was on leave at the time when this note arrived and that my reply is so late.
>
> Thank you for enclosing the letter of Mr. K.'s, and let me say that from the outset that the letter is a very faithful account of the events that occurred. Even at the time I was disturbed by the incident since my previous association with both the inmates and the staff at the prison had never been characterised by such an unpleasant exchange, nevertheless, it was not until I perused my notes by way of preparation for answering this letter that I understand the unfortunate incident more fully.
>
> Unfortunately on that day I mistook Mr. K. for another inmate at the prison whose behaviour had been of great concern to me and who had been rejecting any sort of psychological assistance.
>
> I had indeed seen that inmate, John J., on a few occasions previously, but had forgotten his name, so I asked somebody the name of the prisoner and accosted him forthwith, not realising that it was a situation of mistaken identity.
>
> The incident that followed this was not surprising, although, I wish now that I had realised that some mistake must have been made on the basis of Mr. K.'s reaction. I will send a copy of this letter to Mr. K. and to the Superintendent of the prison and also Dr. John Ward, all of whom must have been more than dismayed at the incident. I am certainly very sorry for all of the confusion and suffering that has occurred as a result of my error."

Although the doctor's actions were found wrong in terms of the Ombudsman Act, no recommendation was made in view of his apology, and the matter was concluded.

Case No. 37

KIRKCONNELL AFFORESTATION CAMP

Prisoners Mowing Officers' Lawns

During a routine visit to the Kirkconnell Afforestation Camp, several prisoners made complaints that they were required to mow the lawns in the front and rear yards of the officers' homes. An investigation of the complaint was commenced under the Ombudsman's own motion.

It was not disputed by the Department that prisoners had been ordered to cut the lawns of the departmental homes of the officers. The Superintendent, Deputy Superintendent, and the local Senior Officer all took the view that this had always been considered legitimate work for prisoners.

Nevertheless, an examination of Rule 15 of the Rules laid down by the Corrective Services Commission disclosed that prisoners were not to be employed at, or in the grounds of, an officer's quarters, "other than in accordance with local orders approved by the Commission". No such local order had been approved in respect of either the Bathurst Gaol or the Kirkconnell Afforestation Camp.

The Department was given the opportunity to comment on the draft report and as a consequence advised that the Corrective Services Commission had approved of a Local Order under Prison Rule 15 to permit inmates to work in the surrounds of Departmental cottages at the Kirkconnell Camp, and at a number of other institutions.

While the conduct of the Superintendent was found to be wrong in terms of the Ombudsman Act, in view of the Chairman's advice that a local order had been made to permit the practice to continue, no recommendation was made.

Case No. 38

METROPOLITAN REMAND CENTRE

Stolen Food

A complaint was received from a prisoner in the Metropolitan Remand Centre that some prison officers in that institution were stealing food. He went on to state that a raid had been made by the Superintendent of the gaol on the officers' freezer and that several parcels of meat had been found.

The complainant was concerned that the matter would be "whitewashed" and so raised his complaint with this Office.

Initial enquiries were made and the Acting Chairman of Corrective Services said, that the Commission had instituted a system of random inspections of prison officers' vehicles as they were leaving the Long Bay Complex. However, there was no evidence to substantiate the allegations.

The files revealed that, following a disturbance in the gaol, a search of the freezers in Wings 12 and 13 had revealed 4kg and 7kg parcels of meat packed in bread wrappers. However, as both prisoners and certain officers had keys to the freezers, it was not possible to prove who had placed the parcels in the freezers.

As a result of these discoveries the Superintendent in charge of the Complex decided to conduct a special search of officers' vehicles leaving at the end of a shift.

A search was conducted on the night of 6th January, 1984, and while 3 tubs of margarine were later found on the roadside, nothing was discovered in the officers' vehicles. It was not possible to identify which officers had thrown the margarine away.

The Superintendent also advised that arrangements had been made to conduct regular searches of officers' vehicles and bags.

This information was passed to the complainant who expressed his satisfaction with the outcome.

In concluding the matter, the complainant was told that, should similar problems occur in the future, this Office would be prepared to consider re-opening enquiries.

(d) COMPLAINTS AGAINST POLICE

Case No. 39

Loss of confiscated property (i)

This Office received a complaint about the failure of Police to return a number of personal items which were seized when the complainant was charged with the offence of scandalous conduct.

Among the items seized were a number of pornographic magazines. The complainant was convicted on three counts of indecent assault. The investigation revealed that several items were not required for the trial and were put aside for return to the complainant. However, the items were not placed in the Prisoner's Property Book and this aspect of the complaint was sustained leading to the offer of an ex-gratia payment by the Police Department. Almost two years after the conviction, the local Inspector pointed out that the exhibit property was still on hand and action should be taken for its disposal. No order had been made by the Court for disposal of the property and no claim had been made by the complainant for its return. The magazines were subsequently destroyed by the Police.

In view of the time lapse between the confiscation of the material and the lodging of the complaint, and the fact that the complainant made no claim for the property from its seizure in 1977 up to the time of its destruction, no recommendation was made regarding the actions of the Inspector who ordered the destruction of the material. Nor was there a recommendation for compensation.

Case No. 40

Loss of confiscated property (ii)

Mr. D. alleged that personal property, in his possession when he was arrested at Walgett, N.S.W., had not been returned to him. The property consisted of one CBC Bank passbook, one silver signet ring, one brown leather wallet containing personal papers and one pair of riding boots.

The property is accounted for in various Prisoners Property Dockets issued at Walgett, Central and Parramatta Police Stations.

The Prisoners Property Docket No. A26290 which accompanied Mr. D. to Parramatta Prison does not list the items which have been lost. All that is recorded on that docket is one suitcase, two overnight bags, one pillow and 16 cents in money.

The Prisoners Property Docket Nos. A48750 and A48751 which came with Mr. D. and his property from Central Police Station are not pasted in the Parramatta Prisoners Property Docket Book on the 11th August, 1982. Instead, photostat copies have been pasted in their place as an acquittance for the property. On the 11th August, 1982, there were only three police officers on duty rather than the normal four at Parramatta Police Station.

Parramatta Prisoners Transfer Note No. D37567 which was forwarded with Mr. D. to Parramatta Gaol on 11th August, 1982, is signed in such a way that the Police Officer responsible for Mr. D's escort cannot be identified. This Officer has also neglected to record particulars of the escort in the motor vehicle diary.

Property Docket No. A26290 issued on 11th August, 1982, and signed by Sgt. F. does not fully itemise Mr. D's property.

Included in the file is Transfer No. B27145 issued at Walgett Police Station on 10th August, 1982, which appears to show that Mr. D. was received by the Officer-in-Charge at Malabar on the 10th August, 1982. The signature of the Receiving Officer is very difficult to decipher. Attached to this transfer note is a note, signed by Inspector H. and dated 25th July, 1983, which reads as follows:-

> "Prisoner D. was never taken to or received by OIC Malabar as indicated hereon. He was conveyed from Mascot Airport direct to Central Police Station on 10/8/82, where ... (the)...Station Duty Officer received him and his property, signed the transfer note B27145 and returned it to the OIC Walgett Police (Inf. from Sen. Const. M., Central 7.25 pm 25/7/83)."

Mr. D's complaint was found to have been sustained and Mr. D. was handed a cheque in the sum of $137.00 on 21st March, 1984 and a "Deed of Release" was signed by him.

There were a number of matters of concern and it is difficult to believe that these were all matters of coincidence. These are:-

- the loss of personal property dockets, Nos. A48750 and A48751, which were not pasted in the Parramatta Prisoners Property Docket Book but for which photostat copies were obtained.

- that there is on file a Prisoners Transfer Note No. B27145 which purports to show that Mr. D. was received at Malabar on the 10th August, 1982, even although it is claimed that he was never taken to, or received, at that Police Station.

- that it was possible to have Mr. D. escorted from Parramatta Police Station to Parramatta Gaol without being able to identify the Police Officer

> responsible for his escort there. One must ask the question what would have happened if Mr. D. had escaped whilst in the custody of an unidentifiable police officer. It is not appropriate that Police Officers, responsible for the safe custody of prisoners, cannot be identified other than by a signature on a slip of paper. The number of escorts from Parramatta Police Station to Parramatta Gaol on any one day is limited and the Ombudsman believes that escorting officers should be identifiable.

In view of the extraordinary, apparently coincidental, mishaps in the transfer of Mr. D. from Walgett Police Station to his final destination at Parramatta Gaol, it should be noted that Sergeant F's part was only a small one, albeit the substance of the complaint. It appears that, because Sergeant F was the only officer who could be identified he must carry the full responsibility for the loss of Mr. D's property.

It was, therefore, recommended that no action be taken against Sergeant F. other than that he be paraded before his District Superintendent and given appropriate instructions and that a reference to this matter not be placed in his service register.

Subsequently, Sergeant F. wrote:-

> "I wish to advise that I have perused the draft report of your Investigation Officer and find it to be a most impartial and fair resume of the circumstances surrounding the complaint of Mr. D. for which, and that of the proposed recommended action to be taken in regard to me, I express my appreciation."

However, Assistant Commissioner Shepherd later advised this Office that reference to this matter would be included in the Sergeant's Service Register.

Case No. 41

Court decides breath-test dispute

Following a motor vehicle accident, police were called to the scene and, after administering a breath test, arrested a man, who was reported to be the driver of one of the vehicles. He was charged with "Drive with Higher Prescribed Concentration of Alcohol." This man, the complainant, pleaded not guilty but was found guilty of the offence. He later appealed and the conviction was quashed.

It was alleged that the complainant had not been driving the car but had been a passenger, and that his wife had been the driver of the motor car at the time of the accident. Witnesses at the scene of the accident stated that the complainant was the driver, but at the appeal this evidence was contradicted to the point where the conviction quashed.

The matter was found not sustained because the evidence available at the time of the arrest suggested that the complainant was in fact driving the car; and the contrary evidence was brought forward only at the time of the appeal.

It was held therefore that the complaint was not sustained and that the police officer had acted correctly in preferring the charge, thereby making it a matter for the Court to determine.

Case No. 42

Christmas in police cells

A prisoner, Mr. H, wrote to this Office in December, 1982, complaining that he been held in police cells for too long, and that a Constable had directed abusive language towards him outside Burwood Court.

The investigation was carried out by Chief Inspector of the Police Motor Vehicles Branch, and the Ombudsman considered that the complaint has been properly investigated.

The complainant was arrested in December, 1980, and spent five days over the Christmas period in police cells. The alleged reason for this was that there was no means for transporting the prisoner back to Long Bay Prison Complex. Two years later Mr. H. was again subjected to this treatment, being kept in police cells for three days.

As the first period of detention arose from the failure on the part of the Judge dealing with Mr. H's case to specify where the prisoner was to be held, this aspect of the complaint was deemed to be not sustained. However, the second period of detention in police cells (14-16 December, 1982) was the fault of the supervising Sergeant of the Police Transport Section, who failed to arrange alternative means for transporting Mr. H. when the usual means were not available. Disciplinary action was taken against the Sergeant to instruct him as to his responsibilities as a supervising Sergeant.

The complaint concerning the abuse given to Mr. H. by a Constable at Burwood Court was denied by the Constable concerned, and owing to the limitations on the powers of the Ombudsman at that time, the Ombudsman was unable to determine whether the complaint had been sustained or not sustained.

Case No. 43

Failure to inform parents of son's death

A case that was found to be sustained involved a failure on the part of a Police Constable to inform parents of the death of their son.

In December 1982 a telex message was sent from Bondi to Newcastle Police Station carrying information that was to be passed on to a country Police Station. That telex message was filed on the telex message pad and no action was taken on it. The Constable responsible, when questioned, admitted his mistake, claiming that he had only recently been rostered to perform "assist station" duties, and he was not wholly conversant with the procedures involved. Furthermore, the Constable sincerely regretted his actions, and extended his apologies to the complainant.

Although the actions of the Constable had unfortunate consequences, they were based on a mistake on his part, rather than a conscious effort to avoid his duty. Given these mitigating circumstances, it was determined that the Constable should be paraded before his District Officer and given instruction as to his responsibilities in matters of this nature. An official letter of apology was forwarded from the Police Department to the complainant.

Case No. 44

Failure to record details of accident

In September 1982 an accident occurred between the complainant's car and a truck. The complainant attended the Parramatta Police Station and gave particulars of the accident to a Constable on duty there. She subsequently received a letter from the firm who owned the truck involved in the accident, denying liability for the damage done to her car.

During the course of the investigation the Constable admitted that he had failed to properly record particulars of the accident, as related to him by the complainant, as he was under the impression that the complainant was merely making enquiries as to the driver of the truck. When asked for a report on the incident the Constable admitted his mistake and apologised for any inconvenience caused.

The Constable was paraded before his District Superintendent and strongly advised as to his responsibilities in matters of this nature. A reference to this was placed in the Constable's Service Register.

Case No. 45

Traffic convictions annulled

A complaint was received in February, 1984, alleging that the NSW Police Department had sent the writer (a resident of Victoria) summonses for traffic infringements he did not commit. He further stated that he had never been to the town where the alleged breaches had occurred, nor did he own the vehicle mentioned in the summonses, and he could produce witnesses to testify to his whereabouts on the day in question.

The complainant did not appear in Tweed Heads' Court of Petty Sessions, and as a result was convicted of the offences, and ordered to pay the fines plus costs.

The Police Department was asked to carry out preliminary enquiries into the complaint, and as a result, it was discovered that the offender was in fact the complainant's brother, who had given a false name and address when spoken to by the policeman issuing him with the infringement notice. On the basis of this information the Police Department said that steps would be taken to have the convictions against the complainant annulled. The complainant was advised accordingly.

PART IV

STATISTICAL SUMMARY OF COMPLAINTS UNDER OMBUDSMAN ACT

1st July, 1983 to 30th June, 1984

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)			(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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Agriculture Department		1		1	2		4				1	3	3	15
Albury-Wodonga Development Corporation													1	1
Anti-Discrimination Board of N.S.W.				4										4
Apprenticeship Directorate		3		1				3	3			1	1	12
Argentine Ant Eradication Committee				1										1
Attorney General's Department		7					1		1	1		2	3	15
Australian Gas Light Company				3				1	8	1	1		1	15
Australian Museum				1										1
Bathurst Orange Development Corporation										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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Board of Fire Commissioners												3		3
Board of Senior School Studies				1					1				1	3
Board of Veterinary Surgeons		1												1
Builders Licensing Board		3		14	10		6	1	4	1	2	10	21	72
Bursary Endowment Board				2								1		3
Chiropractic Registration Board				1										1
Coal-Oil Shale Mine Workers Superannuation & Long Service Leave Branch		1									1			2
Consumer Affairs Department		4		9	3		1	2	2	2	4	4	9	40
Consumer Claims Tribunal		10												10
Co-operative Societies Department	1			2					1				1	5

Public Authority (DEPARTMENTS)	No Jurisdiction Sec.12	Sec.12 (1)(a)	Sec.12 (1)(b)(c)(d)	Declined Sec.13 (4)(a)	Sec.13 (4)(b)	Sec.13 (5)			Discontinued (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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Corporate Affairs Commission		2		8	1				2	2		9	12	36
Corrective Services Department	1	29		94	10		30	9	99	87	2	259	179	818
Council of Auctioneers & Agents				1				1	2			5	1	10
Crown Lands Office				4								1	1	6
Crown Solicitor's Office	1													1
Cumberland College of Health Sciences													1	1
Dairy Corporation of N.S.W.		1		1	1		3					7	8	21
Dental Board of N.S.W.				2										2
Dental Hospital									1					1
Dog Racing Control Board					1									1

Public Authority (DEPARTMENTS)	No Jurisdiction: Sec.12	No Jurisdiction: Sec.12 (1)(a)	No Jurisdiction: Sec.12 (1)(b)(c)(d)	Declined: Sec.13 (4)(a)	Declined: Sec.13 (4)(b)	Declined: Sec.13 (5)			Discontinued: (1)	Discontinued: (2)	Discontinued: (3)	Discontinued: (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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Education Department of N.S.W.		7		21	4		8	2	5	2	1	22	26	98
Egg Corporation of N.S.W.				2									4	6
Electricity Commission of N.S.W				13	3		3		2			9	4	34
Energy Authority of N.S.W.												2	2	4
Environment and Planning Dept.				6	1		1	2	4	2	1	7	9	33
Equal Opportunity Tribunal												1		1
Fair Rents Board													1	1
Finance Department		1		5								2	1	9
Forestry Commission of N.S.W.	1				5		1						1	8
Geographical Names Board									1					1
Goulburn College of Advanced Education				1								1		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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Government Insurance Office of N.S.W.		3		5	37				5	9		3	6	68
Government Printing Office					1				1			3		5
Government Stores Department				2										2
Health Department of N.S.W.	2	5		28	7		12	1	2	4	1	13	13	88
Health Department of N.S.W(Prison Medical Service)				3					4	1		8	5	21
Height of Buildings Advisory Committee													1	1
Heritage Council fo N.S.W.				1				3				1	1	6
Housing Commission of N.S.W.		1		16			7		9	9	1	8	14	65
Hunter District Water Board		1		3	3		1			2		3	3	16
Industrial Relations Department	1	2		6	1		4		6		1	1	6	28

Public Authority (DEPARTMENTS)	No Jurisdiction: Sec.12	No Jurisdiction: Sec.12 (1)(a)	No Jurisdiction: Sec.12 (1)(b) (c)(d)	Declined: Sec.13 (4)(a)	Declined: Sec.13 (4)(b)	Declined: Sec.13 (5)			Discontinued: (1)	Discontinued: (2)	Discontinued: (3)	Discontinued: (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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Joint Coal Board				1					1					2
Ku-ring Gai College of Advanced Education				1									1	2
Land Board Office		2		5	6		4		5			2	5	29
Land Commission of N.S.W.								1				1	4	6
Lands Department of N.S.W. (after April)				1					1				7	9
Land Tax Office				5	1		4		1			3	3	17
Legal Services Commission of N.S.W.	1	3		2	7			1	1	2		5	2	24
Leisure Sport & Tourism Department				1						1		3		5
Licences Reduction Board												1		1
Local Government Boundaries Commission		1		3									1	5

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Local Government and Lands Department(prior April)			1	4				4	1	1	2	4	1	18
Long Service Payments Corporation				4			2		2			6	7	21
Lord Howe Island Board				3										3
Macquarie University	1			3									1	5
Main Roads Department				13	10		3	1	3	2	1	8	13	54
Management Committee, Joint Task Force into Drug Trafficking													1	1
Maritime Services Board				4	1		8		2	3		1	10	29
Meat Authority of N.S.W.	1			1										2
Medical Board of N.S.W.		2												2
Metropolitan Water Sewerage & Drainage Board		1		35	13		10	2	29	5	1	15	11	122

Public Authority (DEPARTMENTS)	No Jurisdiction: Sec.12 — Not Public Authority	No Jurisdiction: Sec.12 (1)(a) — Conduct is of a class described in Schedule 1	No Jurisdiction: Sec.12 (1)(b)(c)(d) — Conduct or complaint out of time	Declined: Sec.13 (4)(a) — General Discretion	Declined: Sec.13 (4)(b) — Insufficient interest, trading, commercial function, alternate means of redress, etc.	Declined: Sec.13 (5) — Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Discontinued (1) — Resolved Completely	Discontinued (2) — Resolved Partially	Discontinued (3) — Withdrawn by Complainant	Discontinued (4) — Other	Under Investigation as at 30th June, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Mine Subsidence Board				1						1				2
Minister for Education, Office of		1												1
Minister for Police, Office of													1	1
Minister for Transport, Office of	1													1
Mitchell College of Advanced Education				1								1		2
Motor Transport Department	2	2	1	20	5		6	1	13	5	1	15	7	78
Motor Vehicle Repair Industry Council		5		1					1	2	1	2		12
Murray Valley (N.S.W.) Citrus Marketing Board													1	1
Music Examination Advisory Board	1												1	2
National Parks and Wildlife Service	1	4		1	2		1		6	1		5	9	30

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 1	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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Nepean College of Advanced Education												1		1
Newcastle College of Advanced Education		1		2				2						5
Newcastle Gas Company				1										1
Nurses Registration Board												1		1
Parole Board		1		2	2		1		1	1		1	3	12
Parramatta Police Boys Club								1						1
Pastures Protection Board								4	1			1	4	10
Payroll Tax Office				1								1		2
Plumbers Gasfitters and Drainers Board				1										1
Police Citizens Boys Club, Federation of								1				1		2

Public Authority (DEPARTMENTS)	No Jurisdiction: Sec.12 — Not Public Authority	No Jurisdiction: Sec.12 (2)(a) — Conduct is of a class described in Schedule	No Jurisdiction: Sec.12 (3)(b)(c)(d) — Conduct or complaint out of time	Declined: Sec.13 (4)(a) — General Discretion	Declined: Sec.13 (4)(b) — Insufficient interest, trading, commercial function, alternate means of redress, etc.	Declined: Sec.13 (5) — Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Discontinued (1) — Resolved Completely	Discontinued (2) — Resolved Partially	Discontinued (3) — Withdrawn by Complainant	Discontinued (4) — Other	Under Investigation as at 30th June, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Police Department				1	1		1	1	6	1		7	17	35
Police Superannuation Board		1		1										2
Premier's Department		1		1							1			3
Property Advisory Management Committee												1		1
Protective Office		2												2
Public Accountants Registration Board					1								1	2
Public Authorities Superannuation Board		1		1	2				1			3	2	10
Public Prosecutions Office		1												1
Public Service Board		1							1			1		3
Public Trust Office	1	2			5		1		5			4	3	21
Public Works Department					2		5			2	1		3	13

Public Authority (DEPARTMENTS)	No Jurisdiction: Sec.12 — Not Public Authority	No Jurisdiction: Sec.12 (1)(a) — Conduct is of a class described in Schedule	No Jurisdiction: Sec.12 (1)(b)(c)(d) — Conduct or complaint out of time	Declined: Sec.13 (4)(a) — General Discretion	Declined: Sec.13 (4)(b) — Insufficient interest, trading, commercial function, alternate means of redress, etc.	Declined: Sec.13 (5) — Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Discontinued (1) — Resolved Completely	Discontinued (2) — Resolved Partially	Discontinued (3) — Withdrawn by Complainant	Discontinued (4) — Other	Under Investigation as at 30th June, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Railway Service Superannuation Board												1		1
Real Estate Valuers Registration Board										1				1
Registrar General's Department				3			2		4			1	1	11
Registry of Births, Deaths & Marriages				7					3	8		2	2	22
Rental Bond Board				4	1				4	2		1	1	13
Riverina College of Advanced Education				1										1
Rural Assistance Board													1	1
Secondary Schools Board										1			1	2
Soil Conservation Service												1		1
Sporting Injuries Committee													1	1

Public Authority (DEPARTMENTS)	No Jurisdiction Sec.12	No Jurisdiction Sec.12 (1)(a)	No Jurisdiction Sec.12 (1)(b)(c)(d)	Declined Sec.13 (4)(a)	Declined Sec.13 (4)(b)	Declined Sec.13 (5)			Discontinued (1)	Discontinued (2)	Discontinued (3)	Discontinued (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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Stamp Duties Office				4	6		2		1	1		3	2	19
State Bank				1	2			1				1	1	6
State Contracts Control Board								1				1		2
State Electoral Office					1							2	2	5
State Fisheries Department				1	1		2		1	1			2	8
State Library of N.S.W.												1		1
State Lotteries Office							1		1			5	1	8
State Pollution Control Commission				4	2		3	1	1	2		2	4	19
State Rail Authority of N.S.W.	1	2		21	13		2	1	10	7		9	11	77
State Superannuation Board		1		4	1							1	2	9
Strata Titles Office	1								1				2	4

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Southern District Racing Association													1	1
Sydney Cricket & Sports Ground Trust				1										1
Sydney College of the Arts												1		1
Sydney Opera House							1							1
Sydney Produce Farm Market Authority					1									1
Teacher Housing Authority									1					1
Technical and Further Education Department		1		8	1		3	1	7			1	4	26
Tick Control Board		1											2	3
Tobacco Leaf Marketing Board				1			2					1		4
Totalizator Agency Board				2			1					1		4

Public Authority (DEPARTMENTS)	No Jurisdiction: Sec.12	No Jurisdiction: Sec.12 (1)(a)	No Jurisdiction: Sec.12 (1)(b) (c)(d)	Declined: Sec.13 (4)(a)	Declined: Sec.13 (4)(b)	Declined: Sec.13 (5)			Discontinued: (1)	Discontinued: (2)	Discontinued: (3)	Discontinued: (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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Traffic Authority of N.S.W.				1	1		3			1				6
Travel Agents Registration Board												2	1	3
Treasury									4	1				5
University of New England				3									1	4
University of Newcastle				7										7
University of New South Wales		1		3	1				1				5	11
University of Sydney				1								1		2
University of Wollongong				1										1
Urban Transit Authority				6	1				1		1		2	11
Valuer Generals Department					2		2	1	2		1	1	2	11
Veterinary Surgeons Investigating Committee		1												1

Public Authority (DEPARTMENTS)	No Jurisdiction: Sec.12	No Jurisdiction: Sec.12 (1)(a)	No Jurisdiction: Sec.12 (1)(b)(c)(d)	Declined: Sec.13 (4)(a)	Declined: Sec.13 (4)(b)	Declined: Sec.13 (5)			Discontinued: (1)	Discontinued: (2)	Discontinued: (3)	Discontinued: (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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Water Resources Commission				3	1		5	1	2			1	3	16
Western Lands Commission				2			1						1	4
Womens Advisory Council												1		1
Workers Compensation Commission		1												1
Youth and Community Services Department	1	3		30	6		10	3	12	10	3	26	17	121
Zoological Parks Board of N.S.W.								1						1
TOTAL:	20	125	2	507	184		168	55	301	186	48	551	532	2679

Public Authority	No Jurisdiction: Sec.12	No Jurisdiction: Sec.11 (1) (a)	No Jurisdiction: Sec.12 (1) (b) (c) (d)	Declined: Sec.13 (4) (a)	Declined: Sec.13 (4) (b)	Declined: Sec.13 (5)			Discontinued (1)	Discontinued (2)	Discontinued (3)	Discontinued (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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
i. Premature Complaints - Miscellaneous Public Authorities				69										69
ii. Unscheduled Bodies (Outside Jurisdiction)														
(a) - Australian Government Departments	101													101
(b) - Electricity Complaints - Policy	26													26
(c) - Employer - Employee	71													71
(d) - Private Organisations and Individuals	330													330
	548	125	2	576	184		168	55	301	186	48	551	532	3276
Local Government Authorities	6	16	2	302	123	95	82	69	100	39	15	182	241	1272
Total from all sources	554	141	4	878	307	95	250	124	401	225	63	733	773	4548
Less under investigation as at 30/6/83														-804
Total Received for year ended 30/6/84														3744

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Aberdare County Council							1							1
Albury City Council												1	3	4
Armidale City Council					1								1	2
Ashfield Municipal Council				1	1			1				2	2	7
Auburn Municipal Council				3	1							1		5
Ballina Shire Council													1	1
Balranald Shire Council				1										1
Bankstown City Council				2	1	1	1	2	4			2	2	15
Barraba Shire Council												1	1	2
Bathurst City Council				1	2							2	1	6

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Baulkham Hills Shire Council		1		1	1	2	1		1			4	3	14
Bega Valley Shire Council				1		3			3	1		1	2	11
Bellingen Shire Council				6	1	10			2		1	3	1	24
Berrigan Shire Council						1	1							2
Blacktown City Council				6			1	2	2			3	4	18
Blayney Shire Council				1										1
Blayney (Abattoirs) County Council		1												1
Blue Mountains City Council				3	2	2	1			1		6	2	17
Bogan Shire Council					1									1
Bombala 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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Botany Municipal Council					1			1				1		3
Broken Hill City Council	1				1								3	5
Burwood Municipal Council									1			1	2	4
Byron Shire Council				1	2	2						1	13	19
Cabonne Shire Council							2					1		3
Camden Municipal Council				2										2
Campbelltown City Council				1			1	1		1		1	2	7
Canterbury Municipal Council				4			1	1	3			1	1	11
Carrathool Shire Council				1										1
Casino Municipal Council				1								1		2

Public Authority (COUNCILS)	No Jurisdiction			Declined					Discontinued					
	Sec.12	Sec.12 (1)(a)	Sec.12 (1)(b) (2)(3)	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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Central Darling Shire Council									1					1
Central West County Council				1									1	2
Central Tablelands County Council												1		1
Coffs Harbour Shire Council		1		5		1			1			3	4	15
Concord Municipal Council				3	2					1		3	1	10
Coolamon Shire Council				1										1
Coonabarabran Shire Council												1		1
Cootamundra Shire Council					1									1
Cowra Shire Council												1	3	4
Culcairn 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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Deniliquin Municipal Council				3	1				2					6
Drummoyne Municipal Council						1				1		1	2	5
Dubbo City Council				1									2	3
Dumaresq Shire Council						1	1					1	1	4
Eurobodalla Shire Council				4	1				2			4	6	17
Fairfield City Council				5	4		1					3	2	15
Far North Coast County Council							1				1	1		3
Forbes Shire Council				1								1		2
Gilgandra Shire Council													1	1
Glen Innes Municipal Council		2						1						3

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Gloucester Shire Council									1			1		2
Gosford City Council				13	7	2	1	4	2	2		2	2	35
Goulburn City Council												1		1
Grafton City Council						1						1	2	4
Greater Cessnock City Council				3	2		1			1			2	9
Great Lakes Shire Council				1		1		1				1	2	6
Greater Lithgow City Council													1	1
Greater Taree City Council				2	2							1	1	6
Griffith Shire Council									1					1
Gunning Shire Council							1							1

Public Authority (COUNCILS)	No Jurisdiction: Sec.12 — Not Public Authority	No Jurisdiction: Sec.12 (1)(a) — Conduct is of a class described in Schedule	No Jurisdiction: Sec.12 (1)(b)(c)(d) — Conduct or complaint out of time	Declined: Sec.13 (4)(a) — General Discretion	Declined: Sec.13 (4)(b) — Insufficient interest, trading, commercial function, alternate means of redress, etc.	Declined: Sec.13 (5) — Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Discontinued (1) — Resolved Completely	Discontinued (2) — Resolved Partially	Discontinued (3) — Withdrawn by Complainant	Discontinued (4) — Other	Under Investigation as at 30th June, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Hastings Municipal Council				5				1	3	2		3	4	18
Hawkesbury shire Council					2	2				2		1	6	13
Holroyd Municipal Council				2	2	1				1				6
Hornsby Shire Council				7	2	1	1	2		2		4	6	25
Hume Shire Council				3										3
Hunters Hill Municipal Council								1		1				2
Hurstville Municipal Council				4	1			1				1	3	10
Illawarra County Council		1		4			1		3		1	1	4	15
Inverell Shire Council				2			1	1				3		7
Kempsey Shire Council					2	1			1			2	1	7

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Kiama Municipal Council				1	1	1								3
Kogarah Municipal Council				2		11	1					2	2	18
Ku-ring-gai Municipal Council				6	3		1		1			3	2	16
Kyogle Shire Council						1							1	2
Lachlan Shire Council							1							1
Lake Macquarie Municipal Council				9	1	3	4	2	6	5	1	6	7	44
Lane Cove Municipal Council				3	2	1						1	2	9
Leichhardt Municipal Council		1		8	3	5			2	2		3	4	28
Lismore City Council				2			1	1		1		4	1	10
Liverpool City Council				2	2	1				1			2	8

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Lower Clarence County District				1										1
Maclean Shire Council									1			2	2	5
Maitland City Council				1				1				2	3	7
Manly Municipal Council				1	2				1			3	1	8
Marrickville Municipal Council				5	1	1		1	1			3	2	14
Merriwa Shire Council				1				2						3
Moree Plains Shire Council				2									1	3
Mosman Municipal Council				2	2	3			1			2		10
Mudgee Shire Council		1		3	2		1					1	3	11
Mulwaree Shire Council				3	1				1			1		6

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Murray River County Council				1		2								3
Murray Shire Council					1				1				1	3
Murrumbidgee County Council				1				1						2
Muswellbrook Shire Council				2								1		3
Nambucca Shire Council				2	1	1	2					1	5	12
Namoi Valley County Council												1	1	2
Narrabri Shire Council	1			2			2					1		6
Newcastle City Council				3		2	1	3				3	3	15
New England County Council				2										2
North Sydney Municipal Council				1	1	1	2	2	3				1	11

Public Authority (COUNCILS)	No Jurisdiction: Sec.12 – Not Public Authority	No Jurisdiction: Sec.12 (1)(a) – Conduct is of a class described in Schedule	No Jurisdiction: Sec.12 (1)(b)(c)(d) – Conduct or complaint out of time	Declined: Sec.13 (4)(a) – General Discretion	Declined: Sec.13 (4)(b) – Insufficient interest, trading, commercial function, alternate means of redress, etc.	Declined: Sec.13 (5) – Local Government Authority where right of appeal or review	No Wrong Conduct	Wrong Conduct	Discontinued (1) – Resolved Completely	Discontinued (2) – Resolved Partially	Discontinued (3) – Withdrawn by Complainant	Discontinued (4) – Other	Under Investigation as at 30th June, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
North West County Council													2	2
Northern Rivers County Council		1		2	1		2				1	2	1	10
Northern Riverina County Council				2					2			1		5
Nymboida Shire Council												1		1
Oberon Shire Council					1								1	2
Orange City Council				1									1	2
Oxley County Council				1									2	3
Parramatta City Council	1	1		6	2		4		1	1	2	2	6	26
Parkes Shire Council													1	1
Penrith City Council		1		3	1		1	1	3			2	4	16
Port Stephens Shire Council				3	1		3	2	3		3	4	3	22

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Prospect County Council				6	2		2		3	3			2	18
Queanbeyan City Council				1		2	1						1	5
Randwick Municipal Council				5	1	3	1	3		1		1	6	21
Richmond River Shire Council				1	1									2
Rockdale Municipal Council				3	2								1	6
Rous County Council	1								1					2
Ryde Municipal Council				3	1		1	2	2				1	10
Rystone Shire Council												1		1
Scone Shire Council													1	1
Shellharbour Municipal Council								1				1		2
Shoalhaven City Council				9	2	2	2	3	2			1	1	22

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Shortland County Council				3	1				3			2	2	11
Singleton Shire Council				1	1									2
Snowy River Shire Council		1		2								1		4
Southern Tablelands County Council				1	1				1				3	6
Southern Mitchell County Council	1						1					1	1	4
South West Slopes County Council				1					1					2
Strathfield Municipal Council				2								1		3
Sutherland Shire Council				8	3	5	2		2	4		5	6	35
Sydney City Council	1	1		11	6	6	11	14	6		1	9	8	74
Sydney County Council		1		10	4		3		11	3		4	6	42

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, 1984	Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Tallaganda Shire Council					1									1
Tamworth City Council				1				1					2	4
Tumut River County Council					1							2		3
Tumut Shire Council				1		1								2
Tweed Shire Council				3	1	1						3	2	10
Ulan County Council					1						1			2
Ulmarra Shire Council				1		1								2
Wagga Wagga City Council				2										2
Walgett Shire Council							1						1	2
Warren 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
Warringah Shire Council				8	7	4	1	2	3	1	1	3	11	41
Waverley Municipal Council				8	1		2	3			2	5	3	24
Wellington Shire Council					1									1
Willoughby Municipal Council		1		3		2	1	1	2			3	1	14
Wingecarribee Shire Council				4	2	2			3			1	3	15
Woollahra Municipal Council				3	3		1	1					8	16
Wollongong City Council				1	3		2	1		1		7	3	18
Wollondilly Shire Council				3										3
Wyong Shire Council		1	2	5	2		3					3	1	17

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
Yallaroi Shire Council							1							1
Yarrowlumla Shire Council				1										1
Yass Shire Council				1	1			1					1	4
	6	16	2	302	123	95	82	69	100	39	15	182	241	1272
Under Investigation as at 30/6/83													-	240
Received														1032

PART V

SUMMARY OF THE ANNUAL REPORT FOR 1983-84

OMBUDSMAN OF NEW SOUTH WALES

Role of the Ombudsman

The Ombudsman is an independent statutory officer who investigates complaints about N.S.W. government departments, authorities, local councils, and members of the police force. He reports on his findings to complainants and where wrong conduct has been found, to the Minister concerned. While the Ombudsman's main task is the impartial investigation of complaints, his Office also recommends administrative improvements, and refers members of the public to other agencies. The current office bearers are:

Ombudsman	George Masterman, Q.C
Deputy Ombudsman	Dr. Brian Jinks
Assistant Ombudsman	John Pinnock
Principal Investigation Officer	Gordon Smith

Complaints received

In 1983-84, the following complaints were received:

OMBUDMSAN ACT	1983-84
(a) Departments and Authorities (other than Corrective Services)	1930
(b) Local Councils	1272
(c) Department of Corrective Services	818
POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT	1550
Outside Jurisdiction (Commonwealth authorities private companies etc.)	534
TOTAL	6104

1156 interviews were held with complainants at our city Office, and about 400 at country centres.

Reports to Ministers

During 1983-84, 124 reports of wrong conduct were made to Ministers. 55 related to complaints against N.S.W. government departments and authorities, and 69 against local councils. The Ombudsman offers to consult with the Minister concerned about each of these reports; many accept, and possible improvements to procedures in their Departments are discussed. The Ombudsman does not investigate the conduct of Ministers themselves.

Reports to Parliament

During the year, 12 reports to Parliament were made. They included reports on:

Overshadowing of Hyde Park (Height of Buildings Advisory Committee and Sydney City Council)

Misleading advertising of home sites (Department of Lands and Land Commission)

Darlinghurst/Kings Cross Brothels (Sydney City Council)

Denial of Liability by Councils (Randwick Municipality and Merriwa Shire)

New Police Legislation

Legislation known as the "police discipline package" was passed by N.S.W. Parliament in 1983. Amendments to the Police Regulation (Allegations of Misconduct) Act gave the Ombudsman direct powers of investigating complaints against the police. He can now question witnesses and police officers where their evidence is conflicting, before reaching his decision on the complaint. To assist in this process, 10 plain-clothes officers, answerable to the Ombudsman, have been seconded from the Police Force.

Administrative independence

On 24th February, 1984, the Office of the Ombudsman was made a separate Administrative Office under the Public Service Act. Before that it had been subject, administratively, to the Premier's Department.

Responses of public authorities to Ombudsman investigations

Responses by public authorities to the Ombudsman's investigations range from co-operative to unco-operative and defensive. The Annual Reort gave examples of helpful responses from the Housing Commission, Parramatta City Council, Valuer-General, Hunter District Water Board, National Parks and Wildlife Service and others. Unco-operative responses had come from Merriwa Shire Council, the Department of Environment and Planning and the Government Insurance Office.

Water Board complaints - improvements noted

From January 1983 to September 1983, all complaints to the Ombudsman about delay by the Metropolitan Water Sewerage and Drainage Board were monitored. The average delay by the Board in responding to consumers involved in the 25 cases was 5.78 months. A wrong conduct report was completed by the Deputy Ombudsman. Continued monitoring has since revealed a dramatic decline in complaints about the Water Board's delay.

Need for Juvenile Prison

The Ombudsman is concerned at the lack of suitable facilities for juvenile offenders who have committed serious crimes of violence. The Courts send some juvenile offenders to prison. A group of youths at Parramatta Gaol complained that the facilities and programmes for them were inadequate.

Following allegations in the press about attempts to sexually assault a young offender at Long Bay, many juvenile offenders were transferred from prison to Youth and Community Services establishments. However, these generally operate on self discipline rather than secure confinement. It is the Ombudsman's view that the case for the construction of a secure juvenile institution is a strong one.

Advertising Land

The Ombudsman recommended introduction of N.S.W. Trade Practices legislation after investigating a complaint that

land promoted by Landcom as "high quality homesites" had been advertised misleadingly. Rubbish, including old washing machines, had been used as fill on one of the blocks. As a result of Ombudsman's investigations the complainants eventually received an ex-gratia payment of $8016.10. In May 1984, the Minsiter for Consumer Affairs endorsed the Ombudsman's view that the standard of conduct of government authorities in commercial dealing with the people should be at least as high as that of private corporations. The Minister intends to introduce a Fair Trading Act in late 1984.

Forensic Laboratory

Following a complaint by a firm of solicitors, an investigation was carried out into the N.S.W. Forensic Laboratory's methods of conducting forensic tests and preserving evidence. The Department of Health was asked to comment on the Forensic Laboratory's alleged failure to preserve and keep slides and plates. Comparative information on standard procedures was sought interstate and overseas. The final report has not yet been written.

Secrecy Provisions of Ombudsman Act

The Ombudsman is prevented, by sections 17 and 34 of the Ombudsman Act, from providing any information about his investigations subject to very narrow exceptions. In a special Report tabled on 18th September, 1984, he has sought the same power to provide information in the public interest that was granted to the Commonwealth Ombudsman by the Hawke Government in October 1983. The relevant section is 35A of the Commonwealth Ombudsman Act. The confidentiality of complainants would continue to be protected.

'Own Motion' Investigations

While most investigations by the Ombudsman result from complaints from the public, some are undertaken on his 'own motion'. In one such case, the Ombudsman received reliable information that a 16-year-old boy was being held in solitary confinement at Endeavour House, Tamworth, a Youth and Community Services Training School. Within hours of receiving the information, the Ombudsman sent two officers to Tamworth to investigate. Their subsequent report found that the so-called Special Containment Programme was oppressive and should cease.

The Office is making efforts to monitor the press for subjects suitable for 'own motion' investigation. Suggestions from the public are welcome.

Highway Patrol Officers

In 1983-84, 390 people complained to the Ombudsman about Highway Patrol Officers and the issuing of Traffic Infringement notices. Of these, 215 complained about police conduct as well as the issuing of the ticket. The more serious of these complaints, such as those involving rudeness, assault, harassment and dangerous driving by the police themselves, were taken up for investigation. As a rule, complaints from people who are merely unhappy at receiving a ticket are declined.

Administrative problems in Traffic Branch

A report to Parliament drew attention to a number of procedural inefficiencies and problems within the Traffic Branch of the Police Department. Two separate instances of persons having received infringement notices, paid the fine

yet still being issued with summonses were documented. In one case, the matter proceeded to court and a conviction was recorded against the complainant before the Traffic Branch properly investigated the solicitor's claim that the fine had been paid. There was no evidence of any attempt having been made to clarify this matter before the Ombudsman's Office intervened. Mr. Masterman said:

> "To be convicted for any reason is upsetting enough but for it to occur through no wrong-doing, merely by acting in accordance with stipulated procedures, can be particularly traumatic for the law-abiding citizen. Citizens should not be needlessly subjected to such experiences."

Delays by G.I.O.

Flaws in the administrative procedures of the Government Insurance Office were identified when a number of complaints about delay were investigated. A report to Parliament documented two separate instances of persons making reasonable requests for information but who only received the information they sought after complaining to the Ombudsman. In one case, the complainant had written seven letters to the Government Insurance Office; in the other case six letters had been written. The Ombudsman said that the Government Insurance Office had been given a statutory monopoly in the area of third party motor vehicle claims, so that complainants did not have the option of taking their business elsewhere. For that reason the ability of the Ombudsman to investigate the complaints against the G.I.O. in that area was important.

Funding Delays

A child care centre funded by the Department of Youth Community Services complained that cheques were sometimes received so late that staff went for weeks without pay. After an investigation by the Ombudsman, procedures were changed so that subsidies could be sent before the pay periods.

Summaries of some case notes from the 1983-84 Annual Report

- A review of first aid available at Western Plains Zoo followed a complaint on behalf of a woman who had fallen from a bicycle and broken her leg. She stated she had to bandage her own leg to immobilise it as none of the staff present knew how to do it. Recommendations included first aid training for staff and warnings to cyclists to ride on the sealed surfaces only.

- Mr. B., an unsuccessful tenderer for a government contract, complained that the State Contracts Control Board refused to reveal the name of the successful tenderer. The Deputy Ombudsman did not think the reasons for confidentiality were strong. He recommended that the regulations be altered so that names of successful tenderers can be supplied to other bona fide tenderers. The Ombudsman made a report to Parliament on this issue.

- An investigation was held into allegations that the Yass River was being polluted by the town's sewerage treatment works and garbage tip. The issue involved both the Shire Council and the State Pollution Control Commission. Archaeological sites and a proposed highway bypass were complicating factors in the search for suitable locations for the tip and treatment works. By early 1984 Yass Shire Council had found land for

both a new garbage tip and the spraying of treated sewerage effluent, but only after a report from the Ombudsman finding wrong conduct on account of unreasonable delay and after threats of prosecution from the State Pollution Control Commission to the Council.

- A woman whose car was involved in an accident with a truck reported the matter to Parramatta Police Station. The owners of the truck later wrote to her denying any liability for the damage to her car. Investigation revealed that the Constable on duty had failed to record details of the accident. He was paraded before his District Superintendent and reminded of his responsibilities.

- Residents of Picnic Point complained to various authorities over several years about the noise of speedboats on the Georges River. They sought a speed limit of 8 knots. In late 1983 the Maritime Services Board said that water-skiing had been banned from the part of the river where the concerned residents lived, but an 8 knot limit would not apply. The complainants decided they would allow the changed boating conditions a trial.

- Excerpt from a complainant's letter:

  > Hope you become independent of Government departments, they're a law unto themselves. If the results of your cases are published they should make interesting reading, a combination of Dorothy Dix, Who Done Its, & the Book of Records.