Annual Report

Ombudsman of New South Wales

Year ended 30th June, 1985

No. 316

1984-85

PARLIAMENT OF NEW SOUTH WALES

REPORT

OF THE

OMBUDSMAN OF NEW SOUTH WALES

FOR THE

YEAR ENDED 30 JUNE, 1985

Ordered to be printed, 14 *November,* 1985

BY AUTHORITY
D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES - 1985

51122-11059 1985—397/398 [$7.00]

THE OMBUDSMAN OF NEW SOUTH WALES

TENTH ANNUAL REPORT

(1st July, 1984 — 30th June, 1985)

INDEX

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TENTH ANNUAL REPORT

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Introduction

Under Section 30 of the Ombudsman Act, the Ombudsman of New South Wales is required to submit an Annual Report to the Premier for presentation to Parliament. This is the tenth such Annual Report and contains an account of the work and activities of the Office of the Ombudsman for the twelve months ended 30th June, 1985. Also included is an account of the functions under the Police Regulation (Allegations of Misconduct) Act, as required under Section 56 of that Act. Developments and issues current at the time of writing (October 1985) have been mentioned where there is merit in bringing material up to date.

The Ombudsman, G. G. Masterman, Q.C., was appointed in June 1981, making this his fourth Annual Report.

Previous Annual Reports have noted increased numbers of complaints received by the Office; the year ended 30th June, 1985 was no exception.

The format of the Report is as follows:

Volume 1
Introduction

Part I
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
Statistics

Part IV
Summary

Volume 2
Case Notes

Written Complaints by Major Categories

	1981/2	1982/3*	1983/4*	1984/5
OMBUDSMAN ACT				
(a) Departments and Authorities (other than Corrective Services)	2034	1742	1530	1559
(b) Local Councils	860	1058	1032	1099
(c) Department of Corrective Services	741	649	654	448
POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT	1121	1349	1550	1798
Outside Jurisdiction (Commonwealth authorities, private companies, etc.)	257	433	528	520
TOTALS	5013	5231	5294	5424

As will be seen from the above, there has been a slight increase in complaints received this year. There is reason to believe that the number of complaints may be reaching a plateau, reflecting a stage of present general awareness of the existence of the Ombudsman's Office and role. The utility of more detailed or different Ombudsman statistics than those contained in the Statistic tables (Part III) is discussed in a subsequent topic note. It is proposed to devote more effort during the course of the year to attempting to develop simple statistical tables which will give a more meaningful impression of the work of the Office.

*Corrected figures

Oral Complaints and Enquiries

The Office receives up to forty general telephone enquiries each day. A fourth Interviewing Officer was appointed in February 1985 to assist with the workload. One of the Interviewing Officers has a particular responsibility in the area of police enquiries.

When a member of the public telephones the Office, the Interviewing Officer considers whether the matter is likely to fall within the Ombudsman's jurisdiction. If so, the procedures for making a complaint are explained. In cases where the matter is not within jurisdiction, the Interviewing Officer is often able to refer the caller to an appropriate agency for assistance.

Where callers have not taken up their complaints initially with the department or authority concerned, they are encouraged to do so before making a formal complaint to the Ombudsman. As is noted elsewhere in this Report, some departments have appointed liaison officers to help with enquiries referred from this Office. Many complaints are resolved in this way.

In addition to dealing with telephone enquiries, Interviewing Officers are also the first point of contact when individuals come to the Office to make a complaint in person. Many complainants have language or literacy problems and require assistance in preparing their complaints. Up to eight of these interviews are conducted each day.

PART I

Section A: Ombudsman Act: General Area

1. Role of the Ombudsman

The previous Annual Report noted that the New South Wales Ombudsman's Office attracts, by international standards, a large number of complaints. The 1984/85 year has seen a further slight increase in complaints received. Complainants object to all manner of things — basic policies of government, the workings of the legal system, human nature itself — in addition to the activities of bureaucrats, which are more directly the concern of the Ombudsman's Office. In the past year complaints seem also to have suggested a deeper cynicism about governments, perhaps because of the publicity that has surrounded accusations of corruption.

Against this background, the Office of the Ombudsman has to make constant adjustments to its role in New South Wales, particularly since the Ombudsman has been given a wide jurisdiction to re-investigate complaints against police: which matters should be given priority; what kinds of results should the Office try to achieve; how should the Office be organized in order to achieve its goals?

In the broad context, a judgement handed down in November 1984 by the Supreme Court of Canada provides an interesting measure (British Columbia Development Corporation v Friedman, Ombudsman). The Honourable Mr Justice Dickson, giving reasons for the judgement in favour of the Ombudsman, had no doubt that the role of the Ombudsman was intended to be remedial in nature. After briefly tracing the development of the modern office from the Swedish Justitieombudsman of the early nineteenth century, Dickson, J. continued:

> The institution of Ombudsman has grown since its creation. It has been adopted in many jurisdictions around the world in response to what R. Gregory and P. Hutchesson in *The Parliamentary Ombudsman* (1975) refer to as "one of the dilemmas of our times" namely, that "(i)n the modern state . . . democratic action is possible only through the instrumentality of bureaucratic organisation; yet bureaucratic power — if it is not properly controlled — is itself destructive of democracy and its values" (p. 15).
>
> The factors which have lead to the rise of the institution of Ombudsman are well known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.
>
> As a side effect of these changes, and the profusion of boards, agencies and public corporations necessary to achieve them, has come the increased exposure of maladministration, abuse of authority and official insensitivity. And the growth of a distant, impersonal, professionalized structure of government has tended to dehumanize interaction between citizens and those who serve them. See L. Hill, *The Model Ombudsman* (1976) at pp. 4-8.

> The traditional controls over the implementation and administration of governmental policies and programs — namely, the legislature, the executive and the courts — are neither completely suited nor entirely capable of providing the supervision a burgeoning bureaucracy demands. The inadequacy of legislative response to complaints arising from the day-to-day operation of government is not seriously disputed. The demands on members of legislative bodies is such that they are naturally unable to give careful attention to the workings of the entire bureaucracy. Moreover, they often lack the investigative resources necessary to follow up properly any matter they do elect to pursue. See Powles, *Aspects of the Search for Administrative Justice* (1966), 9 Can Pub. Admin. 133 at pp.142-3.
>
> The limitations of courts are also well known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases.
>
> The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucractic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman "can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds": *Re Ombudsman Act* (1970), 72 W.W.R. 176 (Alta. S.Ct.) per Milvain, C. J., at pp. 192-193. On the other hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.
>
> In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.

The judgement sees some of the key characteristics of the Office of Ombudsman as being informality, independence and impartiality. At the same time, an Ombudsman's Office is itself an organization, it is funded from the public purse and, in the case of New South Wales, its staff come under the provisions of the Public Service Act.

Informality in investigation must mean that the complainant and the public authority the subject of the complaint are given every opportunity to present information; there have to be fewer constraints on communication than those imposed by the hierarchies of the bureaucracy and the relatively strict procedures of the courts. Even more obvious is the fact that informality in investigation cannot be allowed to upset the rules of natural justice. The New South Wales Ombudsman's Office has evolved procedures, in accordance with the Ombudsman Act, with the regular advice of independent counsel and senior counsel. Particular attention has been paid to the manner of conducting hearings, under the provisions of section 19 of the Act, during re-investigations of complaints against police, and to the methods by which formal reports of wrong conduct (and "no wrong conduct") are drafted according to sections 24, 25 and 26 of the Ombudsman Act. At times public authorities (not complainants) have quite properly exercised their right to challenge these interpretations and procedures, which on occasions have been adjusted consequently; for example, a provisional statement of findings and recommendations is now prepared immediately the first stage of an investigation has concluded, rather than a "draft report". As a further consequence, investigation officers require skill and care of a high order, while the manual of procedures has grown over the years from a modest document to a large volume. However, the complexities mostly arise at the latter stages of investigation and reporting; initial approaches to and by this Office are speedy and informal.

The independence of the Office is formally recognized by the statutory appointment of the Ombudsman, his Deputy and Assistant, and was reinforced by its declaration in February 1984 as an "Administrative Office"; the latter development was detailed in the last Annual Report. During the past year the new arrangements have brought a greater flexibility in the administration of the Office, and that has helped it to cope with the increasing amount of work. Nevertheless, no agency of government should be beyond scrutiny. The New South Wales Ombudsman's Office has been created under a statute of the Parliament and is responsible ultimately to the Parliament. Special attention is given to Parliament's wishes in such matters as the Annual Report; this extends to the desirability of assessing the efficiency and effectiveness of the Office in a sensible manner. The Ombudsman's Office should also be able to account to the public for its actions, in appropriate circumstances. Complainants occasionally object to such things as discontinuing an investigation, and have sometimes complained to Ministers or to the Premier that the Office has not served them adequately. In such cases the Ombudsman would have no objection to the relevant files being open to inspection and evaluation, but such a course is impossible so long as the secrecy provisions of section 34 of the Ombudsman Act remain in force. A further report was made to Parliament on this subject during the year, but the Government has again declined to amend the Act in the manner suggested; recent developments are set out below. In short, the Office should be able to demonstrate its independence by being open to public scrutiny.

The impartiality of the Ombudsman's Office, like its independence, is safe-guarded ultimately by its statutory appointments. However, it also rests upon the integrity of its investigating, interviewing and support staff. Impartiality, like independence, needs to be demonstrated. Thus the statutory office-holders are not part of the "network" of senior bureaucracts, while knowing a good deal about them. The staff are temporary or permanent public servants who must understand their colleagues in other places, without identifying wholly with them. The Ombudsman's Office, more than any other, must resist being "captured" by those whom it is intended to regulate; investigations by this Office sometimes suggest that this fate has befallen certain "regulatory" agencies of government. One factor accounting for this development is the high level of tension in investigative and regulatory work. For that reason, and in order to provide career development for staff, it is imperative that they not remain for extended periods in the Office of the Ombudsman; this is again dealt with below.

Impartiality can be protected within the Office, as well, by among other things, keeping hierarchies to a minimum. Investigation officers are free to exercise their own initiative, within the framework of procedures set down under the Act; there is no impediment to pursuing a legitimate investigation to its end. The major controls are directed towards ensuring that complaints receive the full attention that they deserve; thus no complaint may be declined and no investigation discontinued without the approval of, at least, the Principal Investigation Officer. Investigation officers can discuss complaints and argue their views with each other, but each complaint is the responsibility of an individual, until such time as a report of wrong conduct is adopted (where appropriate) by the Ombudsman or Deputy Ombudsman. The aim is to ensure impartiality by imposing a minimum of internal pressure upon the person conducting an investigation. Formal checks are mostly located at the report stage, where the documents are scrutinised to ensure that they state a reasonable case, take into account the submissions of the parties concerned, and conform with the Act. Since individuals play such a large role in investigations, similar cases may sometimes be treated in a slightly different way by different officers, usually at the outset of the matter rather than in its later stages. By and large, this is preferable to creating elaborate hierarchies and "standard" responses, in the tradition of classic bureaucracies. Yet this mode of operation could not continue were the Ombudsman's Office to grow even larger. It is to be hoped that the annual number of complaints is reaching its peak; if it continues to increase, then it may become necessary to confine investigations to matters involving significant personal hardship or the broader public interest.

2. The Ombudsman — The Final Resort

There is no doubt that the Ombudsman has a remedial role. It is equally clear that Ombudsman's offices, particularly in countries of the Commonwealth, were created in order to fill some of the gaps that exist between the major institutions: the legislature, the executive and the judiciary. When investigating the conduct of public authorities in "matters of administration", the New South Wales Ombudsman's Office is concerned with such gaps as exist within, and at the margins of, the bureaucratic parts of the executive. It follows that such gaps should be known to exist before the Ombudsman's Office intervenes, and so a complainant is ordinarily expected to have exhausted the available remedies before an investigation under the Ombudsman Act is considered.

A complainant almost always has the opportunity to voice dissatisfaction to the public authority in question: to ask the department that owns nearby property to keep it in good order; to request the local council to repair a road. In many cases there is a further stage, where the legislation under which the relevant public authority operates provides a system of arbitration or appeal. In other instances the complainant may have redress at law; this is particularly common where a complainant has a dispute with a neighbour or a former business partner, pursues the matter by seeking the intervention of a regulatory agency of government, and then complains about that agency because it has not taken punitive action against the other party. In most such cases the complainant is able to take the matter to the courts, where a binding decision can be enforced (in comparison with the recommendations of the Ombudsman, made pursuant to a report of wrong conduct in a matter of administration).

The status of the Ombudsman as a final resort for aggrieved citizens, which is internationally accepted, is reflected in the New South Wales legislation; section 13(4)(b)(v) of the Act provides that, in considering whether to conduct or discontinue an investigation, regard may be had to whether, in relation to the conduct complained of, "there is or was available to the complainant an alternative and satisfactory means of redress". When this discretion under the Act is exercised, consideration must be given to whether the alternative redress is "satisfactory": is the appeal mechanism genuinely independent of the public authority the subject of the complaint; does the complainant have such a stake in the matter as to warrant legal action; is legal aid available in appropriate circumstances? It must also be remembered, in this connection, that there are now such institutions as Community Justice Centres, and that jurisdictions like the Land and Environment Court allow ready public access at relatively low cost. Nevertheless, in recent years the discretion has been exercised by the Ombudsman in favour of complainants, rather than against them.

Public authorities can themselves influence the way in which this discretion under the Ombudsman Act is exercised. There are three apsects of this influence, two of them broad in scope and the other specific in nature. The broad aspects are:

1. Numerous complaints to the Ombudsman arise from the public's encounters with the staff of a public authority across the counter or over the telephone. It has been pointed out in many textbooks on public administration that jobs are usually graded in such a way as to move the most effective workers *away* from the public they are meant to serve and behind desks. Public authorities that take "public communication" skills into account when rewarding and grading their employees would ordinarily be given credit for that when this Office is considering its discretion to investigate.

2. It seems to be in the nature of organizations (and perhaps humans) to become defensive when under attack. Some investigations by this Office have found that public authorities have resorted to evasiveness, obstruction and even outright deceit in trying to hide an error that, in the first instance, might have been small. The Office of the Ombudsman, not innocent of error itself, will readily excuse it in others, provided that the admission is free, open and quick.

Specifically, public authorities have sought to deal with aggrieved members of the public by setting up units intended to deal with complaints within the organization. Examples include:

Complaints Unit of the Department of Health
Public Tenants Appeals Panel (Housing Commission)
Prison Visitors Scheme

These developments could provide models for other public authorities to follow. Where suitable avenues for review of administrative action have been established within organizations, the Office of the Ombudsman would be reluctant to intervene before the review process had been completed. This would particularly be the case where the body of review or appeal had been set up in an effort to make it relatively independent of the parent organization; the Department of Health, for example, commissioned Ms Philippa Smith of the Australian Council of Social Services to establish its Complaints Unit, and seconded an investigation officer from the Ombudsman's Office to its staff.

It might well be that the Ombudsman will eventually find wrong conduct under the Ombudsman Act against a public authority that has not established an effective internal complaints unit or review mechanism. Public authorities that have a substantial number of complaints levelled against them — mainly those that provide services directly to the public — might be advised to review their procedures for appointing staff who are in daily contact with citizens, their readiness to admit routine errors, and their avenues for allowing appeals against the decisions of their staff. From the viewpoint of this Office, it is far preferable to show the public a sensible avenue for the alternative redress of their complaints than to engage in the sometimes complex, time-consuming and costly process of investigation in terms of the Ombudsman Act.

3. Unannounced Visits by Ombudsman Investigation Officers

During the past year the Ombudsman, in accordance with the Act, has on several occasions instructed officers to make unannounced visits to public authorities where circumstances seemed appropriate. Such visits are made after a formal investigation of an authority's conduct has begun.

Unannounced visits may be made:

1. Where it is suspected that a public authority might not provide all documents requested.

2. Where the investigation requires urgent action or raises important public interest questions.

3. To prevent public authorities from assuming that this Office has a set procedure for investigating complaints.

The procedure for unannounced visits is:

1. A formal notice under section 16 of the Ombudsman Act is served on the authority, giving details of the conduct the subject of the investigation and of the authority the subject of the investigation.

2. After notice has been given under section 16, the visit is made, usually by two Investigation Officers, to the authority. The officers take with them several formal documents, which have been settled by counsel. Those documents are not used as a matter of course, but if there are objections from the authority the documents are served immediately. The documents include formal delegations by the Ombudsman of particular powers under the Act to the officers concerned, and they formally require the production of specific documents in the authority's possession.

Twelve unannounced visits were made during the year to public authorites including the Department of Environment and Planning, the Department of Local Government, the Sydney Cove Redevelopment Authority and the Department of Corrective Services.

On one occasion ample evidence was given of the need for unannounced visits. During an initial discussion with the Investigation Officers, an officer of the authority said:

> Why are you here without an appointment? You normally give us time to go through the files and pick out what is relevant to your investigation.

In an investigation of the Department of Local Government, this Office decided to obtain a file from the Department. Two Investigation Officers visited the office of the Secretary of the Department, Mr Howard Fox.

Mr Fox planned to catch a plane to Bourke, but agreed to see the officers at approximately 2.50 p.m. Extracts from the file note later prepared by the officers are set out below:

> I explained why we were there and what we required. Mr Fox questioned whether the file was to include his confidential handwritten advice to the Minister. I explained that I wanted the file and any relevant submissions to the Minister which were on or off the file.
>
> Mr Fox then told us that, "off the record", if he'd known beforehand that we wanted the file he would have removed these items as they were confidential and not for our eyes. He then added that if we ever reported that he had said that, he would deny it, "before the bar of the House, if necessary". He also expressed the opinion that the Crown Solicitor's advising in this matter was a privileged document which had been confidentially supplied to Ernie Page and that he had no right to give it to us. I explained that we had in fact obtained a copy of the advising from his Department. He originally denied this but later commented that it must have been while he was on leave as he would not have authorised it.
>
> Mr Fox was annoyed about the manner in which we had chosen to do things. He was of the opinion that there was no need for us to come down like this, the two of us, to get the file, and that we should have telephoned to let him know and he could have had the file ready for us. He had always been co-operative in the past (as anyone in our Office would tell us) and he felt this visit was unnecessary. When I pointed out that, had we given warning, it was likely that he would remove certain items, he said I would not have known what was not on the file as they were not folioed and he could have removed anything. I pointed out that I now knew his intention and Mr Wheeler was a witness to this. He then accused me of threatening him with a witness. Chris explained that we were not threatening anybody and that he was quite welcome to get someone to join him. Mr Fox did not take up this offer. Mr Fox took exception to the suggestion that if we had given notice of our coming documents may have been removed from the file.
>
> The issue of comments was then raised by him. He did not think we should include his handwritten advice to the Minister and other comments on the file, in the report. I advised that if they were relevant they would probably be included however, that was for the Ombudsman to decide. He was then very critical of the Ombudsman's reports and stated that he (the Ombudsman) did not take notice of any comments made and could cite a few examples.
>
> I explained that he had been given an opportunity to comment on the draft report, as had a number of other people, yet he had chosen not to. He stated that this was because the Minister had instructed him not to and his loyalty was to the Minister. He advised that it was a political thing anyway between the right and the left wings of the Labour Party and he was merely the meat in the sandwich.
>
> I pointed out that this was my first Department of Local Government report, I always considered comments, and where relevant, included them in the final report.
>
> He re-iterated that he was not going to comment as he did not want to be a Department Head on a re-employment line. At this stage I re-iterated that I had notices prepared and that if he wished I could serve notices on him to obtain the files. He took exception to this and stated that he wasn't going to hide behind any notices.

He again expressed displeasure at our visit, that we were delaying the plane he was supposed to catch, and that he was going to raise our visit etc with the Ombudsman. We encouraged him to do so and advised that the Ombudsman was in the Office. He declined to do so at that time but claimed that he would on Monday. It was his intention, he said, to let the Ombudsman know quite forcibly what he thought of his officers coming down without any notice.

He advised that it was going around that the Ombudsman and Ernie Page (who were both of the "left") were in collusion on this matter and that was why we had done a report. I assured him that this was not the case, that Mr Page had not complained to this Office and that it was an "own motion" investigation which I had initiated as a result of a number of complaints received. He then stated that Ernie Page had put Mr Tsui up to complaining and proceeded to offer his opinions on Ernie Page and his methods of doing things.

He again commented that Mr Page had no right to give us a copy of the advising and that we should be investigating the Crown Solicitor and asking him why he have the opinion that he did. We explained to Mr Fox that the Ombudsman had no jurisdiction over the Crown Solicitor and that our Office could not investigate him.

Mr Fox called for the file at approximately 3.45 p.m. He leafed through the file and read exerpts and pointed out that it was all there and he was not removing anything. He went to great lengths to defend and explain his recommendation to the Minister not to take action. The grounds were lack of evidence, his gut feelings based on past experience (20 years in Local Government including 7 years as a legal officer) and the fact that as the two persons involved were solicitors, it was highly unlikely that they would provide the necessary evidence.

I explained that whether they decided to prosecute or not was their business. What this Office was looking at was the alleged failure of the Department to properly investigate the complaints received. If a proper investigation had been carried out, the Department would now be in a much better position (depending on the results) to support its decision.

He said there was no evidence. I pointed out that the Town Clerk had offered to supply the information required. He stated that the Town Clerk was merely a mouthpiece of Council, "he only does what he's told so you can't take any notice of what he says".

The interview ended with us taking the files and promising to forward a receipt on Monday. This was done.

Mr Fox was given the opportunity to comment on the file note. He raised some matters relating to the visit, but did not claim that the file note was inaccurate or a misrepresentation of events.

It is anticipated that unannounced visits will continue to be made in the coming year. Overseas they are a well recognised part of Ombudsman investigative techniques on behalf of the citizen.

4. Secrecy — Still a Problem

The secrecy provisions of the Ombudsman Act have been the subject of comments in several consecutive Annual Reports. The 1983/84 Annual Report noted that a special report was made to Parliament on the subject in September 1984, recommending that the New South Wales Ombudsman Act be amended in terms similar to the amendment to the Commonwealth Act by the Hawke government in October 1983. That amendment provided that the Commonwealth Ombudsman could disclose information or make a statement, having regard to certain matters: that there should be no interference with any investigation; that no criticisms should be expressed unless already made the subject of a report; and that complainants should not be identified unless it were fair and reasonable to do so.

The report to Parliament in September 1984 outlined the few alternative methods in the Ombudsman Act for gaining or providing information: in particular, the release of Ombudsman's wrong conduct reports by the public authorities the subject of complaints, and the making of special reports to Parliament. However, these alternatives are inadequate for dealing with the many requests for information and comment received by this Office, and with the problems created by inadvertently inaccurate media accounts. Public authorities are unlikely to release reports that find their conduct to be wrong; and the fact that Parliament sits for a limited number of weeks each year makes it impossible for this Office to respond within a reasonable time, by way of special reports to Parliament, to the many matters that arise when Parliament is in recess.

In December 1984 the Burke Labor government in Western Australia amended that State's Ombudsman Act in terms similar to those introduced by the Commonwealth government in October 1983. This fact was drawn to attention by a supplementary report to the New South Wales Parliament on the secrecy provisions of the New South Wales Act in February 1985. In this supplementary report the Ombudsman gave examples of serious difficulties arising from the secrecy provisions. These included his inability to meet a request from the Attorney General for information about allegations against police investigating certain matters in the poker machine industry; inability to provide adequate scrutiny of this Office's files to persons making enquiries on behalf of a dissatisfied complainant; an inability to provide private businesses and business associations with information, of direct interest to them, which arose from investigations by this Office.

The Ombudsman outlined these difficulties in a press release following the tabling of the supplementary report to Parliament. This was followed by a radio news item on 27th February, 1985 which contained the following passage:

> A spokesman for the Premier said that Mr Masterman had been advised that the government did not believe he was exercising all his powers under the existing legislation which enabled the release of relevant information to interested parties.

The Ombudsman sought from the Premier's Department confirmation of this report, pointing out that such powers as existed under the Act were regularly used by the Ombudsman's Office. "However", he continued, "there is no general power to make information public, except by tabling a report in Parliament. Reporting to Parliament could hardly be described as releasing information to interested parties. Examples of cases in which the current legislation has not permitted me to release information to interested parties were outlined in my [supplementary] report to Parliament."

The Secretary of the Premier's Department replied obtusely, "The comments cited in your letter appear to be consistent with the views expressed by the Premier in his letter to you of 31st August, 1984". That letter had been precisely the document that had prompted the report to Parliament of September 1984!

The Ombudsman then sought the advice of the Crown Solicitor as to his powers to make information available to interested parties. Simply by way of example, he cited the occasion in late March 1985 when the President of Eurobodalla Shire had commented, in a local radio broadcast, on the course of an investigation being conducted by the Deputy Ombudsman into the administration of the Tomaga Sewerage Scheme. The Shire President said that the Ombudsman had "totally vindicated" all of the actions of Eurobodalla Shire Council. This statement was incorrect in that the Deputy Ombudsman had not concluded his investigations and had not, at that stage, reached any decision favourable to the Council or the complainant.

Among the other references to the Shire President's statement was a letter to the Ombudsman from a local resident, who wrote:

> In the last couple of days I have had a stream of people coming in which a single complaint. It is that 'the Ombudsman has totally vindicated all the actions of the Eurobodalla Shire Council'. All this stems from claims by the Shire President over radio and other media outlets, and backed up by a remarkable minute in the Council records of 25th March.
>
> I am sure your staff will tell you that the problem in the Council is a clash between developers and conservationists, chaired by a very elderly gent only interested in winning fights, and with a staff that has grown up in an atmosphere of secrecy, peculiar dealings and prone to the half truth or the big lie. I do not expect that situation to change very much but it seems to me that there is now an impression abroad that your office has joined the staff side, and there is no longer an avenue to right wrongs. I know this isn't so, but it seems to me that for the sake of the reputation of Ombudsmen, you should publicly state your stance on this remarkable claim that you have vinciated every action of the Council.

In such situations, to write a letter of protest to the President of the Council or to write to the complainant deying the statements, would not by themselves be a practical remedy sufficient to correct the impression created publicly.

While pointing out that numerous similar examples could be given, the Ombudsman asked the Crown Solicitor:

(a) would I or the Deputy Ombudsman be precluded by section 17 and/or 34 from going on radio or issuing press releases giving information as to:—
  (i) the terms of the complaint received
  (ii) the conduct made the subject of the investigation
  (iii) the progress of the investigation to date

(iv) demonstrating with chapter and verse that these statements made by the Shire President in relation to the investigation were false.

(b) if section 17 and/or 34 preclude the Ombudsman or the Deputy Ombudsman from doing what is suggested in (a) above, what can the Ombudsman or Deputy Ombudsman do to practically remedy the situation created by such a false media story.

(c) any other advice which would generally assist us to deal with situations of the same type in an immediate and practical way.

The Crown Solicitor replied that there were no legal authorites bearing directly on the questions at issue. In his view, however, the situation was that:

1. The terms of a complaint could not be disclosed.

2. The conduct the subject of an investigation could not be disclosed.

The Crown Solicitor went on to suggest that the disclosure of the stage that an investigation had reached (in the Eurobodalla example, that it had not been concluded) would not be in breach of the Ombudsman Act. The Crown Solicitor reached this view on the grounds that information concerning the stage an investigation had reached was not "information obtained by [the Ombudsman] in the course of his office". If it is accepted, in the absence of authorities, that this view is correct in law, disclosure of the stage of an investigation would still pose major practical difficulties, since such disclosure would, at least by implication, also disclose the terms of the complaint or the conduct the subject of the investigation, or both.

The Crown Solicitor concluded that, in the absence of authorities, and "in the interest of prudence", alternative remedies might be sought. He referred to the Ombudsman's power to make special reports to Parliament, and noted that the Ombudsman could, under Section 31(3) of the Ombudsman Act, recommend to the Premier that a special report to Parliament be made public before being presented to Parliament; in this way a relatively quick response could be made upon a matter of public interest.

Shortly after the Crown Solicitor's advice was received in mid-July 1985, the need arose to seek the "alternative remedy" noted by the Crown Solicitor, by recommending that a special report to Parliament be made public before being presented to Parliament. In this instance a draft report of wrong conduct had been sent to the Minister for Education, the Hon R. M. Cavalier. The draft report concerned a complaint by Mrs J. Supple that the Department of Education had failed to conduct an adequate investigation into her allegations that her son had been assaulted by a teacher at Panania North Public School.

The draft report was sent to the Minister on 21st May, 1985, the Minister being asked whether he wished to consult on the matter under the provisions of section 25 of the Ombudsman Act. An Investigation Officer of the Ombudsman telephoned the Minister's staff on several occasions, but was unable to obtain any indication of whether the Minister wished to consult.

On the afternoon of Friday, 19th July, 1985 a letter from Mr Cavalier to the Principal of Panania North Public School was made available to the media; it was reported prominently in the *Sydney Morning Herald* on 20th July, 1985. Mr Cavalier's letter, while criticising the draft report, misconstrued or misrepresented its contents and contained major errors as to the procedures of the Ombudsman's Office. It also levelled personal criticism at those persons who had prepared the report.

Any Minister has full right to criticise any final report made by the Office of the Ombudsman and to be supportive of his Department. However, the Ombudsman deplored the fact that in this instance the Minister criticised a draft report while his staff were prevaricating on whether the Minister required a consultation on that draft report.

The Ombudsman could not reply in any useful detail to the Minister, because of the secrecy provisions. Accepting the advice of the Crown Solicitor as to an "alternative remedy", the Ombudsman therefore prepared a special report to Parliament, which he sent to the Premier at 2 p.m. on Monday, 22nd July, 1985, recommending that the Premier make the special report to Parliament public before its presentation to Parliament, and asking that the Premier release it by 4 p.m. that afternoon. The Premier declined to do this, advising that the special report would be submitted to the next stitting of Parliament, some two months hence.

The Ombudsman asked the Premier on 2nd August, 1985 whether his legal advisers agreed with the advice of the Crown Solicitor that it would be "entirely appropriate" for the Ombudsman to send a special report to Parliament to the Premier, and to recommend that the report be made public forthwith and prior to its presentation to Parliament. On 14th August, 1985 Mr Gleeson, Secretary of the Premier's Department, replied:

> The Premier has asked me to reply to your letter and to indicate that your comments and the terms of the Crown Solicitor's advice have been noted.

In view of the continuing requests for information from the public and the media, the Ombudsman has persisted in seeking amendments to the secrecy provisions of the Act. In view of the problems that have been encountered in this regard during the year, it remains clear that the desirable course of action is amendment of the Act in terms similar to those in the Commonwealth and Western Australian legislation.

The reasons for the reluctance to amend the New South Wales Ombudsman Act to give to the New South Wales Ombudsman the same powers of disclosure subject to conditions that have been given by Governments of the same political complexion to the Commonwealth Ombudsman and Western Australian Ombudsman remain obscure. The Ombudsman prefers to believe that the situation reflects the "obsessive secrecy" of senior bureaucrats in New South Wales rather than any lack of committment on the part of the New South Wales Government to openness of disclosure to its citizens.

5. Meaning of Matters of Administration in the Ombudsman Act

The Ombudsman Act grants the Ombudsman jurisdiction to investigate conduct which relates to a "matter of administration". The decision whether a particular complaint relates to a "matter of administration" can sometimes be a difficult one. Last year's Annual Report discussed the relationship between this concept, the discretion to investigate and matters of policy and professional judgement.

In November 1984 the Supreme Court of Canada considered the meaning of "matter of administration" in the context of Canadian Ombudsman legislation. The question before the Court was whether business decisions taken by government organisations amount to matters of administration. The Court found that:

> There is nothing in the words administration or administrative which excludes the proprietory or business decisions of governmental organisations. On the contrary, the words are fully broad enough to encompass all conduct engaged in by a governmental authority in furtherance of governmental policy — business or otherwise.

In reaching its decision, the Court gave support to a previous judgement of the Ontario Court of Appeal in *Re Ombudsman of Ontario and Health Disciplines Board of Ontario et al* which says at page 608:

> . . . it is reasonable to interpret "administrative" as describing those functions of government which are not performed by the Legislative Assembly and the Courts. Broadly speaking, it describes that part of government which administers the law and governmental policy.

Indeed in a very recent decision (5th September, 1985) the Divisional Court of the Supreme Court of Ontario held that the Ontario Ombudsman had jurisdiction even to investigate the merits of quasi judicial decisions made by the Ontario Labour Relations Board *(Ombudsman of Ontario v The Ontario Labour Relations Board).*

In 1982 the British Columbia Court of Appeal considered the meaning of "matter of administration". The following excerpts of the Court's decision indicate the general approach taken:

> I agree with the learned chambers judge that the words "matter of administration" are limiting words and that there must be some limits to the power bestowed on the Ombudsman. Generally speaking, the Ombudsman cannot interfere in the purely legislative or judicial fields.
>
> My reasons for holding that the "act or decision" of B.E.D.C. in failing to renew the lease related to a "matter of administration" may be summarized as follows:
>
> (a) The plain and ordinary meaning of the words "matter of administration" is a "matter relating to the carrying out of the executive or management functions of government".

It will be noted that the Courts are giving support for the view that administrative actions are broadly those actions carried out by the executive arm of government which could not be characterised as legislative or judicial.

In *Glennister v Dillon* (1976) V R 550 the Supreme Court of Victoria strongly adopted that view. It had been argued that the professional work of a lawyer in government employ fell outside the meaning of a "matter of administration". Gillard J. stated that:

> I am not prepared to accept the general proposition that because a professional man is carrying out his professional work as such, it is not therefore an administrative action taken in a government department of which he may be an officer.

Menhennitt J. said:

> I am of the opinion that, in the context, "administration" refers to the executive arm of government in contradistinction to the legislative and judicial arms of government.

Dunn J. stated:

> In this context, however, I am of the opinion that the expression "a matter of administration" means any subject that should arise in the course of administration, or putting it another way, in the performance of the executive function of government.
>
> The introduction into the definition of the words "relating to" gives a wider connotation to the expression being defined. An "administrative action" could therefore comprehend, not only any action which would fall strictly into the area of the performance of executive or administrative function but also any other action which might be regarded as reasonably incidental to the performance of such function. But it should be reiterated that any activity in the areas of the exercise of judicial function or the enactment of legislation by Parliament would be beyond the jurisdiction of the Ombudsman. Such activites would not relate to any "matter of administration", as I have interpreted that expression.

The Ombudsman currently supports this broad view of the meaning of "matter of administration". Each complaint must be considered individually to assess whether it falls within the Ombudsman's jurisdiction. In making this assessment, the Ombudsman will bear in mind the interpretation of "matter of administration" favoured by the Courts.

6. The Ombudsman and Freedom of Information Legislation

As yet, there is no freedom of information legislation in New South Wales. In 1983 the Premier introduced a Freedom of Information Bill into Parliament. The Bill was tabled for public comment and it was later announced that an amended Bill would be re-introduced; that has not yet happened.

The State Government has established a Freedom of Information Co-ordination Unit within the Office of the Public Service Board. The Unit's function is to co-ordinate the implementation and management of freedom of information. The Unit sent to the Ombudsman two papers concerning the requirements and implementation of the proposed legislation, and sought comments on the papers. The Ombudsman was also asked to nominate a contact officer for liaison between the Unit and the Ombudsman's Office.

The Ombudsman responded in the following terms:

> I consider that the responsibility of the Ombudsman under the Freedom of Information Act, if and when it is introduced, to be a matter for the Ombudsman. This duty will arise both under the legislation and under the Ombudsman's direct relationship to Parliament.
>
> I appreciate your offer of assistance but believe we should carry out our responsibilities independently.

The Chairman of the Public Service Board said that he should await the introduction of the legislation before commenting on the Ombudsman's policy stance.

As indicated in the previous Annual Report the Ombudsman fully supports freedom of information legislation and looks forward to its urgent introduction in this State.

7. Consultations with Ministers: Purpose and Effect

The Ombudsman Act requires that any finding of wrong conduct against a public authority be made the subject of a report. Before such a report is "made" — that is, before it is completed or made "final", section 25 of the Act provides that the responsible Minister should be given the opportunity to consult with the Ombudsman on the conduct the subject of the investigation. Remembering that only a small proportion of the complaints made to the Ombudsman result in reports of wrong conduct, the steps in preparing such reports are as follows:

1. Investigation proceeds to the point where "wrong conduct" appears to have occurred.

2. Statement of provisional findings and recommendations prepared and distributed to public authorities, complainant, etc., as prescribed.

3. Responses of various parties including any further evidence taken into account; decision as to whether evidence still supports finding of wrong conduct. If not, parties advised accordingly.

4. If evidence still supports finding of wrong conduct a draft report, incorporating any amendments arising from responses of the parties, is prepared and sent to the responsible Minister.

5. If Minister advises that she or he does not wish to consult, the report is made final.

OR 6. Consultation takes place, and any statements or amendments arising from the consultation are incorporated in report.

This process allows the public authority the subject of the investigation full opportunity to respond to the statement of provisional findings and recommendations (the public authority has also responded during the investigation, and in many cases investigations are discontinued as a consequence of these responses). The process of making a statement of provisional findings and recommendations, and inviting responses to it, is provided for by section 24 of the Ombudsman Act.

Consultation with the Minister is provided for quite separately, in section 25 of the Act. The legislature seems therefore to have envisaged a role for the Minister apart from that of the public authority the subject of the complaint. Indeed, the Crown Solicitor, in advising the Ombudsman on a related matter, stated:

> . . . the functions of the Ombudsman of investigating and, where he thinks it right to do so, reporting adversely on the conduct of public authorities, are such as to suggest to me that it was unlikely that the legislature intended that he should have to consult, or even to allow to be present during a consultation with the Minister, officers whose conduct he may have investigated and be proposing to criticise.

As was pointed out in the 1982/83 Annual Report (item 7), there is no point in the consultation with the responsible Minister being used as another occasion for the public authority to restate its case.

During the last year there have been some instances where the staff of Ministers' offices appear to have misunderstood the purpose of consultation on draft reports, to the point where the draft report has been sent to the public authority for yet more comments. While the public authority and the staff of the Minister's office are clearly entitled to brief the Minister for a consultation with the Ombudsman, the process set out above shows that further written comment would be redundant.

There have also been occasions when the staff of Ministers' offices have been slow to respond to requests from this Office to advise whether the Minister wished to consult.

This has particularly been the case in the office of the Minister for Local Government, which receives a relatively large number of draft reports, because all draft reports against local government councils are sent there. The procedure of this Office is to remind Ministers' offices of the request to advise about consultation, firstly by means of a telephone call three weeks after the draft report has been sent out (all draft reports are delivered by courier). If, after several telephone calls to Minister's staff over a period of ten days, advice has still not been received, a letter is addressed to the Minister, advising that the report will be made final two weeks hence, if advice as to consultation has not been received by that time. Notwithstanding this painstaking procedure, a small number of reports have had to be made final without specific advice ever having been received as to consultation.

The main effect of consultation with Ministers should be that the Ministers concerned are given, as it were, another window through which to view the public authorities for which they must assume ultimate responsibility. In many cases the public authorities themselves value these insights, and have said as much. Nevertheless, it is in the nature of the relationship between public authorities and their responsible Ministers that the public authorities will wish to present themselves and their activities in the best possible light. Over the years there has been an increase in the staff of Ministers' offices in order, among other things, to provide scrutiny of advice to Ministers from public authorities.

Reports from the Office of the Ombudsman to Ministers can provide a valuable adjunct to this scrutiny. If, having considered all of the advice available concerning reports of wrong conduct, Ministers wish to defend the public authorities concerned, then there can be no objection to that; from the point of view of this Office, it all helps in the understanding of the workings of government.

8. Reports to Ministers

During 1984/85, 130 reports of wrong conduct (83 against departments and authorities and 47 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 or her on 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 exemp from investigation by the Ombudsman in Schedule 1 of the Act. Public authorities whose conduct may be investigated are government organisations and employees.

9. Reports to Parliament

The Ombudsman has the power to present two types of reports to Parliament, apart from the Annual Report. They are special reports under section 31 of the Ombudsman Act and non-compliance reports under section 27.

Thirteen special reports under section 31 were presented to Parliament on issues that the Ombudsman regarded as significant and in the public interest. There were no reports under section 27 where recommendations were not carried out by the public authority.

One report was made to Parliament under section 32 of the Police Regulation (Allegations of Misconduct) Act.

The following reports have been tabled in Parliament:

Special Reports under Section 31 of the Ombudsman Act.

Failure to ensure public land in municipality was not alienated for private use (Hurstville Municipal Council).

Problems with Government Insurance Office.

Administrative procedures in Traffic Branch of the Police Department (Police Department).

Need to amend the secrecy provisions in the NSW Ombudsman Act.

Supplementary report on secrecy provisions.

Action by Sydney City Council concerning land at Circular Quay known as the Gateway Site (Sydney City Council).

Recommendation for amendment of Ombudsman Act to authorise departments and authorities to make ex-gratia payments recommended by the Ombudsman where a complainant has suffered financial loss as a result of the department's wrong conduct.

Conduct of the Forestry Commission of NSW regarding construction of a road in the Nullum State Forest (Forestry Commission of NSW).

Need to amend the NSW Ombudsman Act to include local council employees within the definition of "public authorities".

Continuing enquiries into certain complaints against Eurobodalla Shire Council (Eurobodalla Shire Council).

Wrongful imposition of fines by Mudgee Shire Council (Mudgee Shire Council).

Treatment and rights of protection prisoners (Department of Corrective Services).

Second report on the overshadowing of Hyde Park (The Height of Buildings Advisory Committee and Sydney City Council).

Report under section 32 of the Police Regulation (Allegations of Misconduct) Act.

Exclusion of the Assistant Ombudsman and Civilian Investigators from investigation of police conduct.

10. Responses of Public Authorites to Ombudsman's Investigations

The Ombudsman has jurisdiction to investigate complaints about the conduct of over 300 departments, authorities and councils. Given the number of authorities that exist, it is inevitable that some will co-operate fully in investigations conducted by this Office but others will not.

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

Department of Public Works

In a matter concerning delay in replacing a septic system at a public school, a formal notice of investigation was issued to the Director of Public Works, Mr Pilz, pursuant to Section 13 of the Ombudsman Act. As a result of the investigation by this Office, the Department itself appointed a Management Analyst who thoroughly reviewed departmental procedures. In a letter to this Office, Mr Pilz said:

> I have had a departmental investigation carried out by Mr Denis Jenkins, Management Analyst, and I enclose a copy of his report. Consideration will be given to the report and to possible disciplinary action against persons mentioned in the report.

Department of Finance

Discussions during the year with Mr A. D. Clyne, Secretary of the Department of Finance, established that complaints about the Department or any of its divisions would be referred to the Secretary.

Mr Clyne is, ex-officio, Chief Commissioner of each of the Department's divisions (for example, Stamp Duties Office, Land Tax Office). Investigation Officers report that, under the new arrangements, responses to enquiries have been dealt with in a very helpful and efficient manner.

Metropolitan Water Sewerage and Drainage Board

The Water Board has four contact officers who deal with, amongst other things, complaints from this Office. They are Ross Quinn, Richard Warner, David Hope and Chris King. Many people phoning with enquiries or possible complaints are referred initially to the Board's officers and often complaints can be dealt with in a few moments over the telephone. These officers are always very helpful and correspondence is usually very prompt.

The Police Department Traffic Branch

This Office receives numerous complaints from members of the public who have received traffic infringement notices or have otherwise come into contact with the Traffic Branch of the Police Department. It is the experience of the Investigation Officers from this Office, that contact officers within the Traffic Branch provide a very helpful service in the handling of telephone enquiries.

State Rail Authority

It has been noted by a number of the Ombudsman's Investigation Officers that Gordon Andrews, contact officer at the State Rail Authority, provides a very good and quick response to enquiries made from this Office.

Some public authorites are unhelpful when it comes to Ombudsman's investigations, although procedures do exist within the Office for dealing with recalcitrant authorities. For example, problems regarding delays and inadequate replies experienced with the Department of Corrective Services are mentioned later in this report.

The Department of Youth and Community Services is often slow in responding to enquiries and requests are regularly received for extensions of time in replying. Glen Innes Municipal Council is an example of a local council which is often slow in responding to enquiries by mail and telephone.

On the other hand, some authorites named in previous Annual Reports of the Office of the Ombudsman have, as a result of criticisms made of them, instituted more effective and efficient procedures for dealing with complaints. For example, in the 1984 Report, it was reported that the Government Insurance Office exhibited delays and an attitude of unco-operativeness in its responses to Ombudsman enquiries. This Office is pleased to report that this situation no longer exists and that the procedures and attitudes of the Government Insurance Office have shown marked improvement.

Examples of responses made to Section 26 Reports of wrong conduct submitted to public authorites for comment, where the public authority has included personal denigration of the Investigation Officer responsible for preparing the report.

Occasionally, a response from a public authority to reports under Section 26 of the Ombudsman Act submitted to them for comment has included personal denigration of the Investigation Officer or other members of the Ombudsman's staff, rather than concentrating wholly on the facts, conclusions and recommendations contained in the report itself.

Building and Construction Industry Long Service Payments Corporation

In a letter to the Deputy Ombudsman concerning a draft wrong conduct report, Mr Riordan, of the Building and Construction Industry Long Service Payments Corporation wrote:

> I am advised by my officers that the report submitted by you contains errors and bias, uses unfounded allegations and adopts a negative attitude to the Corporation and its staff.
>
> The situation regarding determination of "special circumstances" under the Act had been based on a general discussion and appears to have been misinterpreted by your Investigating Officer.
>
> I am most concerned that your officer appears to be unable to take a neutral stance as regards the Corporation, and this may well be a reflection of difficulties associated with a previous investigation.

In the Final Report the Ombudsman rejected the Authority's contention that the report was biased and found that the Investigation Officer had conducted the investigation "competently and in an even-handed manner".

The Department of Education

In a matter which was later to receive wide media coverage as a result of comments by the Minister for Education, in a letter signed jointly by Messrs Dicker, L. S. Mulholland and I. Feneley, all officers of the Education Department, the authors wrote of the draft report:

> We feel [the Investigation Officer] has reached conclusions based upon inadequate research, incomplete evidence and misplaced logic. It appears to us that [the Investigation Officer] reached her conclusions before carrying out an inquiry.

Later on in the investigation the Minister responded to an invitation to consult with the Office on the matter, as provided by Section 25 of the Ombudsman Act, in the following terms:

> I do not wish to consult about the matter. It is my responsibility as Minister for Education to provide a protective environment for teachers and pupils in Government schools. I realise this does not enter your consideration and for this reason discussions between us have no purpose.

A later press release issued by the Ombudsman on the controversy surrounding the matter said, in part:

> I deplore the fact that the Minister made an attack on the Office of the Ombudsman and its procedures without availing himself of the opportunity to consult in accordance with the procedures provided for in the legislation.

11. "Own Motion" Investigations

"Own motion" investigations, which are carried out under the provisions of Section 13 of the Ombudsman Act, have been the subject of comment in recent Annual Reports; in particular, the investigation of the practices of local government councils in handling insurance claims has resulted in a number of reports of wrong conduct. Comments were invited from the public, and journalists and editors who wished to bring interesting stories to the attention of the Ombudsman were invited to do so. The aim was to add to this Office's sources of information about complaints.

In October 1984, following the Annual Report invitation to journalists and editors, a more detailed letter was sent to the editors of 209 Metropolitan, suburban and rural newspapers in New South Wales, inviting their comments and asking whether they would be interested in regularly supplying this Office with copies of their newspapers. One editor responded with detailed information that led to an investigation of a local government council, and some twenty newspapers have added this Office to their subscription lists, at no charge. The newspapers sent to this Office are examined for relevant material. It has been found to date that many "public interest" stories, particularly in the rural press, have already been the subject of complaint to the Ombudsman, while the newspapers provide a valuable means of keeping this Office's files up to date once an investigation is begun, or after a report has been made to the relevant department or council.

The past year has seen the greatest number of "own motion" files to be so far opened by this Office, although these still comprise a very small proportion of the annual total. However, because the "own motion" power is used for matters that appear to be of significance at the outset, the proportion of findings of wrong conduct is fairly high. During the past year reports have been made about the State Bank's failure to notify the public about stolen bank cheques, the removal of the floor and fittings from a private house in Glebe by contractors to the Housing Commission, the use of telephones by prisoners at Parramatta Gaol to contact their legal representatives and the treatment of protection and segregation prisoners in 4 Wing at Parramatta Gaol; the two latter investigations are noted elsewhere in this Annual Report. In three other instances provisional findings and recommendations had been made, but the reports not made final, at the time this Annual Report was written.

Given the relatively large number of complaints received by this Office in comparison with the population of New South Wales, it might be that most of the matters of public concern that are reported in the media are concurrently brought to the Ombudsman's attention by those affected; the public awareness campaigns conducted by this Office no doubt play an important part in bringing this Office's role to public notice, as does the attention given by the media to the tabling in Parliament of the Annual Report.

Nevertheless, there is obvious scope for further use of "own motion" investigations, and they will continue to receive attention.

12. Anonymous Complaints

The "own motion" power provided in Section 13 of the Ombudsman Act can also be exercised in taking up certain allegations made in anonymous letters. The practice of this Office is to draw all but trivial allegations to the notice of the public authority concerned, since the public authority has a right to know that an allegation has been made, and to answer it. Such anonymous complaints, which in past years have been very small in number, have been taken up as "own motion" matters.

The reaction of two public authorities to anonymous allegations was of particular interest. An anonymous letter maintained that Gundagai Shire Council had failed to approve a development and had allowed its staff to use Council motor vehicles in an improper manner. When the letter was sent to Council, the Shire President, Councillor Attwood, was quoted in the local paper as saying that he was disappointed that the Ombudsman would take notice of an anonymous complaint "which had no substance". "The editor of our local paper refuses to publish a letter unless it is signed", he said. "And that's the way it should be". In response to a statement of provisional findings and recommendations following an anonymous complaint against an officer of the Zoological Parks Board, the Chairman of the Board, Mr A. E. Harris, wrote:

> I find it extraordinary that you would carry out a range of investigations such as you have undertaken based on anonymous information. For all of my working life in all of the activities in which I have engaged I have unhesitatingly despatched to the nearest wastepaper basket all anonymous correspondence.

In replying, the Deputy Ombudsman explained the practice of this Office and the reasons for it, and pointed out that there were instances, such as the one concerning the Board's officer, "where allegations that prove to be incorrect can be specificaly declared so".

Anonymous complaints will continue to be drawn to the attention of public authorities and investigated where the nature of the allegations warrants such a course.

13. Discretion to Decline and Discontinue Complaints

The Office of the Ombudsman receives *over 5,000* complaints each year. It is not possible to investigate every complaint, and Section 13 of the Ombudsman Act gives the Ombudsman discretion to decline complaints.

In deciding whether to decline a complaint, the Ombudsman may take into account such things as whether

1. the complaint is frivolous, vexatious or not in good faith;

2. the subject matter of the complaint is trivial;

3. 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;

4. the conduct complained of occurred at too remote a time to justify investigation;

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

6. the complainant has no interest or an insufficient interest in the conduct complained of.

The Ombudsman may also "have regard to such matters as he thinks fit".

In addition to declining complaints from the outset, the Ombudsman by Section 13(4) of the Ombudsman Act has a discretion to discontinue the investigation of a complaint.

The following examples illustrate matters where it was considered a full investigation was not warranted:

- A shopper who parked her car in a Council carpark near Bondi complained that she had received a parking ticket for parking in excess of the two hour limit. The complainant alleged there were insufficient notices to the effect that a time limit existed in relation to that particular car park and another one close by. Preliminary enquiries showed that ample notice was given in the form of signs at the entrace of the carpark and throughout the area as well. Therefore, it was decided there was no prima facie evidence of administrative wrong conduct on the part of Council.

- A number of residents in the Gosford area each made individual complaints concerning excessive fees being asked by Gosford City Council for water connection. The standard fee was $75 but these residents were told they were to pay $2,500. After preliminary enquiries were initiated by this Office, Council resolved in part, that the residents should pay only the standard $75 fee and that reimbursement of the amount in excess of $75 be made to persons who had already paid the previous amount requested.

- A couple who had applied for a birth certificate from the Registry of Births, Deaths and Marriages paid a fee of $15. Payment of the $15 fee provides for the certificate to be mailed within three days of receipt of the application or allows for collection over the counter within twenty four hours. When the certificate had not been received after one week, the complainant rang the Registry to enquire about the delay. She also made a concurrent complaint to this Office but by the time it was received, the complainant had received in the mail two copies of the birth certificate requested. Given these circumstances, and the fact that procedures within the Registry are already under investigation by this Office, it was decided to decline the complaint.

- A ratepayer complained that the Metropolitan Water Sewerage and Drainage Board had charged him an excessive amount for water usage and suggested that his new water meter, which had already replaced a faulty meter, was also registering incorrectly. Preliminary enquiries were made in the matter which included a thorough assessment of rainfall and water usage over the relevant summer periods in the past ten years. These preliminary enquiries disclosed no prima facie evidence of wrong conduct on the part of the Board and enquiries were discontinued.

14. Section 19 (Royal Commission) Inquiries

Section 19(1) of the Ombudsman Act provides that, in an investigation under the Act, the Ombudsman may make or hold inquiries.

Section 19(2) confers on the Ombudsman the powers of a Royal Commissioner, with some limits.

Forty-one "Section 19 hearings", as they are called, were held during 1984/85. Forty of these hearings were conducted in the course of reinvestigation of complaints about police and one formed part of investigations into the conduct of other public authorities. One of the hearings into a police complaint involved the taking of evidence from more than 50 witnesses. Two other hearings involved 45 and 29 witnesses respectively.

Those usually present at Section 19 hearings into police complaints are the Ombudsman, the Executive Assistant (Police), the seconded police officer assigned to the matter, and a sound recordist. At inquiries into the conduct of other public authorities, the Ombudsman, or Deputy Ombudsman, and the Investigation Officer responsible for the matter are usually involved, together with a sound recordist.

The procedures adopted at Section 19 hearings have been developed with the assistance of the Queens Counsel who appeared in the first such inquiry, which concerned the Electricity Commission, and in accordance with advice from counsel retained by the Ombudsman. All witnesses are now sent an outline of these procedures.

Section 19 hearings are conducted at the Office of the Ombudsman in Sydney or in places convenient for the witnesses. During 1984/85 they have been held as far afield as Brewarrina, Walgett, Canberra, Melbourne and Brisbane. Evidence has been taken, on a number of occasions, in prisons. One one occasion evidence was taken from a patient in hospital.

Evidence has to be taken in the country and interstate because the Ombudsman cannot pay witnesses' expenses. The Ombudsman believes that witnesses should not have to bear the cost of travel to and from Sydney. Many witnesses, in any event, lose income from giving evidence to the Ombudsman. All reasonable attempts are made to suit witnesses' convenience (for example, by taking evidence in the early morning or late afternoon), but it is not always possible to avoid loss of income. There appears to be no cogent reason why the Ombudsman should not be empowered to pay witnesses' expenses. Indeed, this power would mean significant saving in the time and public funds required to transport staff and sound recording and other equipment to hearings outside Sydney.

The provisions of the Ombudsman Act allow, in effect, any officer of the Ombudsman to whom the power has been delegated to conduct inquiries under Section 19(1) of the Ombudsman Act, where the inquiry concerns the conduct of a public authority other than police. In practice, only the Ombudsman, Deputy Ombudsman or Assistant Ombudsman presently conduct such inquiries, and are assisted by Investigation Officers.

Present difficulties in having Section 19 hearings for police complaints heard by Ombudsman officers other than the Ombudsman personaly are discussed later under the heading "Legislative Foul Up Delays Reinvestigations".

15. Provisional Findings and Recommendations

Since taking up Office, the present Ombudsman has endeavoured to develop and refine the investigation procedures followed by his Office, so that investigations are carried out in fairness to complainants and public authorities, and in strict compliance with the Ombudsman Act. At the same time, procedures should not be too restrictive or inflexible, as no two investigations are the same, each demanding an individual approach to collection and assessment of facts.

It is essential that the authorities being investigated, the complainant and any parties commented upon adversely as a result of the investigation, be given the opportunity to make submissions to the Ombudsman. Indeed, that procedure is mandatory so far as the latter is concerned by virtue of Section 24 of the Ombudsman Act. All parties are given ample opportunity to state their views early in the investigation process. However, the Ombudsman believes that there should be a formal request for submissions, late in the investigation process, when most of the relevant facts have been ascertained. The best way to give all of the people involved a good opportunity to comment upon the facts and provisional conclusions and findings is to send them a draft of a report.

Until recently, the documents seeking submissions were described as "draft reports". The documents were marked "confidential" and described clearly as containing provisional and prima facie conclusions only. Such a draft document was not a "report" under the Act, but a procedural step in the investigation.

In order to further refine this procedure, the Ombudsman recently decided to alter the title of these draft documents so as to reflect more accurately the status of the drafts. The document distributed for the purpose of obtaining submissions is now described as:

Provisional Findings and Recommendations.

It is purely a provisional document, and is not a "report" of any kind under the Act. It is preliminary to any determination of a complaint under the Act. The conclusions or findings that should be reached as a result of an investigation are reviewed and determined in the light of the submissions received on the provisional document and any further evidence.

16. Toothless Regulatory Agencies

During an investigation by this Office, an officer of the Department of Environment and Planning wrote:

> There is, I understand, a long standing Cabinet direction that there is to be no litigation between government departments.

This advice was of concern to this Office because in such circumstances bodies like the Department of Environment and Planning and the State Pollution Control Commission could not go beyond persuasion in dealing with other government bodies.

The Ombudsman then asked the Premier, the Hon Neville Wran, Q.C., in July 1985 for the terms of any Cabinet decision about litigation between government bodies.

On 5th September, 1985 the Secretary of the Premier's Department, Mr Gleeson, wrote:

> The Premier has requested me to inform you that the proceedings and decisions of Cabinet are confidential. He does, however, draw your attention to a Memo to All Ministers issued in August 1959 which may be of assistance to you in your enquiry. A copy of this Memo is forwarded for your information.

The memorandum, from the then Premier, the Hon J. J. Cahill, referred to a report of a conference of Solicitors and Legal Officers in 1956. The report said, in part:

> These proposals were understood to have the following effects:
>
> (1) Litigation between Governmental Authorities was to be avoided wherever possible and where unavoidable was to be reduced to a minimum . . .

It appears that this is the instruction to which the officer of the Department of Environment and Planning referred. In that instance the Department of Environment and Planning appeared to rely in part on the 1959 instruction to support its decision not to take legal action over a development approval which was possibly in breach of the Environmental Planning and Assessment Act. The development will significantly affect the environment and will be one of the largest commercial office buildings in the Southern Hemisphere.

The Ombudsman believes that legislation, except that which specifically does not bind the Crown, should be enforced by the appropriate regulatory body. There should not be availabe to any government body the ability to circumvent the law.

17. The Ombudsman and the Department of Education

In recent times the Minister for Education, the Hon R. M. Cavalier, M.P., has alleged that investigations by this Office have, in effect, interfered with the work of schools. However, statistics of complaints to this Office show that the Department of Education has few complaints against it, relative to the size of the Department, and that only a small proportion of those complaints concerns the conduct of teachers.

Statistics of total complaints within the last three years are:

	Total	Still under investigation as at 30th June of the year concerned	No jurisdiction and declined	Discontinued	Wrong conduct	No wrong conduct
1982-83	100	23	41	22	1	13
1983-84	98	26	32	30	2	8
1984-85	85	29	24	30	1	1

The number of complaints has declined over the last three years. The Department of Education has been the subject of complaint to this Office about as often as the State Rail Authority. In 1984/85 there were almost twice as many complaints against the Department of Youth and Community Services; in 1984/85, fewer complaints against the Department of Education than against the Housing Commission. During the three years, only four reports of wrong conduct were prepared, from a total of 283 complaints. The first concerned conditions at Dover Heights Boys' High School, the second, the manner in which tenders for a school bus service were called, the third, confusion surrounding a donation of text books, and the fourth, failure to properly investigate an alleged assault by a teacher on a pupil.

Details of the remaining complaints show that most were directed towards the administrative sections of the Department, rather than towards specific schools or teachers. Of these, many concerned broad policy issues and were not investigated. Another large group of complainants included teachers themselves, complaining about their employment entitlements; these are outside the Ombudsman's jurisdiction. Broad categories were:

		1982-83	1983-84	1984-85
a)	Staffing and employment	18	7	8
b)	Bus Service and passes, transport	8	12	9
c)	Property affecting neighbours, etc.	9	6	8
d)	Schools closures, etc.	3	—	—
e)	Scholarships, subsidies	3	2	—
f)	Examination results, etc.	1	7	3
g)	Enrolments, zoning, etc.	9	10	6
h)	Delay in answering	4	5	4
i)	Syllabus	1	4	3
j)	Student matters — discipline, explusion, teachers, uniforms, school fees	11	15	10
	Other	10	4	5
	Still under investigation	23	26	29
		100	98	85

Categories a, b, d, e, f, g, h and i rarely involved even preliminary enquiries of schools and teachers: they were essentially administrative matters, dealt with at headquarters or by a regional office. Property matters usually involved a specific school, but not teachers or pupils; these complaints concerned such things as trees on school grounds blocking the sewers of private houses, the resumption of land, and so on. Even category j — student matters — included a number of complaints that were declined at the outset or were discontinued after brief preliminary enquiries were made of the Department (that is, not of a specific school or teacher); of these, several came from Mr P. Harrison-Mattley, who was himself a teacher.

In short, this Office does not, and never has, interfered with or adversely affected the running of schools. Where school life has been disrupted, the disruptions have occurred long before this Office has become involved. Even then, as in the Supple case, disruptions have been made worse by the Department's failure to observe its own guidelines, or by the persistence of parents and organised groups, rather than through any involvement of the Office of the Ombudsman.

18. Wearing of School Uniforms

Two complainants alleged that students at their children's high schools had been forced to wear school uniforms and had been punished for not doing so, contrary to the guidelines of the Department of Education. Enquiries into the first complaint were eventually discontinued, but rumours began to circulate that this Office had, in effect, declared school uniforms to be compulsory. This was wrong, and people began to enquire about the Ombudsman's opinion on the matter.

Because of the secrecy provisions of the Ombudsman Act, this Office cannot give information to the public about complaints or investigations; this matter is again dealt with in this Annual Report. The manner in which the secrecy provisions create problems for this Office, and the way in which misleading reports can be spread, are illustrated by these two complaints. Since the matter is also one of some public interest, developments in the two complaints are set out in some detail.

A. Complaint by Mr P. Jeremy

In June 1983 Mr P. Jeremy complained to the Office of the Ombudsman that his son, a student at North Sydney Boys' High School, had been told by the Principal of that school, Mr D. C. O'Sullivan, that all students must wear school uniform, and that the Principal had instructed school prefects to give "lunchtime tasks" to students who did not wear the correct uniform. Mr Jeremy believed that the alleged statement and instruction by the Principal were contrary to Section 3.2.12 of the Handbook of Instructions and Information for the Guidance of Teachers, which he quoted in part:

> No child may be prevented from attending school or placed in a position of embarrassment because he or she is unable to wear an accepted school uniform . . .

Mr Jeremy stated that his son was being "continually persecuted" on this issue, and in later letters referred to attempted harassment of his son by teachers, attempted embarrassment of his son by prefects, and bullying and harassment of students by the Principal, over the issue of wearing school uniforms. Mr Jeremy stated in his letter of complaint, "I have very strong objections to the wearing of school uniforms and have forbidden my son to wear one."

As evidence to support his allegations of harassment, embarrassment and punishment, Mr Jeremy referred to a circular from North Sydney Boys' High School entitled "Falcon Bulletin", which included a message from the Principal stating, in part, "Too many students are not wearing correct school uniforms". Mr Jeremy also cited the School's "Daily Bulletin", a typed sheet dated 7th March, 1983, which included the following passage:

> PREFECTS & ALL YEARS — Starting from Tuesday prefects' detention will be held at lunch time in the gym. If you don't want to take part wear correct school uniform, i.e. pocket or tie, school shoes or desert boots (sand shoes only with a note) . . .
>
> Prefects

In later correspondence between the Department of Education and this Office, the Principal denied the allegations made against him personally, said that he had been unaware of prefects requiring students to bring notes from their parents and had "put an end to the practice", and stated that Mr Jeremy's son had never been punished, detained or asked to perform lunch time tasks for not wearing a school uniform. Mr Jeremy contested the facts of the matter and the interpretation of some of the Principal's and Department's statements, but there was insufficient evidence of wrong conduct in a matter of administration, in the terms of the Ombudsman Act, to warrant a formal investigation; the complaint by Mr Jeremy about events at North Sydney Boys' High School was discontinued following preliminary enquiries.

These preliminary enquiries also touched on the general question of school uniforms and on the interpretation of clause 3.2.12 of the Handbook. In one of his letters about Mr Jeremy's complaint, the then Director General pointed out that the full text of the relevant passage was:

> No child may be prevented from attending school or placed in a position of embarrassment because he or she is unable to wear an accepted school uniform. On the other hand, the desirability of wearing a school uniform is recognised, particularly in secondary schools. The practice encourages pride in the school, assists in the maintenance of tone and good conduct, and reduces to a minimum the undesirable distinctions between children because of clothing. In general, the provision of school uniforms, if they are wisely chosen, is not more expensive for parents than the provision of other clothing. It will usually be found desirable to seek the co-operation of the parents and citizens association when the principal wishes to have a school uniform adopted and to have their help in selecting an appropriate style.

Commenting on this passage, the then Director General observed that its "primary purpose" was to:

> have those who administer schools understand that students who are unable to wear school uniforms, because they cannot afford to do so, should not be placed in a position of embarrassment or prevented from attending school.
>
> In support of that primary purpose, it will be noted that the statement indicates that a school uniform need not be more expensive for parents than other clothing. The matter of opposition by a student and/or parent to the wearing of a school uniform, because of a personal view or philosophy, is an entirely different matter and is outside the concept of ability to wear a uniform where, as already mentioned, ability means financial ability.

> The statement in the Handbook recognises the desirability of the wearing of a school uniform, particularly in secondary schools. Those matters listed in the statement about pride in school, maintenance of tone and good conduct, reduction to minimum of undesirable distinctions between children because of clothing are vital aspects in the life and working of schools. It seems to me that the Principal of North Sydney Boys' High School has been doing his best to ensure that those vital aspects are alive and well in his school.

During a later telephone conversation, the then Director General pointed out that parents' attitudes to school uniforms varied from community to community, and for that reason the Department has flexible guidelines, to be interpreted by Principals according to the wishes of parents in the community. Nevertheless, the wearing of uniforms would continue to be encouraged, for the reasons set out in the Handbook and in the then Director General's letters to this Office (paragraph 5, above). Preliminary enquiries on this point were discontinued, since there was no evidence of wrong conduct in a matter of administration.

B. Advice Sought by Mr O'Sullivan

During the course of preliminary enquiries by this Office, Mr O'Sullivan, the Principal of North Sydney Boys' High School, sought a legal opinion on the meaning of clause 3.2.12 of the Handbook, and later set out a version of events in a circular letter dated 12th April, 1984 which, it appears, was addressed to other Principals. The circular letter was as follows:

> THE OMBUDSMAN AND SCHOOL UNIFORM
>
> For your information as Principal:
>
> On 11th July, 1983, I received notification from the Ombudsman on a parental complaint "concerning the alleged enforced wearing of school uniforms".
>
> The relevant section of the Teachers Handbook quoted:
>
> "3.2.12. No child may be prevented from attending school or placed in a position of embarrassment because he or she is unable to wear an accepted school uniform."
>
> If the complaint has substance, then a prima facie case of wrong conduct could exist.
>
> The Director-General assumed the position of respondent.
>
> A number of reports and letters followed. Much time was spent on the issue.
>
> On 29th September, 1983, the Ombudsman wrote to the Director-General:
>
> > "I have noted your comments to the effect that the school community as a whole wishes school uniforms to be worn. Nevertheless, the section from the handbook concerning school uniforms, as quoted in your letter of 24 August, 1983, places an obligation upon public authorities of a kind which, if it is not observed, suggests a prima facie case of wrong conduct against those authorities within the terms of the Ombudsman Act."
>
> At this point, I sought and obtained legal advice from Mr J. McKenzie, senior partner in Bell, Cardogan, Couston & Gingos, and Mr Richard Conti, Q.C. Both are past students of the school and both acted willingly, in an honorary capacity.
>
> Mr Conti's interpretation of the section on uniform, in resume is:
>
> > "It is a basic misconception of the handbook regulation 3.2.12 to refer to the same in terms of a proscription against the compulsory wearing of school uniform. The primary or basic theme of the regulation is the desirability of wearing a school uniform, particularly in secondary schools . . . all that the regulation prohibits is preventing a child from attending school or place a child in a position of embarrassment because he is *unable* to wear an accepted school uniform. Obviously, if a child is able to wear an accepted school uniform, the regulation has no application. Ability to wear a school uniform must be essentially addressed to the matter of financial ability, though perhaps there could be conceivable cases of physical disability . . . opposition to the wearing of school uniform on the basis of some personal parental view or philosophy which appear to be the case here, is plainly outside the concept of ability, in the context of the regulation. Accordingly there is no ground for legitimate complaint in this matter."

The Ombudsman's final response was sent on 13th March, 1984 to the Director-General, informing Mr Swan that he was discontinuing my (his) inquiries.

Included was his letter to the parent which in part stated:

> "My enquiries have not disclosed a case of 'wrong conduct' in a matter of administration, in terms of the Ombudsman Act. To restate my reasons for reaching this conculsion:
>
> 1. The Department of Education has a policy of encouraging the wearing of school uniform, which it has made no attempt to conceal.
>
> 2. The Department has said that it does not force children to wear school uniform, and there is no evidence that your son has been forced to do so.
>
> 3. I hold the opinion that the actions of the Principal of North Sydney Boys' High School in this matter, as disclosed in the evidence before me, do not amount to 'bullying and harassment' in the usual meaning of those terms."

It was a long fight!

C. Rumours about School Uniforms

After Mr O.Sullivan's letter had been in circulation for a few weeks, this Office received telephone calls from people seeking confirmation that a "decision" had been made about the wearing of school uniforms, and requesting details of that decision. Under the provisions of Section 34 of the Ombudsman Act, it was not possible to give this information.

In the latter months of 1984, this Office received further enquiries about school uniforms; by this time it was apparently being said that the Ombudsman had approved the compulsory wearing of school uniforms. For example, on 24th October, 1984 the principal of Riverstone High School, Mr P. R. Wright, sent a circular to parents of pupils at that School which said, among other things:

> Late last year, NSW Ombudsman made it clear that the school was within its rights to insist that wherever possible, school uniform was to be worn at all times.

D. Complaint by Mr van Zuilekom

On 28th October, 1984 Mr H. van Zuilekom, the father of a student at Riverstone High School, complained to the Office of the Ombudsman. Among other things, Mr van Zuilekom wrote:

> Our children wear school gear MOST of the time. However, we parents feel we should retain the right to decide what they do wear! We naturally support protective gear for industrial classes.
>
> The last handout I have seen from the Education Department included the line "No child shall be harassed or embarrassed . . . for not wearing a uniform or part thereof . . "
>
> Under this headmaster those guilty of not wearing PROPER clothes are harassed or embarrassed in the following manner:
>
> 1. "Scab duties" which consist of having to pick up papers etc in school grounds.
>
> 2. Barred from class i.e. stand in corridor.
>
> 3. Last but not least — the kid is told off in front of his mates and even if he's not, the very fact that he's picking up papers is enough to cause a child to be embarrassed even at High School age (my child's 14) and we have 3 out of 5 still at school.
>
> Finally, as a parent I think this disgusting. As a journalist I feel your office is being used for the wrong reason and this may want straightening out.
>
> My wife and I do not wish to remain anonymous in this matter should your office decide to request a retraction by the headmaster. To do this anonymously would be an act of cowardice as we feel the Ombudsman needs support right or wrong.

Responding to Mr Van Zuilekom's complaint through the Department of Education, Mr Wright denied that children not in full school uniform were barred from class or required to pick up papers. In reply to a question from the Office of the Ombudsman as to whether pupils not in full school uniform were admonished in the presence of their class mates, the Principal wrote:

> If you mean by admonishing, reprimanding (as is its normal usage) then children who do not wear full school uniform are not admonished in the presence of their class mates. If however, you mean "exhort, give advice, inform, remind" as given in the definition by the Concise Oxford Dictionary, then this would be correct. The P & C Association urged me to try to encourage more and more pupils to wear uniform as much as possible. On assemblies during roll call, pupils are urged, as a group, to wear uniform. If a member of the executive does speak to a pupil for being badly out of uniform, it would be done so as privately as possible.
>
> It is possible that other pupils, in trouble, may be nearby, but to make the statement that they are admonished (reprimanded) in front of classmates is not correct.
>
> I would like to stress that we consider that having our pupils in uniform is important for improving the tone of the school and raising the esteem of the school in the eyes of the community. We know that we will never get full school uniform in the present soci-economic environment, but if we don't try to ensure that the students look like and can be readily identified as pupils of Riverstone High School, then we are letting down the very vast majority of the parents who support our drive. In reply to our Circular 557 parents supported the uniform policy of the school,
>
> 14 gave qualified support while only 8 (1.4%) disagreed.
>
> Another 180 replies are still forthcoming. As well as the parents, the School Executive and Staff are fully supportive of our attempt to instil pride in being a member of Riverstone High School.

Later, the then Director-General explained that the statement in Mr Wright's letter to Riverstone parents "was erroneously attributed to the Ombudsman when, in fact, it was Mr Wright's interpretation of the legal explanation given to North Sydney Boys' High School, relating to Section 3.2.12 in the Teachers' Handbook. However, it was not Mr Wright's intention to misquote the Ombudsman, but a genuine error in his reading of the letter. "The Ombudsman and School Uniform", circulated by the Principal of North Sydney Boys' High School."

At the beginning of the 1984 school year there apparently were rumours still circulating on the question of compulsion in the wearing of school uniforms, and in March 1985 a lecturer in education at a university wrote to the Office of the Ombudsman about a recommendation supposedly made in a report:

> I understand the recommendation revolves around the word "unable" i.e. through medical or economic reasons and it has been suggested your Office said that unless one or both of these conditions applied uniform could be deemed to be compulsory.

Once again, owing to the provisions of Section 34 of the Ombudsman Act, the Ombudsman could not make a meaningful reply.

In view of the public interest in this question, the then Director General of Education was again asked to give an interpretation of school uniform requirements, with a view to reporting the matter to Parliament. In June 1985 Mr Swan replied to questions as follows:

a)

Q: Does the Department of Education accept the interpretation of Section 3.2.12 provided by Mr Conti, Q.C., to the Principal of North Sydney Boys' High School?

A: The interpretation of Section 3.2.12 provided by Mr Conti, Q.C., to the Principal of North Sydney Boys' High School refers to the basic theme of the Instruction as the desirability of wearing a school uniform particularly in secondary schools. It does not prevent a child from attending school nor does it allow a child to be placed in an embarrassing position because he/she is unable to wear an accepted school uniform. Mr Conti explained that ability to wear a school uniform must be essentially addressed to the matter of financial ability although there could be conceivable cases of physical disability.

I stated in my previous letter of 1st December, 1983 in connection with the Jeremy case, that the purpose of the Instruction is to have those who administer schools understand that students, who are unable to wear school uniforms because they cannot afford to do so, should not be placed in a position of embarrassment or prevented from attending school. I do not find Mr Conti's interpretation inconsistent with my statement of 1st December, 1983.

b)

Q: Does the Department of Education believe that students may decline to wear school uniforms for what might be termed "reasons of conscience"?

A: The Department of Education does not believe that "reasons of conscience" are sufficient justification for a pupil to decline to wear a school uniform. Despite this view no pupil would be educationally disadvantaged or placed in a position of embarrassment because he or she declined to wear a uniform for this reason.

The term "reasons of conscience" is not precise and without further justification could lead to unilateral declaration by students unrelated to genuine conscientious beliefs.

The Office of the Ombudsman has expressed no opinion, and made no finding or recommendation, on the general question of the wearing of school uniforms.

In discontinuing his enquiries into Mr Jeremy's complaint, the Deputy Ombudsman merely noted the Department's policy of encouraging the wearing of school uniforms, and its statement that it does not force children to wear school uniforms (see quotation in Mr O'Sullivan's circular letter, above). Other statements in the Deputy Ombudsman's letter concerned only Mr Jeremy's son.

There may be some inconsistency in the Department's view, on the one hand, that Clause 3.2.12 applies only to cases of financial hardship and physical disability, and, on the other hand, that no student would be disadvantaged for refusing to wear a uniform for "reasons of conscience".

In the event of any student claiming to have been punished or disadvantaged for refusing to wear a school uniform and providing evidence of this, the Office of the Ombudsman will be prepared to undertake an investigation and make an appropriate finding.

19. Grosvenor Place: Overshadowing of Australia Square

In early May 1985 the Ombudsman began an investigation into the procedures of the Sydney Cove Redevelopment Authority in consenting to a development known as "Grosvenor Place", on a site bounded by George, Essex, Harrington and Grosvenor Streets. This building is a very large single tower building intended for prestige offices. When completed, it will be 180 metres high (43 storeys) and will have a floor area of 80,000 square metres. There will be parking for 500-600 cars, and the building will eventually house some 7,000 people.

It seems that Grosvenor Place was approved by the Authority without regard to the provisions of Section 112 of the Environmental Planning and Assessment Act, which require that an Environmental Impact Statement must be prepared for an activity likely to affect the environment significantly.

Grosvenor Place will have a significant effect on the environment. Independent studies made for Sydney City Council and the Department of Environment and Planning have concluded that Grosvenor Place will cause major overshadowing of Australia Square Plaza, particularly during the critical winter lunch-time period. There is no doubt that overshadowing must be regarded as an important planning issue, particularly when shadows are cast over areas during times of their peak use. Australia Square Plaza, a major public space in the Central Business District, is used by office workers and tourists, and any further overshadowing of it is a matter of substantial concern. The building, now under construction, can be seen from the Plaza and it is already reducing winter lunch-time sunshine. In addition, the development will increase vehicular traffic, parking congestion and pedestrian numbers.

Given the public interest in this matter, the Ombudsman sought the advice of two eminent counsel in the field. They concluded that the Authority had made no valid final decision approving the building of Grosvenor Place, because it had not obtained an Environmental Impact Statement nor otherwise complied with the provisions of Section 112. Grosvenor Place is proceeding in breach of the Environmental Planning and Assessment Act. Submissions have been received from the Authority and a final report is in preparation.

For some time Sydney City Council and the Department of Environment and Planning have been concerned about the adverse effect Grosvenor Place will have on the environment. However, they did not take any action to ensure that the Authority complied with the relevant legislation. The conduct of both bodies in this matter is also under investigation.

The unfinished 'Grosvenor Place' development at the centre of the controversy.
Photo courtesy of John Fairfax and Sons Ltd.

In one sense the issue in question is not limited to Grosvenor Place which realistically is not going to be pulled down at this stage. At stake is the principle whether an authority such as the Sydney Cove Redevelopment Authority, having responsibility for a significant area of the City of Sydney, is to exempt itself (or even be exempted by amending legislation) from any outside scrutiny on environmental grounds by bodies such as the Department of Environment and Planning or the Sydney City Council, let alone interested members of the public.

20. Zoning of Milk Distributors in New South Wales

The Ombudsman received a complaint from seven milk vendors that the distribution depot from which they operated was to be closed by the Dairy Corporation and the vendors transferred to a depot some distance away. The vendors maintained that extra expense and travelling time would make their milk runs uneconomic. They believed that another milk processing company, Perfection Dairies Pty Limited, would operate the depot should the existing processor, United Dairies Limited, gain the Corporation's approval to close it. Investigation of the complaint led to examination of the system of milk distribution and the principles upon which the Corporation exercises its considerable statutory powers.

There are four milk processors in the Sydney Metropolitan area with roughly the following market shares:

Dairy Farmers Cooperative Ltd	60%
Peter's Milk	29%
United Dairies Ltd	8%
Perfection Dairies Pty Limited	3%

These processors receive milk from dairy farmers and provide packaged and bottled milk to milk vendors, who deliver to shops, supermarkets and the public. Each milk vendor has a geographical area, specified street by street, to which the Corporation authorises service through the conditions in each vendor's Registration Certificate. The Registration Certificate also contains a condition directing the vendor to deal with a specific processing company.

Through this system each processor has gained a percentage of the market through the allocation of vendors to it by the Corporation. Consequently, each processor operates in a zone of exclusive distribution, the area of which depends upon the number of vendors dealing with the processor. These zones are regarded by processing companies as immutable and, although the Corporation has statutory power to redirect vendors to any other processors, it rarely does so. Indeed, a representative of one processing company is convinced that processors would be able to take legal action to prevent the reallocation of vendors and protect their property rights in existing zones. It appears that reallocation of market shares occurs when the processors reach agreement on the division of the market, with the Corporation implementing the decision by means of its statutory powers. This system is known as "orderly marketing".

As to the complaint lodged by the milk vendors, it seems that Perfection Dairies cannot have a distribution depot in a United Dairies' zone without a trade-off between the two companies to maintain market shares. There are further complications from an agreement reached among the processors around 1972, under the Corporation's supervision and direction, which re-arranged the zoning of Sydney in order to make each processor's zone more profitable. Previously, each processor's zone consisted of isolated pockets of service area which had grown up from "the horse and cart" days. The zoning system was inherited by the Corporation, whose officers feel that there can be little immediate change because of the entrenched interests within the industry.

The Corporation does not appear to have a policy for exercising its powers to zone milk vendors and processors. At present, it seems to use its powers only to preserve the status quo. The Ombudsman is concerned that the Corporation, although exempt from trade practices legislation, appears to protect a system, albeit an inherited and deeply entrenched one, in which processor companies determine market shares by agreement.

The Corporation, at the date of writing, had yet to decide on the future of the depot which was the subject of the complaint. Having regard to the resources which would be involved in a thorough investigation of the Corporation's practices, the Ombudsman has decided to take no further action until a decision on the particular issue has been made by the Corporation.

21. The Building and Construction Industry Long Service Payments Corporation

The Corporation was established in 1982 by the Building and Construction Industry Long Service Payments Act. The Act allows building and construction workers to obtain a portable long service entitlement and was administered by the Builders' Licensing Board before 1982. Employers in the industry are required to lodge returns and pay to the Corporation charges based on the weekly earnings of their employees (and, in some cases, the employees of their sub-contractors). These charges are "credited" to each worker who can make a claim when eligible for long service payments.

A worker must register with the Corporation and receive a registration number in order to receive credit towards a long service entitlement. Failure to do so means that the worker can claim no benefit, even if his name or her name appears on the employer's returns and contributions have been made for many years. In these circumstances the money paid by the employer to the Corportion might never reach the worker for whom it was intended. In cases where the employee fails to register, the Act provides that the Corporation shall not backdate payments for more than two years, except for "special circumstances".

In two recent complaints, workers who had not registered asked for backdating for more than two years. Their employers had made the required contributions for much longer than two years, and had named the workers, but the Corporation deemed this insufficient for granting additional credit. In one case, the employee had worked in remote places for many years and had not been aware of the need to register. He had assumed that, since his employer was making contributions, he was covered. In the other case, the employee had written to the Corporation (then the Board) in 1980, saying that he had joined earlier. The Board had no record of correspondence with the complainant, despite the fact that he could produce copies of letters.

The Corporation's view was that "special circumstances" were "something almost unique"; it refused to backdate the credits. This Office found that the Corporation's view was unduly restrictive, and that its record-keeping procedures were inadequate. It was recommended that a less stringent criterion than "something almost unique" should be adopted by the Corporation when it determined "special circumstances", and that the employees' joining dates be backdated for more than two years.

In another case, an employer who had complained of overcharging by the Corporation had his account reduced by some $1,300 following inquiries by this Office. The Corporation had applied penalty interest to his account, which remained unpaid while his accountant enquired about unexplained changes in his monthly statements. This Office found that these had been mistakes in the Corporation's accounts. Overcharging had resulted from a failure to identify payments made to the Corporation by the employer's sub-contractors, who were employers in their own right. When the "double-charging" was identified by the Corporation, the consequent reduction in the account was not fed into the Corporation's computer system. This resulted not only in an overcharge, but in the levying of penalty interest. Charges are sometimes assessed by the Corporation, working from the employer's financial records. These charges are not credited to particular workers, and may not be disbursed unless the worker happens to complain.

These cases give rise to a concern that the legislation may not be serving those it was intended to benefit.

22. Adoption of Overseas Children

The Review of Adoption Policy and Practice in New South Wales, by Audry Marshall, which was tabled in Parliament on 26th September, 1985 acknowledged, "The existing Adoption Services are all, in different degrees, in a state of crisis. They are caught in a situation where, as a result of rapid social changes ... there are very few new born healthy babies available for adoption ... Yet many people still have an expectation that they can adopt a baby."

The report continues, "Adoption of children from overseas has in consequence gradually increased and now comprises a significant number among children being adopted in New South Wales ... However, policies and practices are in rather a confused state, and there are many areas of uncertainty for both prospective adopting parents and adoption workers ... It is anticipated by adoption workers that the number of people applying to be approved as adoptive parents for children from overseas countries will continue to increase as the impact of the changing nature of adoption in the local scene becomes more understood and accepted."

Complaints were received by this Office about the Adoptions Branch of the Department of Youth and Community Services. They fell into two broad areas.

Some complaints alleged delays by the Department of Youth and Community Services in considering applications by single women to adopt overseas children, particularly those children with special needs. Others concerned delays experienced by married couples in having their applications to adopt overseas children dealt with.

A number of single women complained about their application to adopt overseas children. Section 19(2) of the Adoption of Children Act provides that, where the Court is satisfied that in the particular circumstances of the case it is desirable to do so, the Court may make an Adoption Order in favour of one person. In one instance, a single woman applied to the Department in 1982 to adopt an overseas child with special needs. At the time of writing, a decision had not been made on her application, although the relevant assessments were completed some time ago. Another single woman applicant, who applied in 1983, is still waiting for a decision.

One young married couple from an outer Western suburb of Sydney applied to adopt a child from overseas, knowing that their chance of adopting a baby from within Australia was very remote. They have been told they face a wait of up to two years for assessments to be completed, but another couple from an area south of Sydney had assessments completed within three months of lodging their application.

This Office has begun investigations into the procedures of the Department of Youth and Community Services in this area.

23. Delays in Providing Certificates: Registry of Births, Deaths and Marriages

There have been many complaints about the Registry of Births, Deaths and Marriages during the last year, most of which have arisen from the special problems that the Registry has faced in recent times. New Commonwealth regulations required the provision of a full birth certificate (rather than an extract) when applying for or renewing a passport. This greatly increased the workload of the Registry. There has also been a trend towards demanding full certificates for all sorts of other purposes; even some junior football clubs demand full birth certificates.

About half of all applications received are given priority, upon payment of an additional fee. Signs at the Registry Office explain the scale of fees for priority and standard applications and the time that it will take for a certificate to be mailed.

Most complaints have come from people who have applied for certificates by mail and have not known about the priority fee and the time required for despatch. For example, Mr J, from Queensland, posted an application on 5th February, 1985 and his cheque was processed by 14th February. On enquiring on 19th March, he was told that the certificate would be sent that week. It finally arrived in early May. Before his certificate was issued, a priority counter application was made on his behalf. The cost to the complainant, including phone calls, was approximately $45.

Mrs M, from the Northern Territory, posted her application on 4th February, 1985 and her cheque was cleared by 14th February. When Mrs M rang the Registry on 25th March, she was told that the certificate would be ready to post on 28th March. The certificate arrived on 12th April and was stamped, "Issued at Sydney, 3rd April, 1985". The delay forced Mrs M to cancel her travel plans and to forfeit $100 fare deposits.

24. Builders' Licensing Board

The Builders' Licensing Board is not a big agency, but a relatively large number of complaints against it are received in the Office of the Ombudsman. Statistics for the last four years are as follows:

Year	No. of Complaints	Declined	Discontinued	Wrong conduct	No wrong conduct
1981/82	65	9	11	2	20
1982/83	56	17	14	1	11
1983/84	72	24	17	1	6
1984/85	64	17	22	—	4
Totals	257*	67	64	4	41

*Figure includes complaints in other classifications — for example, outside jurisdiction.

It can be seen from these statistics that the relatively numerous complaints against the Builders' Licensing Board resulted in few findings of wrong conduct. Many of the complaints — more than half, in fact — were declined at the outset or discontinued after preliminary enquiries were made.

The main reason for declining complaints was that the Builders' Licensing Act provides an avenue for arbitration, once matters have reached a certain stage. However, many of the complaints have been discontinued after long and time-consuming enquiries, often with the matter little advanced, from the complainant's point of view. To understand the reasons for these complaints being discontinued, it is necessary to consider some of the factors that influence the relationship between people wishing to build houses and the Builders' Licensing Board.

The builder engaged to construct a house enters into an insurance agreement with the Board, under which rectification work up to a certain value may be undertaken, according to specific procedures, in the event of faulty workmanship. Such agreements apply only to work done by licensed builders. If the Board, acting upon a complaint from a prospective owner, decides that work is faulty, it usually tries to negotiate informally with the builder for any faults to be remedied. Such negotiations are generally conducted by the inspectorial staff of the Board. If informal negotiations are unsuccessful, the Board's staff may issue rectification orders, for which there is formal provision under the Act. It is the understanding of this Office that the majority of complaints to the Builders' Licensing Board are settled after the negotiation and rectification order stages have been completed.

If genuine problems still exist, the prospective owner may make an insurance claim to the Board. If this is approved (within specific limits) the prospective owner is asked to obtain three quotations from builders (other than the one who failed to remedy the fault) as to the cost of rectification. The quotations are then considered, but need not be accepted, by the Board. Once the Board accepts a quotation, rectification work proceeds.

Since the building of a house involves major decisions for most people, and because the process outlined above can be protracted, there are occasions when relations between a prospective owner and the Board become strained. In some cases the prospective owner might have high expectations of the Board: for example, that the Board's officers will act immediately and in a punitive way against a builder. In almost every instance there are numerous oral and written communications between the prospective owner and the Board's staff, and these can give rise to misunderstandings; this can be the case particularly when an Inspector makes a casual remark which is interpreted as being "in favour" of the prospective owner. Tension can also arise if there is apparent delay in completing work that has been negotiated or made the subject of a rectification order; interpretations of compliance can vary widely from builder to Board, to prospective owner. At a later stage, there might be disagreement about the amount of work to be covered by insurance, or over the suitability of quotations for rectification work obtained by the prospective owner.

By the time they complain to the Ombudsman's Office about the Builders' Licensing Board, prospective owners have often compiled a substantial dossier, sometimes including reports that they have commissioned on their own behalf from architects and engineers. They have an intimate knowledge of myriad details in a matter which might well have come to dominate their lives, sometimes causing them great financial loss and stress. In many cases, however, their disputes with the Builders' Licensing Board revolve around differences of opinion as to whether particular rectification work should be done, or whether the premises in question have been restored to a satisfactory standard: for example, should concrete piers be placed under a house to prevent further cracking of brickwork; has the replacement of a few patio tiles solved the problem, or should they all be torn up and relaid? By and large, these are questions in which the Office of the Ombudsman would not seek to substitute its own opinions for those of the public authority whose function it was to decide such things. Of course, a decision of this kind might appear so unreasonable or bizarre as to warrant investigation, but that it is not the case in the majority of complaints against the Builders' Licensing Board. The result is that a relatively large number of matters are eventually discontinued after the complex technical issues have been defined; this can itself require a considerable amount of the time of the investigation staff of this Office, and of the officers of the Builders' Licensing Board. However, this can be justified when the complainants have a clear understanding of the decisions that have been made, even though in some cases they may not agree with them.

25. Visits to Juvenile Institutions and Residential Care Units

This year saw a reduction in the number of visits made to juvenile institutions. The major reasons for this were:

— the closure of and/or reduced numbers of residents accommodated in such establishments following government policy initiatives towards relocating young offenders and wards into the community;

— the generally low level of complaints received during visits to residential care units last year;

— the need to allocate scarce resources to those areas generating the most demand for service (i.e. the major juvenile remand centres and prisons).

No visits were made to residential care units this year.

It is intended to continue periodic visits to the major institutions (i.e. Minda Remand Centre, Worimi Remand Centre, Cobham Youth Centre and Mt. Penang Training School). As well, arrangements have been made to commence regular visits to the new Yasmar Youth Centre at Ashfield.

ORAL COMPLAINTS RECEIVED AND DEALT WITH — VISITS TO JUVENILE INSTITUTIONS
1st July, 1984 to 30th June, 1985

NATURE OF COMPLAINTS	INSTITUTION				TOTAL
	Worimi Remand Centre, Broadmeadow	Cobham Remand Centre, St. Marys	Minda Remand Centre, Lidcombe	Mt. Penang Training School, Gosford	
Department of Youth and Community Services					
Activities		4			4
Clothing	1	4			5
Day/Weekend Leave			1	1	2
Enquiry re Current Complaint	1		1		2
Facilities			1		1
Food	1	4	1	1	7
Future Placement	1		2		3
Programmes and Amenities			2		2
Release Date				1	1
Requests			1		1
Rules			3		3
School Attendance		1			1
Smoking	1		1		2
Transfer	1		1		2
Visits			3		3
Totals	6	13	17	3	39
Other Authorities					
Police			2		2
Courts (no jurisdiction)			2	2	4
Totals			4	2	6
TOTAL COMPLAINTS DEALT WITH	6	13	21	5	45

26. Bribes for Taxi Drivers' Licences

On 19th April, 1985 the Ombudsman received an anonymous complaint alleging, "... at least amongst the immigrant Asian refugees it is commonly understood that bribes have to be paid for driving licences", and, "... it is simply accepted that a sum ($100 plus) has to be paid through a driving school, which can then guarantee the result of the official driving test". The complainant named two driving schools.

In response to preliminary enquiries by this Office, the Commissioner for Motor Transport advised that he had ordered an examination of the driving test records at the Fairfield Motor Registry for the months of January, February and March 1985. This showed that three driving schools, including one named by the complainant, had a pass rate higher than the average. The Commissioner arranged an investigation of all three driving schools, and in particular of the average pass rate by certain examiners for those schools. Should the investigation reveal improper practices, the matter will be referred to the Police.

CORRECTION

26. The heading should have read "Bribes for Drivers' Licences". In the second sentence "two" should have read "one" and "schools" should have read "school".

In an interim report the Commissioner has said that there is evidence of two driver examiners favouring the three driving schools. However, as of 27th August, 1985 there was no proof of the payment of bribes.

27. Control of Agricultural Pesticides in New South Wales

During the year this Office completed a complex investigation involving agricultural pesticides, mainly the organochlorines, and in particular Heptachlor. Mr J. Chambers, a dairy farmer near Kempsey, complained that, because pesticides had not been correctly labelled and because he had not been told of the long-term problems of using Heptachlor, a vital part of his dairy farm had been rendered useless for the growing of lucerne, or "sterilised". The labelling of pesticides, including agricultural ones, is controlled by the Pesticides Act 1978. The Act provides, among other things, for the registration of pesticides and for their correct labelling according to the terms of the registration. It also provides that a pesticide might be controlled by a Pesticide Order rather than by registration; this is apparently intended for cases where advice is awaited as to suitable uses for a pesticide, but where restricted use of the pesticide is still to be permitted. The Act was administered by what was known, at the time of the investigation, as the Pesticides Registration Section, headed by the Registrar of Pesticides, located in the Department of Agriculture.

Further, field officers of the Department of Agriculture have as one of their functions the giving of advice to farmers on a wide range of matters, including the use of appropriate fertilizers and pesticides. Mr Chambers believed that the field officers knew, or should have known, about the long-term problems of Heptachlor after tests were conducted in the United States and Australia as early as the mid-1970s. He maintained that staff of the Department of Agriculture knew that he was using Heptachlor in 1981 and 1982, and that they had a responsibility to warn him against the chemical. Mr Chambers further argued that Pesticide Orders for Heptachlor had been incorrectly administered, and that the Department had erred by allowing pesticides which were restricted in their use by Pesticide Orders to be sold while bearing old labels that gave a wider (and by that time illegal) range of uses.

On the question of the amount of information that was or should have been given about organochlorines and Heptachlor, it was found that a good deal of general publicity had been arranged by the Department, but that it was impossible to tell whether, at the time, the pamphlets, lectures, letters and so on had been adequately disseminated and understood by the farmers for whom they were intended. The Department's files showed, however, that a decision had been made not to give media publicity to organochlorines, apparently for fear that the publicity might be used improperly by conservationists and alternative-lifestyle communes in the north coast area. The Deputy Ombudsman found that this decision was based on irrelevant considerations, and was wrong in terms of the Ombudsman Act.

The investigation showed that there had been a delay in issuing Pesticide Orders for Heptachlor, and that the Orders had been allowed to lapse on more than one occasion. These problems had apparently been caused by the introduction of the regulatory provisions of the Pesticides Act at an earlier time than had been anticipated by the Department, and by the workloads and resources problems that had existed from that period; in fact, delays in the registration of pesticides appeared to have increased, the longer the Act had been in force. During the relevant period Heptachlor (and a fertilizer containing Heptachlor known as G Five Plus) continued to be manufactured and distributed, bearing an old label which contained instructions for use that had been overridden by the Pesticide Order. The Department argued that it would have been physically impossible to recall stocks or to have the Department's officers travel around, altering labels. The Deputy Ombudsman found, however, that the Department could at least have advised manufacturers to make an interim change to their labels: for example, by obliterating the old instructions and overprinting the words "Read the Pesticide Order", or something similar.

The report on the investigation emphasised the fact that it made no determination on the virtues of Heptachlor. However, in complaints of this kind that involve technical questions as well as matters of administration, the technical and administrative aspects are not easy to separate, particularly when there is an amount of media publicity, as in the Kempsey case. Largely as a result of the publicity, this Office received representations from environmentalists on a range of issues, including the manner in which pest exterminators were allegedly using organochlorines in and around houses. A specific complaint on this aspect of organochlorine use was lodged, but the complainant later withdrew it, possibly because she proposed to take legal action.

During the later stages of the investigation the Department of Agriculture made several changes to the organization of its pesticides administration and provided the unit with additional resources. At about the same time it was announced that somewhat wider use could be made of organochlorines for pest extermination than had been possible under the Pesticide Orders. That decision led to further protests to this Office by interested groups, but there have been no additional formal complaints.

28. Department of Health Complaints Unit

As noted elsewhere in this report, members of the public who have a complaint about a public authority or Council are encouraged to pursue the matter as far as possible with the authority concerned before bringing the matter to the attention of the Ombudsman. However, even this process has its difficulties, especially when authorities fulfil a range of roles or are regionalised, or where no satisfactory internal procedures exist for dealing with complaints.

Some departments, naturally, have far more contact with the public than others, and the chance of complaints being made about the conduct of these authorities or their officers is greater. Examples of authorities fitting this category include the Department of Corrective Services, the Police Department, the Department of Education and the Department of Health.

The latter body, the Department of Health, last year set a precedent in forming its own internal Complaints Unit. Many matters which would formerly have come to this Office as complaints are now referred to and dealt with by the Unit. An internal complaints system results in a more efficient handling of complaints and provides the mechanism for more effective resolution of problems than may otherwise result in an investigation by the Ombudsman. Of course, if people are not satisfied with the manner in which an internal complaints unit has handled a matter, they are still able to make a complaint to the Ombudsman.

A brief description of the role of the Health Department Complaints Unit is outlined below:

The Complaints Unit was set up in January 1984. The then Minister for Health had expressed concern at the level of complaints being received from various sources (including the Office of the Ombudsman) about the Department, and an examination of the system for handling complaints showed that it was fragmented, with no common approach to basic issues and that, because of the regionalisation of the department, single issues were being resolved differently from area to area, depending on where the conduct the subject of complaint occurred.

Prior to the establishment of the Complaints Unit, some major complaints had arisen which, because of lack of resources, were not being investigated. The Chelmsford Hospital issue was one of these but the Complaints Unit has now set up an enquiry to investigate these matters. Ms Helen Hurwitz, an Investigation Officer with this Office, has been seconded to the Department of Health Complaints Unit to assist with this particular enquiry.

The Complaints Unit has seven important roles:

1. to examine instances of malpractice, negligence or abuse and recommend a departmental response in terms of the Medical Practitioners Act and other legislation. This role is qualifed to the extent that allegations concerning doctors in private practice can be examined only with the authority of the Secretary of the Department;

2. to examine and monitor consumer complaints and recommend departmental response. To achieve this, a data base has been created providing a coding and classification system for complaints;

3. to develop and review guidelines and practices. For example, to review procedures reegarding possible discrimination against pensioners and other non-insured patients in public hospitals;

4. to periodically report on and overview trends of complaints;

5. to provide an analysis of the implications of and recommendations for the ongoing policy and practices of the Department;

6. to liaise with a variety of community and interest groups such as the Pensioners Association, the Australian Consumers Association, the Australian Medical Association and the Doctors' Reform Society; and

7. to develop projects which actively seek feedback on the quality and availability of services.

This initiative has been welcomed by the Ombudsman, and other government departments and authorities are encouraged to look closely at the role of the Department of Health Complaints Unit with a view to implementing similar procedures within their own organisations.

29. Public Tenants Appeal Panel

In January 1985 the Minister for Housing established a Public Tenants Appeal Panel to consider complaints from Housing Commission tenants. The Panel is intended to provide an avenue of appeal to Housing Commission tenants who think that decisions of the Commission are contrary to current policies or are unfair or unjust. Appeals can be made in the areas of tenancy management, rental accounts administration, processing of rebates and maintenance of dwellings. The Panel is not able to look at matters relating to applications for accommodation, settling of rents or matters in which legal action has been taken.

The Appeal Panel comprises a representative tenant (who is elected by tenants), a Commission Officer and an independent person appointed by the Minister to act as a convenor.

Access to the Ombudsman should be a remedy of last resort, and so this Office reviews each complaint received from a Housing Commission tenant to determine whether it involves a matter which should be dealt with in the first instance by the Public Tenants Appeal Panel. Where this is considered appropriate, the complainant is referred to the Panel. A complainant who remains dissatisfied after the Panel has dealt with a matter retains the right to approach the Ombudsman again.

30. Consumer Claims Tribunal — Amendments Still "Under Review"

It was anticipated that proposed legislative amendments flowing from the review of the administration and operation of the Consumer Claims Tribunal would be placed before Parliament in early 1985. This has not occurred.

The Ombudsman understands that a discussion paper prepared by the Senior Referee and arising from the review was referred to the Department of Consumer Affairs in July 1984. The Commissioner for Consumer Affairs has informed this Office that proposed amendments to the Consumer Claims Tribunal legislation is one of several matters now being reviewed with a view to a submission to the Government before the end of the year.

The Commissioner said that, because of a number of factors, it has not been possible to complete the review of the Consumer Claims Tribunal legislation any earlier. Those factors included:

- a comprehensive legislative programme, including new legislation in the areas of fair trading, residential tenancies and chattel securities, and amendments to existing legislation in the areas of travel agents registration, valuers registration and Auctioneers and Agents;
- a Management and Strategy review of the Department involving the retention of external consultants and an extensive programme of re-organisation, and a total revision of the management structure of the Department;
- the fact that the Consumer Claims Tribunal is continuing to deliver "quick and speedy justice" for thousands of consumers each year.

This Office will continue to monitor the position. Complaints received by the Ombudsman relating to the Tribunal are currently declined in accordance with the views expressed in the 1982/83 Annual Report.

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

The 1982/83 Annual Report outlined an investigation of the Heritage Council's involvement with proposals to demolish the Rural Bank building in Martin Place, and the 1983/84 Annual Report dealt with a complaint about failure to preserve the historic house Abbotsford, near Picton. Both Annual Reports referred to the fact that the Heritage Council relies on the Department of Environment and Planning for its administrative support. This Office's wrong conduct report on Abbotsford found that the support was ineffective, and recommended that the Heritage Council have its own administrative support unit. The Director of the Department strongly disagreed with this recommendation.

Two further complaints again drew attention to the relationship between the Heritage Council and the Department. The first was a complex matter involving land, adjacent to Rouse Hill House, which was thought to be associated with the site of the Battle of Vinegar Hill, the clash in 1804 between soliders and convicts. The owners of the land were initially prevented from building on the land, which at various times from July 1979 was covered by Interim Conservation Orders. The Heritage Council was advised by the Department that any development on the land should be "sympathetic with the environs of Rouse Hill House"; that was in late 1980. However, the Interim Conservation Orders were first placed on the land on the grounds that it was associated with the Battle of Vinegar Hill. The landowners wished to build a house on a spur running down from Rouse Hill House; officers of the Department tried to persuade the owners to build below the spur, out of sight of the main road, but the owners would not agree. Nor did the owners, a Lebanese family, wish to sell the land, to which they had become closely attached, and where they had planted a substantial orchard.

In early 1981 the Department offered to buy the land, but the owners believed that the suggested price did not take into account the cost of improvements and the problems involved in their finding another site. Their counter-offer was considered excessive. In July 1981 the Interim Conservation Order on the land lapsed, and was renewed some three months later. It was decided to hold a Commission of Inquiry under the Environmental Planning and Assessment Act into the site of the Battle of Vinegar Hill. The land owners asked that negotiations over their land be suspended during the Inquiry, and the Department agreed.

In May 1982 the Commission of Inquiry found the land in question, among other areas, was not the site of the battle, and the second Interim Conservation Order was revoked in July 1982. The owners assumed that they had "won", and in September 1982 wrote to the then Minister that they had applied to Blacktown City Council for permission to build. They received no reply. In December 1982 the landowners obtained building permission from Blacktown City Council, and prepared to build a house on the spur.

In June 1983 the Department, discovering that building had commenced, placed various restrictions on the activity, and eventually obtained orders in the Supreme Court. On 26th August, 1983 the land was resumed, essentially on the grounds that it was needed to protect the environs of Rouse Hill House.

The report on the Deputy Ombudsman's investigation was strongly contested by the Department and the Heritage Council, which maintained that negotiations had always proceeded on the basis that the aim was to protect Rouse Hill House, rather than to preserve land associated with the Battle of Vinegar Hill. It was argued that the owners had offered to sell the land. The owners maintained, to the contrary, that they had understood the land to be needed because of its association with the battle, and that they had not freely accepted an offer to purchase the land.

The Deputy Ombudsman preferred, in general, the landowners' version of the negotiations. He also found that the Department and the Heritage Council had been unreasonable in allowing a conservation order to lapse, and in not renewing the order between July 1982 and June 1983. In particular, he was critical of the Department's failure to take any action following its receipt of the September 1982 letter from the landowners to the Minister saying that building was to begin. In view of the oversights, the Deputy Ombudsman believed that it was unreasonable of the Department to resume the land when it did. The question of compensation for the resumed land is now before the courts.

The second complaint concerned the partial demolition of houses at St. Mark's Road, Randwick, to make way for the expansion of Netherleigh Private Hospital. The houses were among eleven buildings classified as a streetscape by the National Trust in July 1981, and protected by a notice under Section 130 of the Heritage Act (the Act) in January 1982. The proprietors of Netherleigh Private Hospital had been ordered by the Department of Health and the Board of Fire Commissioners to improve their premises. They proposed to do so by building on the land occupied by Nos. 42-44 and 46 St. Mark's Road, and to that end sought permission to demolish the houses there by serving a notice under the provisions of Section 132 of the Act, which was received in the Department of Environment and Planning on 26th April, 1984.

The Act provides that, in the absence of further action, any order made under Section 130 expires within 40 days of the receipt of a notice under Section 132; that period ended on 4th June, 1984. However, on 1st June an order against demolition was issued under Section 136 of the Act; that order was due to expire at midnight, Friday, 29th June, 1984.

In the meantime, it was decided that an Interim Conservation Order (with a maximum currency of two years) should be placed on the houses. A draft Order was sent to the office of the acting Minister on 26th June, and was signed by him on 29th June. However, an Interim Conservation Order becomes effective only upon its publication in the Government Gazette. That was not arranged, in this instance, before the expiry of the Section 136 anti-demolition order at midnight on Friday, 29th June.

The developers had made prior arrangements, paying compensation to tenants, booking motel rooms for them, hiring demolition contractors, and so on. In the early hours of Saturday morning the demolishers moved in, but work was halted after an hour or so at the request of an officer of the Department of Environment and Planning. By that time the houses appeared smashed beyond effective restoration.

The complainant in the matter, one of the erstwhile tenants, learned that a person had visited the Department late on the afternoon of 29th June, inspected the Heritage Register, and learned of the Section 136 order. The complainant believed that this visit should have alerted the officers of the Department; there was even a hint that the Department might have been involved in some sort of collusion.

Investigation by this Office showed that a solicitor acting for one of the parties to the development checked the Heritage Register at about 4.30 p.m. on 29th June, noted that no further notices had been gazetted, and advised the developers of the expiry of the Section 136 notice at midnight. Other legal advisers told the developers that there would then be no legal impediment to demolition. During his visit to the Department, the solicitor is said to have evaded close questioning by telling each of the two officrs who attended to his enquiry that he had given further information to the other.

The Deputy Ombudsman concluded that, while the conduct of some of the Department's officers might have been wrong, it did not warrant the preparation of a formal report, since the officers had drafted an Interim Conservation Order by 26th June, and had little reason to anticipate the deception and speed involved in the demolition.

During the Abbotsford and Rouse Hill investigations, and particularly after the St. Mark's Road debacle, the Department of Environment and Planning made substantial changes to the staffing and procedures of the Heritage and Conservation Branch, which among other things provides administrative support to the Heritage Council. The changes were discussed initially by the Deputy Ombudsman with the Director of the Department and the Manager of the Branch, and later by the Ombudsman and Deputy Ombudsman with the Minister for Planning and Environment, the Hon R. J. Carr, during a consultation on the Rouse Hill report.

It was concluded that, in view of the changes within the Heritage and Conservation Branch, the recommendation for a separate administrative unit for the Heritage Council would not be pursued; the changes would, it was hoped, be reflected in a reduced number of complaints to the Ombudsman about heritage matters. Up to July 1985 there were no further serious complaints of that nature.

32. The Ombudsman and Universities

Complaints by Students

The Office of the Ombudsman has continued to receive complaints from students in universities, colleges of advanced education and colleges of technical and further education about the grades they have been awarded. It was pointed out in the previous annual report that a decision of the Federal Court suggested that the process by which a university determines the results and ultimately the academic performance and standing of students is of an administrative character. The same reasoning applies to colleges in the tertiary education sector. During the past year, then, this Office has taken up complaints by students where the conduct was such that the Ombudsman, in the exercise of his discretion, believed that investigation should occur.

One of the matters investigated concerned the examination of a dissertation for the subject Law 514 at Macquarie University. There were many similarities with the case that was reported in some detail in the 1983/84 Annual Report (pp.21-24); indeed, it appeared at the end of the investigation that there had again been wrong conduct, and a draft to that effect was prepared for comment by the complainant and the several university staff who had been involved in the matter. When these comments were considered and some further enquiries made, it was decided that any deviation from the set procedure that might have occurred would not have been sufficient to affect the grade awarded to the complainant; and that there was no evidence of bias on the part of one of the markers, as alleged by the complainant. The two significant differences between this case and the one reported last year were that, in this case, the supervisor of the complainant's Law 514 project had at all times agreed with the assessment of the marker whose grade was finally accepted; and that marker had been appointed according to the set procedure. As a consequence, and in contrast to the previous case, there had been no occasion, according to the prescribed rules of assessment, for considering the appointment of a third marker. The finding in this case was "no wrong conduct", after a very long and complex investigation.

A general conclusion might be drawn from these and other cases that have been investigated by this Office during the last three years. Having assured themselves that the assessment they proposed to adopt is not itself manifestly unreasonable, those responsible for a course or project might consider some procedural guidelines; for example:

1. The assessment details and the procedures for assessment are set out in writing early in the course.

2. If the details and/or procedures *must* be varied, then such variation(s) are communicated fully and in writing within a reasonable time.

3. Those responsible for assessment must be familiar with the set details and procedures and must follow them.

Obvious though these steps may seem, they can still be overlooked, particularly when students are themselves involved in determining assessment details, and when assessment has to be completed within a relatively short time at the end of a course. On the broader questions surrounding allegations of unfair conduct and bias, all that can be said is that, when it is known that such allegations might be made, then special care must be taken in an effort to avoid even the appearance of bias or unfair considerations.

Complaints by University Academic Staff

Complaints were made by members of the academic staff of the Law School at Macquarie University about the way their work had been treated by the university authorities. One complaint largely concerned matters of employment and, in the absence of detailed submissions on the point from the complainant, was declined because it fell outside of the jurisdiction of the Ombudsman. The other complaint was lodged by several academics whose marks for a first-year course in Law had been changed by the university authorities. Here again there was doubt about jurisdiction, both as to whether the conduct complained of related to aspects of employment, and whether it related to matters of administration. At the invitation of this Office, Mr M. Newcity, on behalf of the group of complainants, made detailed submissions on the subject of jurisdiction. The complaint was eventually put to the university authorities who, while replying in detail, put further arguments on the jurisdiction question.

The Ombudsman then sought the advice of independent counsel, Mr J. C. Campbell: this was to the effect that the complaint lodged by Mr Newcity was indeed outside the Ombudsman's jurisdiction, but that certain aspects of the University's conduct could be investigated of the Ombudsman's own motion, pursuant to Section 13 of the Ombudsman Act. Copies of the advice were sent to the university authorities and to the group of law academics, and further submissions were received from them. Having considered the, by now, voluminous material arising from the complaint, the Ombudsman decided not to undertake an investigation, giving his reasons as follows:

> As I see it, the central issue in the complaint relates to the manner in which the Senate of the University, applying certain statistical data, interfered with the academic decisions of certain teachers of law in the School of Law. The result in the particular case of the action taken by the Senate was that some students received grades higher than they otherwise would have received. The material indicates that this was the first and only occasion on which such action had been taken at the University. The students have long since been informed of their results as approved by the Senate.
>
> I can appreciate the concern which the complainants expressed. Like Mr Campbell, I hold the view that it would be open for me to carry out an investigation under the provisions of the Ombudsman Act into what I describe as the central issue, acting not on the complaint of the complainants but on my own motion. However, as the matter has so far been a "one off" situation and having regard to the resources available to this Office, I do not believe, as a matter of discretion, that I should undertake any investigation.

33. Sydney City Council: Darlinghurst — Kings Cross Brothels

The 1982/83 and 1983/84 Annual Reports discussed the investigation of a series of complaints about the alleged failure of the Sydney City Council to take sufficient action to prevent the proliferation of brothels in the Darlinghurst/Kings Cross area and the associated problems of noise and public nuisance.

The Ombudman found that 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 purpose of prostitution or soliciting for prostitution in residential areas where related activities would result in unreasonalbe disturbance to the amenity of the neighbourhood, and that would make such other provisions for the control and regulation of such premises in other areas as the Council thought necessary;

— liaison with the Department of Attorney-General and Justice during the preparation of the draft plan;

— Council's making a submission to the Select Committee of the Legislative Assembly enquiring into prostitution.

In response to the Ombudsman's report the Council declined to carry out the recommendation to prepare a Local Environmental Plan to protect the amenity of people in the residential areas of Kings Cross and Darlinghurst or to create a task force of its staff to police illegal brothels. Council maintained that there was no prospective successful purpose in pursuing that course of action. In view of the Council's response the Ombudsman made a report to Parliament in November 1983, saying he believed that Council's attitude was a partial abdication of its responsibilities to residents.

At the end of 1984 a special sub-committee of the Council was set up to consider the problems of prostitution. The sub-committee has prepared a Draft Local Environmental Plan which recommends that brothels be restricted to those zones in which commercial premises are permissible, with the exception of certain business zones such as neighbourhood business zones. Development for the purposes of prostitution will require the Council's consent. The Draft Plan has yet to be adopted by the Council.

The Council's proposals are similar to those introduced in Melbourne, where the Melbourne Metropolitan Planning Scheme Ordinance was amended to allow brothels to be established in certain zones, with Council's consent. The objective of the amendment is to protect the amenity of residential and reserved living zones by requiring a buffer of at least 40 metres between the zones and the site of a brothel. The Melbourne Metropolitan Board of Works also allowed one year for existing brothels to obtain a permit from the Council. The legislation allows the Council to close down brothels which do not have a planning permit.

This Office is monitoring the progress of Sydney City Council in taking action on Ombudsman's recommendations following a complaint by residents in Darlinghurst and Kings Cross that prostitutes were taking over their back lanes.

The North Sydney Council has prepared a Draft Local Environmental Plan which is concerned with prohibiting prostitution where there is unreasonable disturbance to a neighbourhood. This Draft Plan was adopted by the Council in 1983 and submitted to the Department of Environment and Planning for certification. The Department is waiting for the release of the report of the Select Committee of the Legislative Assembly enquiry into prostitution before issuing a certificate for the plan. It is expected that the report of this Committee will be released in late 1985.

The Ombudsman's report to Parliament also questioned the role of the New South Wales Police Force in assisting the Sydney City Council to take action to prevent the illegal operation of brothels. The report suggested that there was a lack of co-operation by the police in responding to requests by the Council for affidavit evidence of the operation of premises as a brothel and the identity of the owners of premises. This information is required if the Council is to commence injunction proceedings.

The matter has been the subject of continuing correspondence between this Office, the Minister for Police and the City Council, and it now appears that procedures for Police to assist the Council's solicitors have been improved. The Council officers or the Council solicitor can contact the officer in charge of the Vice Squad, who will make an application under the Disorderly Houses Act if sufficient evidence is available.

The Minister for Police has also informed this Office that the Commissioner for Police will keep the matter under close review.

34. Innisfallen Castle

As mentioned in last year's Annual Report, the Ombudsman asked the Heritage Council whether it proposed to make a preservation order over Innisfallen Castle, and thereby give the owner some rights of objection under the Heritage Act.

The Heritage Council has now made an Interim Conservation Order over the whole of the building and its 8000 square metre site.

The complainant now has a right of objection to the Minister, who could then appoint a person to hold an inquiry into the objection.

The Office of the Ombudsman has now ended its involvement in this matter.

35. Department of Motor Transport: Role of Taxi Co-operatives in Allocation of Taxi Plates

The annual reports for 1982/83 and 1983/84 noted that the Ombudsman had been critical of the role of taxi co-operatives in controlling entry into the taxi industry and had suggested that the Department of Motor Transport change the procedure for determining eligibility in order to make them fair and equitable.

The points raised by the Ombudsman were included in a review of the structure of the taxi-cab industry, in which the industry and the general public participated.

The Department's report following the review referred to the suggestions made by the Ombudsman. The Minister for Transport is now considering proposals for amending the legislation.

36. Hermitage Reserve — Sydney Harbour National Park

The Sydney Harbour National Park has been of continued interest to this Office. As stated in the 1983/84 Annual Report, Mr P. Beggs, the original complainant, further complained that, following the gazettal of the Reserve on 9th March, 1984, the National Parks and Wildlife Service had not adequately maintained the Reserve. Mr Beggs made simultaneous representations to the Minister for Planning and Environment, who advised Mr Beggs that there was still an enormous amount of work to be done before the long-neglected parkland could achieve its full potential, and that this work would be undertaken as permitted by the priorities within which the Service must allocate its available financial and staff resources.

Two inspections by this Office showed that the track through the parkland had been improved, and some encroachments removed.

Mr Beggs also complained that the Maritime Services Board had not carried out the Minister's promise of unimpeded public access to the Reserve and had considered building plans that constituted encroachments on the area.

Preliminary enquiries showed that the Minister had told Mr Beggs that he would ensure that an encroaching wall would be breached at its in-shore end to provide unimpeded public access at beach level. However, the promise was not carried out because an adjoining owner had withdrawn an application to provide access to this jetty; that application had prompted the Minister's promise in the first place. The Board and the Service are now examining an alternative proposal to provide access to that owner's jetty. In this connection, it is understood that both authorities are giving favourable consideration to a proposal made by Mr Beggs. Under the circumstances, this Office took the view that the Board should be given an opportunity to give proper and adequate consideration to that alternative and that, at this stage, it would be premature and inappropriate for this Office to intervene.

As to Mr Beggs' objections concerning the building plans, the Board advised this Office that the matter was fully dealt with by the Minister for Public Works and Ports. Mr Beggs was advised that, under the circumstances, there was no utility at this stage in this Office re-investigating the matter. Ministerial conduct is expressly excluded from investigation under the provisions of the New South Wales Ombudsman Act. (This is not necessarily the case in other countries of the world.)

Accordingly, preliminary enquiries into Mr Beggs' complaints about both the Service and the Board were discontinued.

37. Corporate Affairs Commission: Registration of Business Names

More complaints have been made by people who disagree with decisions of the Corporate Affairs Commission about similar names on the Business Names Register. The registering of a business name merely gains a licence to conduct a business under that name for a specified time, but people come to think that they "own" the name. This is the cause of most disputes.

In determining whether a name is available for registration, the Commission has to decide among other things, whether a proposed name is likely to be confused with an existing registered name. Checking for similar or identical names is still carried out manually. At this stage errors occur, and the subjective judgements of the Commission sometimes cause contention. Different individuals may well arrive at different conclusions about the similarity of business names, but the Commission alone has the responsibility for deciding whether a proposed name is available for registration; that decision, once confirmed by the Commission, can only be set aside by the Court.

The Commission is trying to minimise checking errors, and a computer, planned for early 1986, should help. However, there may still be errors that cause inconvenience and financial loss for the affected parties.

This Office is concerned that, where an "inadvertent" registration has taken place, there can be excessive delay before the status quo is restored. Both the person who first registered the name and the person who registered a similar name have rights. The procedure for resolving problems attempts to be fair, but involves long negotiation.

Two complaints provide examples of problems:

1. A company called "X" was formed and the name registered, as required, in 1966. The company was engaged in the motel business and commenced operating a motel on the coast. In 1983 another company, which operated a motor lodge approximately six miles away from "X", changed its name to something very similar, "XY", and this was duly registered. Company "X" wrote to the Commission on 11th November, 1983 complaining about the situation which had arisen, and the Commission negotiated with the other company to give up its name. The matter was finally resolved in April 1985, some seventeen months later, when the second company again changed its name.

2. A firm traded as "A" and built up a chain of outlets, which it later sold. A condition of sale was that the present trading name could not be used. However, unbeknown to the firm, one of the purchasers had applied to register the name "WAs'" (W being the suburb and the previous trading name made plural). This name was accepted by the Commission and duly registered. The firm complained in December 1983. The Commission said that it did not intend to take any action, but that the firm could consider legal action of its own. After this Office raised the matter, in March 1984, the Commission sought cancellation of the name. The process of negotiation was unsuccessful, and the similar name was cancelled in February 1985. A new name was approved in April — some sixteen months later.

A person can take legal action for "passing off", but this process is time consuming and expensive. Computerisation of the checking procedure may eliminate errors. If not, other steps will have to be considered by the Commission to ensure that neither party in an "inadvertent" registration is unduly inconvenienced or penalised.

38. Building Overshadowing Hyde Park — Final Developments

The 1983/84 Annual Report described investigations of the Height of Buildings Advisory Committee and the Sydney City Council in their dealings with the proposed construction of a tall building in Elizabeth Street, Sydney; this building would have overshadowed Hyde Park and created adverse "wind tunnel" effects.

The results of those investigations were reported to Parliament. Following that report, the then Attorney-General, the late Mr D. P. Landa, sought legal advice and decided to ask the Land and Environment Court to determine the validity of the decisions of the Height of Buildings Advisory Committee and the Minister for Planning and Environment in connection with the building.

On 24th and 25th October, 1984 these issues were considered by the Land and Environment Court. His Honour Mr Justice Cripps found the purported resolutions of the Height of Buildings Advisory Committee and the purported concurrence of the Minister to be void because the Committee's decision had been based on irrelevant and extraneous considerations. (Substantially the same reaons on which the Ombudsman had reached his view.) His Honour restrained any development on the site based upon the purported concurrence. No appeal was lodged against this judgement.

As a result of the Ombudsman's investigations, the building was redesigned to eliminate the problem of overshadowing of Hyde Park. This is an architect's perspective of the new building.

The Ombudsman made a second report to Parliament on this matter in order to bring members of Parliament up to date. It was felt that this case highlighted the role of the Ombudsman as an institution for the review of Government administrative action. If the Ombudsman had not investigated this matter, it is almost certain that the proposed building would have been constructed pursuant to a void approval. A recommendation in the Ombudsman's report led to the issues being decided by the Court. It is clearly in the public interest that issues of such importance to the community as a whole should come before a court of law for determination rather than being buried in the files of the bureaucracy.

In his report to Parliament, the Ombudsman drew attention to the fact that the matter would not have gone before the Court but for the actions of the Attorney-General of the day. This was truly a decision in the highest traditions of Attorneys-General, and one which has been of benefit to the citizens of Sydney.

39. Milk Sediment Testing in New South Wales

The Ombudsman's investigation into milk sediment testing in New South Wales was reported on in detail in the 1983/84 Annual Report. Briefly, following a detailed investigation, the Ombudsman found that the current practice employed by the NSW Dairy Corporation for testing the sediment content of milk was too subjective, being based entirely upon visual assessments made by different graders. Such a subjective test is apt to produce inconsistent and unreliable results. The Ombudsman recommended that field trials being conducted by the Corporation into the use of an electronic machine called the Chroma Meter II should continue. If the trials showed the machine to be suitable, the Chroma Meter should be promptly introduced. If the machine proved unsuitable, an alternative, less subjective test should be found and implemented.

Testing of the Chroma Meter continued until April 1985, because of difficulties in locating sufficient samples of defective milk for the trials. However, by April, almost 600 samples had been satisfactorily tested, and the Corporation considered that the instrument had adequately demonstrated its suitability for sediment testing. The Corporation decided to recommend this method of testing to the NSW Dairy Industry Conference and the Minister for Agriculture as the approved test for sediment.

The question of the use of the Chroma Meter was considered by the Dairy Industry Conference on 7th June, 1985, and the following resolution was passed:

> That Conference does not agree at this point of time to the introduction of the Chromameter for establishing sediment test results except for their use by Corporation supervisory staff to establish and regulate conformity of applied standards between factories and that any further application of the instrument be deferred pending the result of the DFA investigation into the further usefulness of the sediment test at all for NSW.

Consequently, the Corporation expects considerable opposition from the dairy industry to the introduction of the Chroma Meter. The Corporation has decided to conduct a symposium to be attended by representatives of industry and recognised authorities on milk testing to consider all aspects of the sediment test.

40. Department of Consumer Affairs: Allegedly Dangerous Hose Attachments

The 1983/84 Annual Report noted that the responsible public authorities had not prevented the sale of unapproved devices, operated by attachment to domestic water connections, to dispense detergents, liquid fertilizers, and other chemicals.

The Sydney Water Board and other water supply authorities throughout the State consider the unapproved devices to be a threat to the safety of the user, and to the public generally, because of the potential danger of having harmful chemicals drawn back into the water supply, and the pollution of garden taps and hoses by such material.

The connection of these devices to the Sydney water supply, through a domestic attachment, is prohibited and subject to a maximum penalty of $1000, plus $50 for each day of continued use. However, this prohibition has not been made widely known and, more importantly, the unapproved devices continue to be sold to a largely unsuspecting public.

The problem has caused concern to water supply authorities over a number of years. At the publication of the Ombudsman's 1983/84 Annual Report it was still receiving attention by the Products Safety Committee, following the setting aside of a recommendation made to the then Minister for Consumer Affairs following a conference of experts held early in 1983 at the instigation of the Ombudsman.

The Ombudsman believed prompt conclusion of the Committee's deliberations to be clearly necessary, but at the time this Annual Report was being compiled the matter remained unresolved.

41. NSW Division of Forensic Medicine — Non Retention of Blood Test Slides and Photographs

Messrs Brennan, Blair and Tipple, on behalf of Mr Michael and Mrs Lindy Chamberlain, complained about the way in which the Division of Forensic Medicine, New South Wales Department of Health, identified blood samples likely to be used in criminal trials. The complaint encompassed 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. A progress report on the investigation appears as Item 33 in the 1983/84 Annual Report.

The Ombudsman's investigation found that the Department did not keep test slides and plates of blood samples likely to be used in criminal trials, because this would lead to unnecessary work and require additional staff. The complainants contended that all test plates (particularly in criminal matters) should be stained, dried and preserved as a permanent record, and that the laboratory should be equipped with photographic facilities to record all results.

The investigation by this Office included the collection of details of procedures in several Australian and overseas forensic laboratories, an inspection and discussions at the South Australian Forensic Science Centre, Adelaide, the appointment of an expert to assist the Ombudsman, and the holding of an inquiry under Section 19 of the Ombudsman Act.

The Ombudsman concluded that the Department should have retained the test plates or the slides of the blood stain tests carried out by the New South Wales Forensic Laboratory in the Chamberlain case; the failure of the laboratory either to retain the test slides or to make photographs of them in the Chamberlain case prejudiced the defence and made it more difficult for the Court to ascertain the facts about the blood samples.

In his report, the Ombudsman made the following recommendations:

(i) That the Department develop criteria for the retention of blood stain test plates and slides and include in its laboratory manual both those criteria and steps to be taken to preserve and store the plates or slides.

(ii) Additionally or alternatively, that the Department introduce the practice of photographing blood stain test slides and provide the necessary facilities to enable this to be done.

(iii) That a review take place as to the procedures which ought to be followed in relation to the testing of anti sera received in the New South Wales Forensic Laboratory. These procedures (including the records to be kept of the testing) should then be set out in the laboratory manual.

On 8th August, 1985 the Deputy Premier and Minister for Health, the Hon R. J. Mulock, advised the Ombudsman that he had instructed the Department of Health to implement recommendation (i) and that recommendation (iii) had been implemented. The Minister said that recommendation (ii) concerning the introduction of the practice of photographing blood stain test slides is to be the subject of a research project within the Department so that its effectiveness and its usefulness in court cases may be tested.

On 16th October, 1985 the Minister tabled the Ombudsman's report in Parliament. Although he levelled some adverse comment at the Ombudsman's reference to the Chamberlain trial, the Ombudsman's report does not attempt to question the validity or finality of the court proceedings. The report examined the Forensic Laboratory's procedures and recommended that those procedures be altered so that, in future, all material is available for scientific scrutiny and examination, should the need arise.

The Ombudsman is the only outside body who can make recommendations for change in administrative procedures, and follow up those recommendations, if necessary, by report to Parliament. The Ombudsman is pleased that his recommendations have been accepted by the Department.

42. Misleading Advertising by Government Authorities: Slow Progress on Introduction of NSW Trade Practices Legislation

The 1983/84 Annual Report outlined an investigation into the conduct of the Land Commission and the Department of Lands concerning the sale of a block of land to a member of the public. The investigation found that the advertisement, which described the land as a "high quality" homesite, was misleading.

The Ombudsman recommended in a report to Parliament that the Government should consider the introduction of Trade Practices legislation to apply, among other things, to the sale of land and other commercial transactions of State Government departments and authorities; the legislation would, as far as possible, give citizens legal protection against government authorities similar to that which exists against private corporations.

The Government accepted this recommendation and the Minister for Consumer Affairs, the Hon G. Paciullo, advised that he hoped by late 1984 to seek Cabinet approval of a Fair Trading Act, to incorporate most of Part V and the relevant provisions of Part VI of the Trade Practices Act; this would be binding on the Crown.

The Ombudsman's Office has followed up the proposed legislation. In April 1985 Mr Paciullo advised that a working party comprising officers of each State's consumer affairs authority and the Commonwealth Attorney-General's Department was developing uniform fair trading legislation. The working party had prepared draft legislation for discussion at a special meeting of Consumer Affairs Ministers at the end of May.

To date State Cabinet has not approved Fair Trading legislation. Some 15 months have passed since the Premier publicly said:

> I am taking this matter very seriously. I have instructed the Consumer Affairs Minister, Mr Pacuillo, to examine the ramifications of the recommendations from Mr Masterman. This review is designed to see proposed legislation brought before Cabinet.

The Ombudsman will continue to monitor action taken as a consequence of his recommendation, and will consider keeping Parliament informed by means of special report.

43. Sydney Harbour and Foreshores Management: Snail Pace Progress

In the last three Annual Reports the Ombudsman referred to a complaint which drew attention to the plethora of authorities concerned with the planning, management and control of Sydney Harbour and its foreshores.

In the Ombudsman's report of September 1982 he recommended that the Minister for Ports (after consultation with the Minister for Planning and Environment) arrange for an interdepartmental review of the legislative and administrative framework for the planning, management and control of Sydney Harbour and its foreshores. In September 1984, the Minister for Public Works, the Hon L. J. Brereton, agreed that a review of this kind was warranted. The Minister said that the review would be part of a regional study by the Department of Environment and Planning, in association with the relevant councils, government authorities and other interests. As a first step a regional environmental plan was to be prepared for the Parramatta River.

In June 1985, the Ombudsman asked the Ministers for Public Works and Planning and Environment whether there had been progress with the regional study.

The Minister for Public Works replied:

> In my letter to you of 12th September, 1984 I advised that a study was being undertaken by the Department of Environment and Planning in connection with the development of a Regional Environment Plan for the Parramatta River. I indicated that your recommendation for review of the legislative and administrative controls affecting Sydney Harbour could have been made part of that study.
>
> Since that time, further consideration has been given to the matter by the Board and it would seem that a preferable alternative would be to formulate a Regional Environmental Plan specifically for Sydney Harbour.
>
> Accordingly, the Board is pursuing the matter with the Department of Environment and Planning with a view to the earliest possible formulation of such a Plan.

The Minister for Planning and Environment, the Hon R. J. Carr, recently informed the Ombudsman:

> My colleague, the Hon L. J. Brereton, Minister for Public Works and Ports, and Roads, and I have agreed that the most effective way to rationalise the existing legislative controls and administrative responsibilities, would be by means of a Sydney Harbour Regional Environmental Plan. The Maritime Services Board is to provide the necessary resources, and a brief is currently being prepared by the Department in consultation with the Board, with a view to the work proceeding before the end of the year.

After three years, the recommended review has not begun. There is no dispute that the review is badly needed.

44. Ex-gratia Payments

In his last two Annual Reports, the Ombudsman has noted that, both overseas and in Australian States and Territories, Ombudsmen commonly recommend that a department or authority make an ex-gratia payment to a complainant if the conduct of the department or authority is found to be wrong.

In April 1985 the Ombudsman made a special report to Parliament, outlining difficulties which have been encountered with the procedure available for the making of ex-gratia payments. The report was prompted largely by an investigation into the conduct of the Public Authorities Superannuation Board. As a result of the investigation, the Ombudsman believed that it was fair and proper that the Board make an ex-gratia payment to the complainant. The Board claimed that it did not have legal power to make the payment. Finalisation of the investigation was delayed for one year as a result of legal uncertainty about the ex-gratia payment recommendation. Legal advice finally confirmed that it was not within the legal capacity of the Board to make the payment recommended.

Other public authorities fall into the same category as the Board. This means that, if the Ombudsman believes that he should recommend that an ex-gratia payment be made by such an authority, it is necessary to examine the statutory powers of the authority in relation to any particular case. This requires the obtaining of legal advice which is costly and causes delay.

The Ombudsman's report to Parliament concluded:

> The question of whether an authority ultimately accepts a recommendation of the Ombudsman is, of course, a matter to be determined by the authority itself. However, if an authority accepts the Ombudsman's recommendation that an ex-gratia payment be made, the head of the authority should have the power to authorize and make the payment. The current procedure for the making of ex-gratia payments is not satisfactory. It is not available to all public authorities within the jurisdiction of the Ombudsman. In the case of those authorities outside the State Budget sector, there remains uncertainty which must be resolved by costly legal advice on a case by case basis.

The Ombudsman considers that this matter should be placed beyond doubt by legislative amendment and recommends that the Ombudsman Act 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 head of that public authority has, by virtue of this section, power to authorize and make the payment.

45. Resumptions — Need to Increase Interest Rate

The previous annual report discussed an injustice in the rate of interest on outstanding amounts of compensation in the first 12 months following resumption of land. The rate has remained at 4 per cent per annum, when commercial rates are three or four times as high.

In a report of wrong conduct the Ombudsman found this rate of interest to be grossly unfair to citizens whose land is resumed. He recommended that the Government implement a recommendation of the Inter-Departmental Committee on Land Acquisition Procedures which provided that:

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

On 24th September, 1984 the Minister for Public Works, the Hon L. J. Brereton, advised that further recommendations from the reconvened Land Acquisition Procedures Committee had been referred to Cabinet.

At the time of this report, approximately one year later, the interest rate remains 4 per cent per annum. The Minister for Public Works has been advised that legislative amendment may not be required to alter the interest rate. Consequently, on 5th September, 1985 Mr Brereton wrote to the Treasurer in the following terms:

> In the letter to the Ombudsman you say that the matter is one that will require legislative change. I am advised that under Section 126A(5) of the Public Works Act, 1912 you could by notification published in the gazette specify a rate of interest in respect of the first 12 months after acquisition.
>
> I share the view of the Ombudsman that an interest rate of 4% per annum is not fair and reasonable in current circumstances. I should be grateful if you would in exercise of the powers given to you by Section 126A(5) gazette a rate which in your opinion is reasonable in respect of the first 12 months after acquisition.

Hopefully, one way or the other, remedial action is not far off.

46. Forestry Commission: Environmental Impact Statements

Logging operations in NSW have, over the years, attracted much political and media attention and have been strongly opposed by some sections of the community. The Ombudsman has received three complaints this year alleging that the Forestry Commission failed to properly consider the effect of logging upon the environment.

Two of the complaints concerned the decision of the Commission to log that part of the Nullum State Forest known as Blackbutt Plateau. While logging had not been commenced at the time the complaints were received, the road intended to service the logging operation had been constructed. The complainants alleged that the environment would be significantly affected by the proposed logging and by the construction of the road.

The Forestry Commission carried out an "environmental survey" prior to commencing work on the road, but decided that an Environmental Impact Statement was not warranted.

Section 112(1) of the Environmental Planning and Assessment Act states:

> A determining authority shall not make a final decision to undertake, or to approve of the undertaking of, an activity of a prescribed kind or an activity that is likely to significantly affect the environment unless —
>
> (a) the determining authority has obtained, examined and considered an environmental impact statement in respect of that activity . . .

The Ombudsman commenced to investigate the alleged failure of the Forestry Commission to comply with the provisions of Section 112 prior to the construction of the Nevasae Road, which was intended to service the proposed logging operation in Blackbutt.

During the investigation one of the complainants said that the Premier had given her an undertaking that no logging would commence before an Environmental Impact Statement had been prepared. It was also said that the Director of the Department of Environment and Planning had visited the area and had advised his Minister that the proposed logging and the construction of the road access would have a significant effect on the environment, and that an Environmental Impact Statement should have been prepared before road building began. The Minister, the Hon R. J. Carr, communicated his Director's views to the Premier and to the Minister for Natural Resources, who is responsible for the Forestry Commission.

The Ombudsman considered the investigation to be a matter of public interest, but he was precluded by the secrecy provisions of the Ombudsman Act from releasing information to individuals and organisations with a genuine interest in the matter. The Ombudsman therefore made a report to Parliament, setting out the progress of his investigation. This report was made public in April 1985.

On 26th April, 1985 the Secretary of the Premier's Department, Mr G. Gleeson wrote to the Ombudsman:

> "Mr Wran wishes me to advise that following consultation with the Minister for Natural Resources it has been decided by the Minister that no logging is to take place within the next 4-5 years.
>
> It has also been decided that logging will not commence without the Minister's approval and in addition the Minister had instructed the Forestry Commission that prior to the commencement of logging an environmental impact statement is to be prepared."

The Ombudsman's investigation is continuing.

Enquiries have also been made about another complaint against the Forestry Commission over the proposal to construct a road and to log in another State Forest. The complainant alleged that the Commission had failed to consider the need for an Environmental Impact Statement in proposing to extend logging and provide access to the operation.

At the heart of these complaints lies the question whether, even though there be some not insignificant immediate effect on the environment as a result of logging operations, the Forestry Commission may unilaterally decide not to prepare an E.I.S. or go through the procedures of Part V of the Act because it believes the overall effects are not adverse in the long run. The validity of this approach no doubt will need to be scrutinised during the continuing investigations.

47. Staff

The current office-bearers are:

Ombudsman	G. G. Masterman, Q.C.
Deputy Ombudsman	Dr Brian Jinks
Assistant Ombudsman	J. Pinnock

During 1984/85 the staff of the Office of the Ombudsman increased by one to 59 (excluding the three statutory officers). An additional position of Executive Assistant (Police) at Grade 6 level was created to assist directly the Ombudsman in the new police complaint reinvestigation function entrusted to the Office by the November 1983 amendments to the Police Regulation (Allegations of Misconduct) Act.

The Executive Assistant (Police) Grade 7/8, Penny Pether, was appointed soon after the amendments first took effect. She has proved to be of very high calibre and has carried an enormous work load in the difficult first period of operation of the new police complaints system. Eventually, the work load was such as to require another person to assist her. Even with some temporary assistance, unreasonable delays were being experienced. Accordingly, approval for an additional position of Executive Assistant at Grade 6 level was sought, as was necessary from both Premier's Department and the Public Service Board. The position was approved on the understanding that it would not be occupied before 1st July, 1985 and that the cost would be met from the already notified 1985/86 budget allocation. The position was advertised both within and outside the Public Service and Michelle McAuslan, an Associate to a Federal Court Judge, was appointed. She took up duty on 1st July, 1985.

The former Executive Officer, Penny Nelson, left the Office to go to the Public Service Board. The position was advertised both within and outside the Public Service. Mr David Brogan, formerly an Investigation Officer with the Office, has recently been appointed to the position.

The Office employed a number of temporary Investigation Officers again this year to handle peaks in the work load of the Office. The ability of the Office to employ temporary assistance, although directly related to the availability of funds, has proved to be essential for the efficient and effective operation of the Office. Temporary Investigation Officers during the period have been Jane Deamer, Jane Oakeshott, Claudia Douglas, Kieran Pehm, Anthony Lennon and Alice Mantel. The Ombudsman is most grateful for their assistance.

48. Investigation Officer Recruitment: Limited Term Appointments and Secondments

The policy of limited term appointments of investigation officers continues to attract very talented people to the Office and to serve the public well. Nine of the 18 civilian Investigation Officers have now been appointed under the new system. Six of these have been appointed from outside the public service under Section 80 of the Public Service Act and three from within by way of secondment under Section 75 of the Public Service Act.

The positions of Investigation Officer are advertised widely both within and outside the Public Service. A recent advertisement has attracted over 80 applicants of whom 26 are being interviewed.

The system allows for officers of high calibre who wish to extend their three year period and remain in the Office to be able to do so but for no longer than a further period of two years. Indeed Helen Mueller, one of the first appointees under the new system, has requested and has been granted an extension of two years.

During the year the use by the Ombudsman of the provisions of Sections 75 and 80 was the subject of unsuccessful legal challenge by the NSW Public Service Association. This is further discussed under the topic "Industrial Relations".

49. Long Serving Investigation Officers: Attempts to Assist Lateral Mobility

The consequence of Investigation Officers remaining in the Office for indefinite periods has been the subject of comment in previous Annual Reports. The particular nature of the investigation of citizens' complaints against government authorities and public servants and the need for lateral mobility of long serving officers had been formally raised with the Chairman of the Public Service Board in April 1984. The Ombudsman suggested the Board "nominate suitable officers to liaise with this Office on strategies for developing a programme for lateral mobility in the interests both of long serving staff of this Office and of the Public Service in general". Discussions did take place but were not initially successful. Indeed, in his last Annual Report the Ombudsman felt obliged to say that "without in any way doubting the bona fides and the good will of the Board officers involved, the whole exercise has been quite fruitless. Indeed it has raised expectations only to diminish them".

Events of the past 12 months have been somewhat more encouraging. Three of the long serving Investigation Officers have been relocated to other Public Service departments. One officer has secured a permanent position in the Department of Youth and Community Services. Two other officers have taken up six-month secondments; one with the Department of Environment and Planning and the other with the Department of Health. The first two of these three changes appear to have been assisted by direct initiatives from officers of the Public Service Board, whose personal help is much appreciated.

Excellent reports have been received about the performance of Mr W. C. Hayes, the officer seconded to the Department of Environment and Planning. The Department's Head of Administration has indicated informally that Mr Hayes, in the short time he has been with the Department, has become an invaluable officer. The Department is, at the moment, making efforts to secure for Mr Hayes a permanent position within the Department. However, a final decision on the matter has not yet been made.

Excellent reports have also been received about the performance of Ms H. Hurwitz, the officer seconded to the Department of Health. Ms Hurwitz has been assisting the Department with the investigation into Chelmsford Private Hospital and the Department has indicated that Helen "has been of considerable assistance" in that regard. Indeed, the Department has sought a six-month extension of the secondment. At the time the secondment was being negotiated, the Department of Health gave an undertaking to use its best endeavours to secure a suitable permanent position for Ms Hurwitz within the Department but as yet this has not eventuated.

Two other long serving investigation officers have recently had discussions with the Public Service Board with a view to assistance towards relocation. Surprisingly however, it seems that there is little the Board is prepared or able to do at the present time to assist long serving Ombudsman Investigation Officers in achieving career paths in other departments.

Part of the problem, in the Ombudsman's view, is that Investigation Officers get little or no opportunity at the Office for supervisory experience; this tells against them in applying for advertised promotional or even lateral positions. It is sometimes also suspected that other authorities might regard Ombudsman personnel as having developed too independent patterns of thought. Whatever the reasons, good officers feel trapped and tend to become stale. Positive steps are needed to assist lateral mobility, which ought not be merely a theoretical goal.

50. Industrial Relations

The Ombudsman's policy of appointing Investigation Officers for limited terms initially of up to three years under Section 75 and 76 or Section 80 of the Public Service Act has continued to be the subject of litigation in the NSW Industrial Commission. For reasons discussed in earlier Annual Reports, this policy was approved by Premier's Department and the Public Service Board. The Public Service Association opposes this policy and in January 1984 commenced proceedings under Section 25A of the Industrial Arbitration Act. Ultimately the Industrial Commission decided that the dispute in the form in which it was commenced could not be maintained and, if the Association wished to take the matter further, a fresh dispute application or award application would have to be lodged.

On 30th November 1984 the Association commenced fresh proceedings in the Industrial Commission by way of notice of motion. The notice sought orders that the Public Service Board cease to allow, approve of or sanction the filling of positions of Investigation Officer on a term basis, that the Public Service Board cease to follow a general policy of approving on a regular basis the employment of temporary employees as Investigation Officers and that the Public Service Board be required to ensure that advertisements for vacancies of Investigation Officer did not restrict the scope of applications to temporary appointments.

The Public Service Board took the view that, given the provisions of Section 65A of the Public Service Act, the Industrial Commission had no jurisdiction to deal with the Notice of Motion. The relevant parts of Section 65A are in the following terms:—

(1) The appointment or failure to appoint a person to a vacant position in the Public Service, or any matter, question or dispute relating thereto, is not an industrial matter for the purposes of the Industrial Arbitration Act, 1940.

(2) Subsection (1) applies whether or not any person has been appointed to the vacant position.

(3) Without affecting the Government and Related Employees Appeal Tribunal Act, 1980, no proceedings, whether for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, shall lie in respect of —

(a) ...

(b) ...

(c) the appointment or failure to appoint a person to a position in the Public Service, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment.

The matter was listed before His Honour Mr Justice Watson on 7th December, 1984 and 7th February, 1985. His Honour decided that, because of the importance of the issues raised, the jurisdiction question should be removed to the Commission in Court Session. The matter was listed for hearing before the Commission in Court Session on 3rd June, 1985 before their Honours Fisher J. (President) and Cahill and Watson JJ. The Board briefed Mr Chester Porter, Q.C., and Mr P. Menzies to put its argument with customary clarity and persuasiveness.

In a reserved decision handed down on 18th July, 1985 the application of the Public Service Association was dismissed on the basis that Section 65A clearly ousted the jurisdiction of the Commission. The Commission said in part:

> "The award which the Association seeks relates to the appointment of a person or persons to vacant positions in the Public Service. Perhaps more specifically categorised it is directed at the "failure" of the Board "to appoint" in a way which accords with the Board's general or normal policy. But however it may be regarded, it must be set against the plain words of Section 65A(1), which are that the "appointment or failure to appoint... or any matter, question or dispute relating thereto, is not an industrial matter for the purposes of the Industrial Arbitration Act". Those plain words must surely be construed as taking the order or award sought out of the purview of the tribunals under the *Industrial Arbitration Act*.
>
> We also consider that Section 65A is a provision obviously drafted with Section 8 of the *Public Service Act* well in mind. Section 8 provides:
>
> > Unless otherwise expressly provided, nothing in this Act affects the Industrial Arbitration Act, 1940.
>
> It seems obvious to us that Section 65A, in terms, "affects the *Industrial Arbitration Act*, and we are satisfied, in the light of Section 65A(1) in particular, that the answer to the question argued is that there is no jurisdiction to entertain the application of the Association in this case."

The decision of the Commission appears to have brought the litigation to an end.

Industrial policy and strategy is one entirely for the Association and its constituent branches. However, the Ombudsman hopes that, at least on one front, the Association may give consideration to whether it can fruitfully assist those of its able Investigation Officer members at the Office of the Ombudsman who, after excellent service there, feel trapped in those positions — not because of their lack of ability, but because, necessarily, they have had little or no supervisory experience and there are virtually no promotional positions in the Office of the Ombudsman. The development of career paths for such officers in other parts of the public service would seem a desirable objective of both management and union.

51. The Public Service Board and the Ombudsman

The Ombudsman, both in this country and overseas, is traditionally independent from the bureaucracy which he or she investigates and is responsible to Parliament. Before 24th February, 1984 the Office of the NSW Ombudsman was a sub-department of the Premier's Department. In February 1984 the Office was made a separate administrative unit and the Ombudsman was given departmental head status. Although achieving independence from the Premier's Department, the Office remains subject to the NSW Public Service Act. With the exception of the Ombudsman, Deputy Ombudsman and Assistant Ombudsman, all staff in the Office are public servants. In most other states of Australia (Victoria, Queensland, Western Australia and Tasmania) staff are not public servants.

In his previous Annual Report the Ombudsman indicated that he had an open mind as to whether the Office would operate more efficiently if his staff were placed outside the Public Service. In theory, the NSW Office of the Ombudsman ought to be totally outside the Public Service Act and any control by the Board. However, provided the Public Service Board continued to recognise the Ombudsman's traditional need for independence and his responsibility to Parliament, the efficiency of the Office need not be impeded. The most serious impediment to the efficiency of the Office of the Ombudsman currently resulting from the application of the provisions of the Public Service Act and the control of the Board is discussed in the next topic.

During the year an officer of the Public Service Board (who prefers to be nameless — at least in an Ombudsman's Annual Report!) was extremely helpful in initial attempts to break the deadlock in securing lateral mobility for long serving Investigation Officers. Senior Officers of the Board have readily assisted the Ombudsman by sitting on selection committees for positions in the Office and lending their unique experience in this area.

Under Section 81 of the Public Service Act, the Public Service Board is the deemed employer for the purposes of any proceedings relating to officers or temporary employees before the Industrial Commission. In November 1984 the Public Service Association commenced proceedings in the Industrial Commission seeking orders that the Public Service Board cease the practice of filling positions of Investigation Officers on a short term basis. The proceedings were conducted by the Public Service Board competently and efficiently and the Ombudsman is most grateful to Mr Rod Morrison and Mr Ernie Schmat of the Industrial Relations Division of the Board for their efforts and their selection of highly competent counsel to argue the case. Ultimately the application by the Public Service Association was dismissed (see topic 50).

In order to implement certain initiatives contained in the equal employment opportunity management plan, restructuring has begun of the records section in the Office. Discussions have taken place between this Office and the Public Service Board and the Ombudsman is indebted to the assistance provided by Mr Geoff Corrigan in dealing with this matter. The restructure, at the time of writing this report, has not been completed but it should be finalised in the near future.

52. Public Service Board Restrictions Impair Ombudsman's Efficiency: Typists and Stenographers

One of the most irksome and potentially damaging restrictions imposed upon the efficiency of the Office as a result of its being subject to the Public Service Act is the tying of stenographers' and typists' pay scales to Public Service rates. These have an extremely low base, and provide for measured escalation up to a maximum of $17,951 *after 12 years* in the public service. The signing-on rate has fallen far below market rates paid in the private sector. Highly competent and experienced stenographers cannot be recruited to the Ombudsman's Office other than at the base level equivalent to their age. This is ludicrous. Length of service in the Public Service, to say the least, is not the only way of measuring efficiency; it should not be the sole or major basis of assessing an appropriate reward for work.

Further, no matter how competent or efficient, a stenographer or typist already in the New South Wales Public Service cannot achieve a more rapid increase in pay, or be paid at a higher rate. This has led to the loss of a number of valuable and efficient staff, who found that the remuneration available to them in the private sector was very much greater than that which the Ombudsman could offer, and that to remain in the Public Service took on the character of an act of charity. Efficient staff who remain are earning much less than the quality of their work would bring them outside the Office. In addition, it becomes very difficult to train and encourage junior typists and stenographers to produce work of a high standard when there is no financial advantage to be gained if they do.

Public Service rates of pay for stenographers and typists in New South Wales has fallen embarrassingly far behind private sector wages. This leads to loss of good staff and difficulty in finding suitable replacements for them. Indeed, stenographers are presently virtually unprocurable. The Ombudsman understands that some vacancies advertised at the Public Service Board for stenographers have remained unfilled for up to twelve months.

This is beginning to impinge on the efficiency of the Ombudsman's Office, where a high volume of correspondence and the production of lengthy and detailed reports demand support staff of high calibre. Unless the current restrictions are lifted, the situation can only deteriorate.

The Accord, at least at the present, would stand in the way of increasing rates of pay for public service stenographers and typists. However, there appears to be no logical reason why skilled and efficient staff cannot be paid at the top of the current scale, simply because they have not served twelve years in the Public Service.

Similarly, releasing the Ombudsman from the fetters of the Public Service Act would enable him to remunerate staff appropriately without, apparently, threatening the Accord. The Queensland Ombudsman, for example, has the right to and does pay typing and stenographic staff at above Public Service rates.

53. Treasury and the Ombudsman

The 1984/85 budget allocation to the Office of the Ombudsman was lower than the amount sought. However, as indicated in the Ombudsman's previous annual report, Treasury had given an assurance that if, as the financial year progressed, the reductions caused problems, an application for supplementation of the budget could be made.

The need for supplementation became apparent by December 1984 and in January 1985 a formal application was made. The principal area of concern related to the salaries of seconded police officers employed in the office. During the course of preliminary discussions with the then Commissioner of Police, Mr Cec Abbott, about the rank of police officers to be seconded to this Office, the Commissioner suggested that the Ombudsman should accept five Inspectors and five Sergeants first class. The proposal would have cost, at that time, in the vicinity of $517,000 per annum. Ultimately, on the basis of his assessment of individual applicants, the Ombudsman decided to employ two inspectors, three sergeants first class, one sergeant second class, two sergeants third class, and two senior constables. The total cost at that time for these ten officers was approximately $315,000, substantially less than would have been incurred had the suggestion made by the then Commissioner of Police been adopted. It was understood, however, that these ranks would not remain immutable, that some promotions were likely and that replacements might not be made at the same rank but on an individual assessment by the Ombudsman. Two promotions occurred in September 1984, resulting in an increased cost to this Office of around $15,000.

The other main area of expenditure requiring supplementation was that in relation to leave on retirement and resignation. Two officers retired and one officer resigned; this resulted in a need for supplementation of $55,000.

Expenditure over-runs in these and some other smaller items could not be foreseen and were unavoidable. Treasury had no hesitation in granting supplementation.

Some other individual items did exceed the individual allocation for that item. The Appropriation Act recognises the possibility of this occurring and specifically provides for an application to be made to the Treasurer seeking permission to transfer funds from items which are under expended to items where over expenditures occur. Such an application was made to the Treasurer by the Ombudsman in respect of six particular items. Treasury gave permission for funds to be transferred on the understanding that over expenditure would be fully offset by savings on other items. This was complied with and at the end of the financial year the Office was able to report to Treasury that total expenditure had not exceeded the overall, supplemented allocation.

The major increasing item of expenditure in the Office budget is directly related to the important new police complaints initiative introduced by the Government in November 1983. The number of complaints against police officers is increasing, reinvestigations of police complaints are often complex and time consuming and the Ombudsman has had to seek approval to increase the staff number of the Office by one to enable the appointment of an additional Executive Assistant (Police) at grade 6 level. The creation of the position was approved, but on the condition that the cost be met from the 1985/86 budget allocation.

In the early part of 1985 the Ombudsman had submitted forward estimates for the financial year ending 30th June, 1985. In March 1985 the Ombudsman received a request from the Secretary of the Premier's Department to submit revised estimates to achieve a cut of 0.7% on the 1984/85 appropriation. In May 1985 further correspondence was received from the Secretary of the Premier's Department advising that the ceiling for the Office of the Ombudsman was determined at 2.4 million dollars. That represented a cut of $68,000 from the amount the Ombudsman had determined was a reasonable estimate of funds required for the office to function properly during 1984/85.

Accordingly, the Ombudsman wrote to the Treasury indicating that he would make every effort to live within the budget allocation. Should funds allocated prove insufficient the Ombudsman believes that he should decline more local government complaints if curtailment of the service provided by the Office becomes necessary because, firstly, this is an area where dissatisfied complainants can express their views to their local aldermen and, ultimately, through the ballot box; secondly, the Minister for Local Government, even where findings of wrong conduct are made by this Office after extensive investigations, does not have any power to see that recommendations made by the Office are implemented.

Advice has been received from Treasury confirming the figure of $2.4 million; $52,000 has also been provided to cover the cost of increases in awards and agreements and $12,000 for the purchase and installation of new computer facilities. It may well be that the Office will not be adversely affected by the expenditure reductions. However, should this prove not to be the case the matter will be raised with the Treasurer and, ultimately, the services of the Office may have to be partly curtailed.

The Treasury officers with whom the Ombudsman and his Executive Officer have come into contact (and particularly Mr John Hogg) have been unfailingly helpful in explaining current Treasury policies and their application to the Office of the Ombudsman.

54. Publicity

A reading of the item "Secrecy — still a problem" may lead one to believe that the Office of the Ombudsman either receives or is able to generate very little publicity concerning its work and functions. Although precluded by the secrecy provisions of the Act from making public comment on investigations being conducted, the Office has maintained a high profile in the press and community through the production of pamphlets, posters and press releases which have, in turn, resulted in wide media coverage.

Three new posters and another new brochure have been designed and are ready for printing. The posters, which are aimed at providing information about the Office to ethnic groups in the community, have been designed by Robert Skinner whose orange and blue poster "The Ombudsman — a real safeguard" has proved very successful. Care has been taken in the preparation of the new posters to provide a message in a variety of languages that effectively conveys the concept and functions of "Ombudsman", a word with no equivalent translation in many languages. The Office aims to release multi-lingual posters in all major community languages and the first three, in Arabic, Chinese and Italian, will be produced before the end of 1985.

Complaints from prisoners comprise a large, specialised area of investigation. In order to provide prisoners with a better understanding of the kinds of matters this Office is able to look into, a brochure, designed by Maggie Beech, has been prepared for distribution in New South Wales prisons. The cover design is reproduced in this report.

In early November 1985, the first edition of the "Ombudsman's Office Newsletter" will be distributed to government departments, local councils, schools, community centres, Members of Parliament, libraries and other outlets. The newsletter will be published at regular intervals and the first edition includes an article on how to approach departments and other authorities before making a complaint to the Ombudsman.

Publicity appears in many forms. One of the more unusual (but none-the-less very effective) pieces of information about the Office appeared in 'Streetwize' Comics No. 4, published by the Redfern Legal Centre. 'Streetwize' aims to provide practical legal information in easy to read comic format to young people. "How to complain to the Ombudsman" is reproduced in this report.

Previous Annual Reports have referred to the considerable publicity generated for the Office by the distribution of media releases, but the 1983/84 report noted that "Greater effectiveness in this realm [press coverage] is inhibited by the secrecy provisions of the Ombudsman Act". The basic problem with press releases and public comment is that, in effect, the Ombudsman is not able to publicly describe the terms of a complaint or comment on investigations. Therefore, when media representatives contact this Office for information or clarification of a story they have somehow managed to obtain, they must be informed that the Office can neither confirm nor deny the existence of an investigation.

This situation often results in stories appearing in the media which, through no fault of the journalist concerned, contain some inaccuracies. The Crown Solicitor has advised that, in this situation, "a simple denial by the Ombudsman of the truth of some public statement purporting to state facts about the subject matter of a complaint, would not appear to me to amount to a disclosure of information. A refutation by you of the statements made ... if couched simply as a denial ... and a revelation that the investigation (had or had not concluded) would not appear to me to infringe the section".

It is in this context that many of the media releases are distributed. Releases, which are generally taken up by the media in a very responsible fashion, are also distributed when reports, including the Annual Report, are tabled in Parliament. A selection of newspaper clippings appears in this report.

From *Streetwise Comics* published by the Redfern Legal Centre (a store-front community legal centre) in Sydney, summarising the progress of a complaint to the Ombudsman.
Not produced by the Ombudsman's Office.

Prisoners and the Ombudsman

Are you being treated fairly?

How to make a complaint to the Ombudsman

A new brochure has been prepared for distribution in prisons.

Ombudsman defends his policemen

POLICE investigating complaints against fellow officers are doing a very professional job, the Ombudsman, Mr George Masterman, said last night.

He was defending the seven Police Association members attached to his office after an attack by their union president, Mr John Greaves.

Mr Greaves claimed some of the seconded officers were being told to spy on their former mates.

But Mr Masterman said: "We have been conducting hearings since November, 1982, in which the Police Association has been legally represented.

"Their solicitor has had ample time to make submissions about the way a hearing should or should not be conducted.

"But he has voiced no criticism whatsoever."

Mr Master[illegible]

By Police Reporter ALAN HARDIE

[illegible]time a civilian authority was to have the power to investigate police.

"And having officers on the staff was thought at that time to be a sop to the Police Association.

"In fact the only criticisms came from civil liberties groups who thought they could not have confidence in an investigation that relied on seconded police officers.

'Rift'

"But this is [illegible] intriguing [illegible]

Mr Masterman . . . hit back at police union

[illegible]s in the [illegible] are investigating complaints against their brother officers.

"But others are doing the job very effectively and professionally."

But Mr Greaves said: "Unionists are investigating unionists and that flies against all our principles and rules.

"The procedure is causing a rift among our members and we are seeking to have the whole affair axed immediately by the Police Minister, Mr Anderson."

COUNCIL ATTACKED

ROCKS TOWER STORM

THIS 44-storey building going centre of Sydney's Rocks possibly shouldn't be there at

The Ombudsman, George Masterman, ha the legality of the city's biggest new tower block million Grosvenor Place — because the develo to complete an environmental impact study required before construction can begin.

Grosvenor Place is now two-thirds complete

Now Sydney City Council could face dismissal alleged mismanagement of the building application from the building's developers, the Sydney Cove Redevelopment Authority.

A spokesman for Local Government Minister, Mr Stewart, said the council's failure to take action could be grounds for dismissal.

Continued on page 2

Allow me to alert public early, says Ombudsman

By ROSS DUNN

The NSW Ombudsman, in a special report to Parliament, has repeated his call for the State Government to remove the secrecy provisions which prevent him from disclosing information in the public interest.

Sun SAYS END THIS SHAM!

★ **THE CURRENT system for checking complaints against police, never solid, now looks decidedly shaky.**

Presented with a choice, some NSW police are taking their complaints about the police force direct to the NSW

Ombudsman moves over forestry row

By GREG ROBERTS

The refusal of the NSW Forestry Commission to prepare an environmental impact statement on a controversial road through the Nullum State Forest near Mullumbimby led to the tabling of a report by the NSW Ombudsman, Mr George Masterman, in State Parliament this week.

Mr Masterman was clear frustrated by the inter-govern ment wrangling over the 1.5-kil metre road and said there was "conflict" between the Ministe for Natural Resources, Mrs Cre sio, and the Minister for Plan ning and Environment, Mr Carr

Mr Masterman warned h would use his powers to instigat a full inquiry into the dispute first raised almost a year ago, i the Government did not find solution.

Ombudsman says civilians should investigate police

By ROSS DUNN

Complaints against the police may soon be investigated by civilian members of the State Ombudsman's Office — a move which is bound to spark a hostile reaction from the rank and file of the NSW Police Force.

The Ombudsman, Mr George Masterman, QC, has complained to the Government that the exclusion of civilian investigators in his office from the police area is a waste of public resources and is delaying [illegible] bers of corrupt colleagues.

One obvious advantage of going to the Ombudsman, is that a police complainant stays anonymous.

Two who went public say they have been pilloried and persecuted by other police to the point of having to take extended sick leave.

Council slammed over $100 fines

By DENNIS RINGROSE

THE NSW Ombudsman has slammed the Mudgee Shire Council for arbitrarily imposing $100 fines on several residents

[illegible] yesterday, described the council's actions as being "unreasonable and unjust" and outside existing laws.

Citizens affected by the rulings had been denied the opportunity to have their cases heard by the courts and the council had taken unto itself the role of "judge and jury".

The report covers an investigation following an official complaint from Mrs B. Reardon of Madera Rd, to the Ombudsman, Mr George Masterman QC.

The activities of the Office of the Ombudsman receive wide media coverage despite the secrecy provisions of the Act.

55. Community Information Programmes in Country Areas

During 1984/85 officers visited the following places:

• Hunter Valley/Central Coast	—	Maitland, Newcastle, Toukley, Gosford
• North West	—	Narrabri, Walgett, Moree
• Central West	—	Parkes, Orange, Bathurst

Officers contacted co-ordinators of local community information centres, arranged times and dates to interview members of the public, and arranged suitably-timed publicity. Paid advertisements were placed in local newspapers, press releases were distributed and there was a generous amount of coverage by the media. In addition, talk-back radio proved to be a particularly useful forum for describing how the Ombudsman's Office deals with typical complaints.

Once again the officers involved received enthusiastic co-operation from paid and volunteer community workers and from members of the media. Their assistance greatly contributed to the success of these visits. Over 200 people were interviewed during these three visits. Visits to the Grafton/Lismore/Murwillumbah and Newcastle/Gosford areas have been arranged for the coming year.

56. Expert Assistance

Section 23 of the Ombudsman Act provides that, "In an investigation under this Act, the Ombudsman may, with the consent of the Minister, engage the services of any person for the purpose of getting expert assistance".

Expert assistance has been obtained on three occasions in the last twelve months and the Ombudsman would like to express his thanks to and respect for the excellent quality of assistance provided by the following people:

- Dr Graham Fleet, Senior Lecturer, School of Food Science and Technology, University of New South Wales. Dr Fleet provided expert assistance in the area of monitoring and supervision of large scale food preparation in New South Wales.

- Professor B. Warren of the Department of Anatomical Pathology, Prince Henry Hospital. Professor Warren assisted the Ombudsman in an investigation concerning 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.

- Mr Michael Fearnside MB MS (Syd) FRACS, visiting Neurosurgeon, Westmead Hospital, relieving Neurosurgeon, Blacktown Hospital, relieving Neurosurgeon, Repatriation Hospital Concord, Clinical Tutor in Neurosurgery (University of Sydney). Dr Fearnside's assistance was requested in an investigation where expert medical knowledge was required.

The Ombudsman also appreciates the ready concurrence given by the Premier, as relevant Minister, to the retention by the Ombudsman of these distinguished experts.

57. Satisfied and Dissatisfied Complainants

It has been gratifying to note during the year that many complainants write to express appreciation for the work of the Office, particularly where an investigation has clarified long-standing problems or irritations with public authorities or where, in the case of preliminary enquiries, problems that seemed otherwise insurmountable have been easily resolved. Naturally, there are some people whose attitudes to the Office are not so favourable. What follows are some excerpts from letters of both satisfied and dissatisfied complainants.

Satisfied complainants:

— This investigation was my first dealing with your Office. I was most impressed by the efficiency of the investigation and in particular with the conscientious, professional and impartial approach of your Investigation Officer, Mr G. Walsh. I must say that at all times he was readily available and most approachable.

— Whilst your enquiries have revealed that the Council is within its rights and accordingly my complaint is unfounded, your advice at least provides me with an assurance that the Council was not charging rates unfairly. The speed with which your officers dealt with this matter is a credit to your Office and the staff themselves. I only hope that other Government Departments will some day achieve the same efficiency and effectiveness as your Office.

— From a prisoner — The Ombudsman's Office has done very well for me and I am grateful for your assistance. I will battle on myself about the reasons for my transfer. I feel that whatever can be done from here in this situation, I'll be able to achieve myself.

— I must say your Department has done an excellent job. I wish I had written to you earlier.

— I would like to let you know how impressed I am with the cool, efficient manner in which the case was handled by your Office and for the satisfactory outcome.

— Many thanks for your letter and the investigative work that must have gone on. I really appreciate everything that your Office has done... and am delighted to think that justice can be done for the "little person" in this world. Signed, "one very happy citizen".

— Due to extensive travelling I regret not writing before to express my thanks for your good offices in obtaining redress and repayment of a $25 parking fine. Although only a very small matter, it is nice to know that one has recourse to your Office.

Dissatisfied complainants:

— Where the Investigating Officer declined to carry out an investigation — "What did the investigator fear? Maybe the publicity. Publicity does not scare me. No sir. I do not want your Office to take any action. I will never ever trouble you again."

— Suffice it to say, that your Office was established to investigate all complaints against Government Departments. Therefore it would appear that your duties are not being carried out as intended.

— What is the point in having an Ombudsman, if his officers are not going to take the time to fully investigate a complaint, get full details from the complainant, take an impartial point of view in the matter and then get on with it, without fear or favour, regardless of the consequences?

The Ombudsman's discretion to decline or discontinue complaints and the reasons for the exercise of this discretion are discussed in topic 13 above. When a complainant expresses dissatisfaction with a decision to decline investigation, the matter is considered again in the light of any new information or reasoning but the decision is not necessarily changed.

58. Need to Make Ombudsman's Statistics More Meaningful

In the course of preparing this Annual Report and in discussions with some other Ombudsmen, it has become apparent that an attempt must be made to make Ombudsman's statistics more meaningful. In one sense, the number of complaints received (whether written as required by the New South Wales Ombudsman Act, or oral as in some other jurisdictions) while in some way indicative of community perceptions and dissatisfaction does not provide an entirely useful barometer of the work of the Office. Nor do traditional categories of complaints, such as "resolved", "sustained", or "not sustained".

In concept and in terms of the New South Wales Ombudsman Act (and indeed many other local and overseas Ombudsmen Acts) the Office of the Ombudsman is essentially an investigative agency (the words "resolved" or "conciliated", or anything like them, do not appear in the Ombudsman Act). Yet given the time consuming and skilled nature of investigative work, there is a definite limit to the number of full or completed investigations involving detailed reporting that even the most able investigation officer can manage. In the present Ombudsman's experience, the completion each year of 15-20 investigations, each involving a detailed report, represents a high workload for a dedicated officer.

In total office terms, approximately 160 detailed written reports of investigation were completed during the year by a generally efficient team of investigation officers. In the light of over 5,000 complaints this means a not insignificant amount of the resources had to be devoted to a process which might be described as "filtering". Complainants need, and have the right, to be told the grounds on which their complaints are outside jurisdiction or are not thought to warrant investigation. Not infrequently detailed preliminary enquiries often need to be made before it can be seen that a complaint does not raise even a prima facie case of wrong conduct on the part of the authority the subject of complaint. Sometimes again, the initial correspondence by the Ombudsman to the public authority leads to the matter being taken up in some higher echelons of the authority and for this reason or otherwise the complaint is "resolved". (Even when this does happen, an Ombudsman occasionally should still investigate, particularly where the incident the subject of complaint may be symptomatic of a more general or more deep-seated problem.)

Ultimately then, and with a great deal of effort, the particular Ombudsman's Office is left with the necessarily limited number of complaints or own motion inquiries that can be fully investigated with the available resources. The Ombudsman considers that existing statistics do not convey an adequate picture of the balance of work in the Office. In the interest of accuracy and external evaluation, it is proposed to devote more effort during the course of the year to developing simple statistical tables which it is hoped will assist in giving a more meaningful impression of the work of the Office. The subject is also on the agenda for the next meeting of Australasian Ombudsmen and joint discussion of the problems involved will no doubt assist all.

59. Equal Employment Opportunity in the Office of the Ombudsman

Like other New South Wales government agencies, the Office of the Ombudsman was required to develop a management plan to achieve equal employment opportunity. The New South Wales Anti-Discrimination Act provides that the management plan had to be prepared and implemented by 1st October, 1985.

On 8th May, 1984 the Director of Equal Opportunity in Public Employment was asked to advise the Office about its obligations under the Anti-Discrimination Act and to provide guidelines to help in formulating a management plan. The Director replied that the Premier had asked all government departments and authorities to co-operate in a resurvey in March 1985; in her view, the most productive way of the Ombudsman's Office to proceed would be to wait for the resurvey. The Director also suggested that the Office should review its personnel practices before the resurvey.

The review of personnel practices was completed and the Office participated in the resurvey in March 1985. The management plan has been prepared and forwarded to the Director of Equal Opportunity in Public Employment on 1st October, 1985. Parts of the plan had, prior to 1st October, been implemented. To give clerical assistants in the Office a career structure with the possibility of advancement, a restructure of the Records section of the Office was commenced. In addition, typing staff have been encouraged to act in clerical positions within the Office to enable them to gain clerical skills to enhance their opportunities for promotion.

Quite apart from the Ombudsman's legal obligations under the Anti-Discrimination Act, a number of other steps were taken prior to the formulation of the management plan to ensure equal employment opportunity within the Office. Investigation Officers are at Grade 7/8 (current salary range $29,578 to $32,695). They are senior officers in Public Service terms. As at 30th June, 1985 the Office employed twenty investigation officers. Eighteen were employed in established positions, ten of whom were women. A further two, one male and one female, were employed on a purely temporary basis. Overall, of the twenty investigation officers employed, eleven were women. The Office also had ten police officers seconded from the police force of whom two were females.

To provide a grievance mechanism for dealing with any complaints of sexual harassment that might be made, the Ombudsman introduced a temporary grievance system pending the establishment of a permanent grievance system under the management plan. Two officers, one male and one female, have been nominated as persons to whom complaints of sexual harassment can be made or from whom advice can be sought about dealing with sexual harassment. These two people have direct access to the Ombudsman to discuss these matters if thought necessary. In addition, all officers have been made aware of sexual harassment as an employment and industrial issue and have been provided with helpful and relevant literature.

In terms of staff development, the Ombudsman has encouraged non-investigation staff, principally interviewing staff, to become more closely involved in investigations and, indeed, has approved those officers being allocated their own investigation files for which they are fully responsible.

60. Performance Measurement and the Office of the Ombudsman

In its seventh report in August 1983 the Public Accounts Committee of the Parliament examined the accountability of statutory authorities in New South Wales and noted the importance of performance measures and indicators in determining whether organisations had achieved their aims. The Public Accounts Committee later reported on performance review practices in government departments and authorities in its fifteenth report in June 1985. In the latter report the Public Accounts Committee recommended, among other things, that departments and authorities should:

1. Continually review performance.
2. Develop and maintain measurable objectives which reflect the aims of relevant legislation and government policies.
3. Derive performance measure to determine whether objectives are being achieved.
4. Publish external objectives and key performance measures in annual reports.

In its seventh report the Public Accounts Committee noted that the private sector is often thought to have profit as an easy measure of performance (even though it is one of a number of factors considered by corporations), and that measurement in the public sector is usually considered difficult. The Committee's report continued:

> "For public sector organizations, profit cannot be the sole concern. The range, quality, access and cost of service are more often the focus of attention. Performance may not be directly and easily measured. If this is the case, indicators rather than measures may only be possible."

It has also been pointed out that, within the public sector itself, some activities are more easily measured than others: kilometres of road built, or the number of treatments at a clinic are much easier to quantify than the policy advice given to a Minister. There is also need to distinguish between efficiency and effectiveness: there is little point in being the very best producer of widgets if no one wants them.

In a chapter on management accountability in its fifteenth report, the Public Accounts Committee outlined factors to be considered in setting objectives and measuring performance, and the concomitant need for an effective management information system. It also noted that the recent introduction of programme budgeting had prompted organisations to define objectives more clearly. Other things being equal, one could expect a relatively small organisation such as the Office of the Ombudsman to do this more readily than a large department. Even so, there are broader considerations for all public sector organisations when considering objectives: it is important that objectives reflect the intentions and strategies of the Parliament and the government, and the expectations of the public generally. Clearly, the objectives adopted, and the measures assessing their attainment, must be more than a set of long-accepted practices — a kind of lowest common denominator.

The broad function of the Office of the Ombudsman is clear and consistent from the legislation of Parliament, to the speeches of political leaders, to letters and other communications from the public — it is to investigate citizens' complaints about the public bureaucracy. This had been recognized in the programme for the budget of the Office of the Ombudsman. Within that function, objectives have to be set for various kinds of investigations, some of which differ markedly in their procedures and in the clientele to be served. The categories are already recognized in the Office's Annual Reports as investigations involving departments and authorities, local government councils, corrective services and police. The main procedural differences arise in handling, and in some cases re-investigating, complaints against police. Within each category, investigation or re-investigation can have different outcomes; these have been recognized in the classification of complaints, authority by authority, in the detailed statistical appendices to each Annual Report.

The efficiency of the Office, in simple terms of outputs and inputs, can be generally assessed from the fact that the numbers of complaints dealt with increased at a faster rate than staff and other resources, particularly in the early 1980s. However, staff numbers were increased substantially in 1984 to carry out new tasks in the re-investigation of certain complaints against police. Those re-investigations are usually more complex and protracted than almost any other work undertaken by the Office.

Measuring the effectivness of the Office is, of course, complex. Here again, there has been an important change in recent years. For some seven years after its establishment, the Office classified complaints as "sustained", even though there had been no reports of wrong conduct written on the great majority of the matters, despite the express terms of Section 26 of the Ombudsman Act. In 1981 it was determined that any "sustained" finding — or finding of wrong conduct, as it is termed in the Ombudsman Act — required that a report had to be prepared, considered by the responsible Minister, and so on, according to the provisions of Sections 24, 25 and 26 of the Ombudsman Act. The former

"sustained" finding (the term is not used in the Ombudsman Act) seems to have been treated rather more lightly than the finding of wrong conduct provided in the Act. In recent years there have been fewer findings of wrong conduct than there once were "sustained", but each requires considerable work and is treated seriously and with care. Even so, reports of wrong conduct have increased in number in recent years.

The effectiveness of the Office could not be gauged merely from the number of wrong conduct reports prepared. The notion of effectiveness is likely to vary considerably among different people. An investigation officer might consider that a wrong conduct report resulting in a change in departmental procedure was the true mark of success and effectiveness, even though the change would be unknown to the public (and, as is sometimes the case, might have no impact at all on the person who made the complaint). The process of investigating, drafting and reporting can last for months, can require periods of intense concentration and can lead to an adversarial situation that creates tension and strain. By contrast, a single phone call sometimes breaks a kind of communications log-jam: the public authority responds swiftly, the complainant is openly pleased, and the investigation officer can enjoy a moment of quiet satisfaction. According to public expectations, the latter was undoubtedly the more effective activity, even though it required very little exertion. In fact, the largest group of complainants to thank the Office or individual investigators for their work refer to the fact that "things started to happen as soon as the department/council/authority received the Ombudsman's letter" (or words to that effect). In many such instances, the mere *existence* of the Office can lead to action: how can effectiveness of that kind be measured?

Despite these problems, attempts will be made during the forthcoming year to develop a set of performance indicators specific to the Office of the Ombudsman and the various categories of its work. One important reason why this attempt will be made is that it has been suggested by the Public Accounts Committee, an important committee of the New South Wales Parliament. Despite opposition to or dilution of the proposals by senior New South Wales bureaucrats, the Ombudsman believes, particularly given the traditional role of the Office of the Ombudsman as an agent of Parliament, that it should seriously explore the possibility of the setting of external objectives and indicators of performance for its own organisation. This task will need to be undertaken with a full understanding that the Ombudsman's Office is a small organisation already under some strain, and staffed by some of the best and most dedicated public officers in the State — impatient to get on with their immediate task of investigating citizens' complaints against government agencies.

61. Function of Ombudsman Investigation Officers

Although many people bringing complaints about public authorities to the attention of the Office of the Ombudsman expect the Ombudsman himself to deal with their problem, it is the Investigation Officers who have most contact with complainants.

When a complaint is received two decisions must be made. First, it must be determined whether or not it is within the jurisdiction of the Office to deal with the matter, and second, even if this criterion is satisfied, it must be decided whether the complaint is one which justifies the expenditure of the time and resources of the Office to investigate. With over 5,000 written complaints coming in every year, this latter consideration is not always properly understood by people whose complaints have been declined for this reason.

Under present practice, in most cases the Deputy Ombudsman makes the initial decision whether a complaint should be referred to an Investigation Officer or be declined immediately. If the decision is the former, the complaint is handed to an Investigation Officer who then makes initial contact with the complainant and who usually carries out preliminary enquiries and determines whether the complaint should be made the subject of formal investigation. This involves the preparation and service of a formal notice under Section 16 of the Ombudsman Act signed by that officer.

There are 28 established investigation officer positions within the Office, 10 of which are filled by seconded police officers whose special area of responsibility is the investigation of police complaints. The 18 other Investigation Officers deal with complaints of all kinds concerning New South Wales government departments, statutory authorities, local councils, and the first stage of police complaints. Currently, Investigation Officers are being recruited on a temporary basis pursuant to Sections 75, 76 or 80 of the Public Service Act. As noted elsewhere in this Report, it is the philosophy of the present Ombudsman, supported by the Public Service Board and Premier's Department, that Investigation Officers should be employed in this capacity for terms of up to 3-5 years, but certainly for no longer than 5 years.

Investigation Officers come from a variety of backgrounds, including law, town planning, journalism and social work. This combination of skills is extremely useful in an office where the range of complaints is so vast, as well as ensuring a flexibility of approach in handling complaints.

Pursuant to the Ombudsman Act, Investigation Officers work under delegation from the Ombudsman in the carrying out of their investigations and it is imperative that officers are, and are seen to be, impartial and independent. They are free to exercise initiative in conducting investigations within the constraints of the Ombudsman Act and established office procedures, which provide a system of controls and checks.

It is the Investigation Officer's responsibility to ensure that both the complainant and the authority concerned are given every opportunity to present all necessary information. Following a complaint about the conduct of one investigation, the following provision was added to the Office Procedures Manual:

1. Criticism has been made recently of the procedures said to have been adopted by this Office in the investigation of complaints which involve the conduct of an individual or a number of individuals (e.g. a committee) who may have been associated with the conduct of a public body (i.e. department, university, local council, etc.) which is the primary subject of complaint. (Hereafter referred to as "individual/s".) Such criticism has been along the lines of a failure in some cases by this Office to afford such individual/s, at an early stage, an opportunity to comment on allegations made about them by complainants.

2. (a) In future, the following procedures are mandatory unless, in a particular case, I expressly agree to departure from them:

   (i) *Where the complaint received by this Office identifies individual/s,* a copy of the complaint is to be sent to such individual/s seeking comment on the complainant's allegations. This should be done at the same time that comments are being sought from the head of the public authority.

   (ii) *Where, during the course of preliminary enquiry or investigation, the identity is established of individual/s to whom the complaint relates,* the action set out in (i) should be taken at the earliest practicable opportunity.

   Where the original complaint received from the complainant does not raise the issue of the individual/s' alleged conduct and this has arisen purely as a result of enquiry or investigation by this Office, the alleged conduct on which comment is sought should be clearly delineated in the letter sent by the Investigation Officer.

   (b) In both situations, the Investigation Officer, as well as seeking comments, should ask relevant questions of the individual/s involved in the same way and ideally at the same time as questions are asked of the head or secretary of the body.

3. Of course, additionally, once a decision is made to investigate alleged conduct of a body, consideration should be given as to whether individuals are so closely involved with the conduct that they should be specifically named as public authorities in the Section 16 notice when they will automatically receive such notice in accordance with existing procedures and the Ombudsman Act. Even where individuals are not made public authorities the subject of investigation but they could reasonably believe that criticism of the body is criticism of them, steps should be taken to give them the opportunity before the draft report stage to participate in the investigation.

4. The purpose of the above procedure is to acquaint the individual/s concerned with the allegations made about them and to afford them an opportunity to make comments or submissions in rebuttal at a time earlier than will occur following distribution of a draft report.

5. Should the cirumstances of a particular case lead an Investigation Officer to believe that the approach outlined above should not be adopted, the matter is to be referred to me immediately for decision. Departure from the general policy set out above is not to occur without my express consent.

This provision merely restated the practice followed by most Investigation Officers. However, in view of the particular difficulty of ascertaining the views of the Committees or Boards whose members sometimes have different views, it was thought desirable to make observance of the provision obligatory.

Under the Act, Investigation Officers have the right to seek out and obtain information that may not be voluntarily offered and, in discovering this information, unannounced visits to authorities are sometimes made. Investigation Officers are not obliged to obtain information only through the head of an authority; they may interview any officer of an authority whom they believe can contribute information relevant to the subject of investigation. Site inspections are carried out where correspondence either does not provide a clear picture of the relevant problem or where, for example, there is an obvious conflict of fact or opinion between a complainant and an authority. Investigations are, for the most part, conducted relatively informally with few constraints on communication, but basic rules of fairness apply to all investigations. In particular, if the Investigation Officer reaches provisional conclusions adverse to a public authority following initial investigation of material provided by a complainant, the authority and other interested persons, he or she prepares and submits to the Ombudsman a document now called "Provisional Findings and Recommendations". This document is sent out to the complainant, public authority and any persons adversely criticised, inviting comments and any further evidence. The provisional statement is sent out either by the Ombudsman or Deputy Ombudsman accompanied by a letter which is usually in the following terms:

To Complainant

Your complaint about (name of authority).

I refer to your previous correspondence with (name of Investigation Officer) concerning your complaint about (name of authority).

* *I enclose a statement of provisonal findings and recommendations prepared by (name of Investigation Officer).* The statement has been prepared in confidence, for the purpose of obtaining submissions or further evidence to be taken into account in the investigation. When the submissions are received, I will consider whether there has been wrong conduct on the part of the (name of authority). If there is a finding of wrong conduct, I will send a draft report to the Minister for

Before I decide whether to send a draft report to the Minister, I would appreciate any comments you wish to make about the terms of the statement and would be pleased to receive such comments within twenty-one (21) days of the date of this letter.

Yours faithfully,

* (Emphasis added)

To Authority

Complaint by (name of complainant)
Your reference:

This complaint has been the subject of investigation by this Office since (date).

* *The investigation has been carried out by (name of Investigation Officer) who has prepared a statement of provisional findings and recommendations.* The statement has been prepared in confidence, for the purpose of obtaining submissions or further evidence to be taken into account in the investigation.

It seems to me fair and sensible that you be given the opportunity of commenting on the accuracy of the matters set out in the statement and of stating your views about the conclusions put forward for my adoption so that I can give these consideration before I decide whether a draft report should be sent to the responsible Minister.

Accordingly, I enclose a copy of the statement and would like to have any comments you see fit to make within twenty-one (21) days of the date of this letter. In the absence of a reply within that time, I will consider whether a draft report should be forwarded to the Minister.

It may be that you do not wish to make any comment other than that contained in (name of author) letter of (date), which is the last letter on the file from . If this is the case, please let me know as soon as possible.

Yours faithfully,

Encl.

* (Emphasis added).

The Investigation Officer and the Ombudsman or Deputy Ombudsman, as the case may be, consider the new material and the Ombudsman or Deputy Ombudsman then makes a final decision on the complaint.

In conformity with the above approach, it is usually the Investigation Officer handling the investigation of a complaint who will recommend to the Ombudsman the holding of a Royal Commission type (Section 19) inquiry. Given the pressures on the Ombudsman's time, the Investigation Officer has to put his or her case for such a hearing persuasively and with personal vigour.

On rare occasions, in responding to statements of provisional findings and recommendations, authorities have attacked the integrity and impartiality of the Investigation Officer concerned, rather than question facts, conclusions and the substance of the statement of provisional findings. Accusations such as this must be taken seriously, but, in each case to date, the Ombudsman has found the attitude of the Investigation Officer to be fair and reasonable, and his or her integrity to be beyond criticism. In any event, at the end of the investigation, it is the Ombudsman or Deputy Ombudsman who must make the final decision that there has been wrong conduct on the part of an authority, Even then, in accordance with the traditional concepts of the Ombudsman, that decision has no binding force and only has such weight as the facts and conclusions reasonably demonstrate.

SECTION B: OMBUDSMAN ACT, LOCAL GOVERNMENT

62. Council Employees not Covered by the Ombudsman Act: Need for Amendment

On the advice of senior counsel, the Ombudsman believes that employees of local councils do not fall within the definition of "public authority" in the Ombudsman Act. Consequently, the conduct of individual council employees cannot be the subject of complaint and direct investigation.

However, the Crown Solicitor is said to be of the view that employees of local councils are "public authorities" under the Act and to have advised the Government accordingly. This difference of opinion led to a stalemate and prompted the Ombudsman to make a special report to Parliament on 1st April, 1985.

When the Ombudsman Act was amended to bring local councils under the Ombudsman's jurisdiction, the parliamentary debates made it clear that the legislature, both Government and Opposition, intended individual council employees to be brought within jursidiction. However, a number of councils contended that their employees were not public authorities under the Act. The Ombudsman then obtained an opinion from Mr R. D. Giles, Q.C., who advised that council employees are not within the definition of "public authority". That view was supported by written opinions from Mr D. G. Barr, Solicitor for Sydney City Council, and from Mr M. H. Tobias, Q.C., whose opinion was obtained by the New South Wales Local Government and Shires Associations. The Ombudsman agrees with their interpretation.

The Ombudsman asked the Premier to place the issue beyond doubt by legislative amendment. The Premier's Department responded that no amendment appeared necessary.

The Ombudsman drew the following conclusions in his report to Parliament:

> The Ombudsman believes that, in the public interest, the question of whether he is able to investigate citizens' complaints about the conduct of individual employees and officers of local government authorities should be resolved. It is undesirable in the public interest that the Ombudsman, on the basis of advice that he has received, and which is to the same effect as advice obtained from Senior Counsel for the Local Government and Shires Associations, does not investigate complaints against council employees, while the Government on the advice that it has received is not prepared to amend the Act to conform with its stated policy aims of including employees of councils within the scope of the Act.
>
> The present unsatisfactory situation could be simply and effectively resolved by amending Section 5(1)(gl) of the Act to read:
>
> "(gl) any local government authority or employee of a local government authority."

> As the matter stands, the Ombudsman is unable to investigate citizens' complaints about the conduct of individual council employees. In some such cases the Ombudsman may investigate the conduct of council as a corporate entity treating the complained of employee's conduct as conduct done for and on behalf of the council. In some circumstances, this can result in unfairness in that the council's conduct if found be wrong in terms of the Act when in fact, any wrong conduct involved was committed entirely by a council employee of which the council may have had no knowledge. In other cases, for example where it is alleged that a council employee unknown to the council has not acted impartially by reason of some form of inducement or otherwise it may be beyond the Ombudsman's jurisdiction to investigate at all.

The Ombudsman's report recommended that Parliament introduce an amendment to the Ombudsman Act to add to the existing paragraph (g1) of section 5(1) the words:

> "or employee of a local government body."

The Attorney General was asked recently to include this amendment in the Statute Law Revision Programme. The Ombudsman's submission was forwarded on to the Premier. The Secretary of the Premier's Department wrote to the Ombudsman in the following terms:

> The Premier has asked me to let you know that consideration is being given to a proposal to amend s.5 (1) to place beyond doubt the Ombudsman's power to investigate the conduct of employees of local government authorities.
>
> It is proposed that an appropriate amendment might be included with other proposed amendments to the Ombudsman Act about which you have previously been informed.

63. Ombudsman Reports to the Minister for Local Government: Mere Waste Paper?

Since Ist July, 1982 the Office of the Ombudsman has sent numerous reports of wrong conduct on the part of local government councils to the office of the Minister for Local Government, asking whether the Minister wished to consult on the investigations, under the provisions of Section 25 of the Ombudsman Act. According to the records of this Office, the Minister has sought a consultation on only one of those reports of wrong conduct.

The main reason guessed at for this lack of consultation was noted in the 1982/83 Annual Report of this Office: the Minister for Local Government has no general power to supervise or "discipline" Councils, or to instruct them to act on the recommendations contained in wrong conduct reports. The Minister's final power under the Local Government Act is to dismiss a Council, and that is one that is exercised rarely. None of the conduct so far found to be wrong by this Office would have been hinted at the need to dismiss a local government council. Yet in some instances a pattern of complaints against a certain council emerges: a significant number of ratepayers, joined often by community groups and progress associations, seeks to draw the attention of this Office to what is said to be a pattern of inefficiency or maladministration on the part of a council. However, the Ombudsman Act does not envisage broad investigations. The Office of Local Government employs Inspectors, but they have limited resources and devote their attention to serious matters, notably where financial problems are involved. The Minister has no general disciplinary function. Complainants sometimes suggest that local government councils can, if they wish, virtually ignore community demands for efficiency and accountability.

Perhaps there is no suitable alternative: that is, the electors themselves have the responsibility for ensuring that they elect representatives to councils who are capable of supervising the work of the permanent staff and of responding to the reasonable wishes of ratepayers. If the citizens are not satisfied with their choice, then they can make another at the next elections. Arguments that things are not so simple in practice, and that local government councils should be supervised more closely, can turn into arguments against the democratic system itself. It also seems that community groups can be strongly opposed to intervention by State Government authorities when they feel that their local councils are acting in the interests of their neighbourhood. There is no simple answer to the problems posed by less-than-efficient and unresponsive government, at any level.

It is often suggested that the problems of dealing with governments would be reduced if the public enjoyed greater access to official information and reports. For example, there is a Commonwealth Freedom of Information Act, and similar legislation for New South Wales has been mooted for several years. Correspondence and reports on local government councils from this Office sometimes find their way into the local press, in one form or another, but this Office is unable to comment upon its relevant findings and recommendations, owing to the secrecy provisions of the Ombudsman Act. If that part of the Act were amended, as has been requested on several occasions, then the public would have a greater chance of learning more of the circumstances surrounding reports of wrong conduct upon their councils. At present, they rarely receive more than the contradictory and partial accounts that are sometimes issued to the press by the complainant and the council, respectively. If the Ombudsman, too, could make an appropriate contribution, then the public would be likely to gain a clearer understanding of what had transpired. As things stand, councils appear most reluctant to table reports from this Office and have them as part of the public record. And the copies that are sent to the Office of the Minister for Local Government are, given the Minister's limited role in this area, little more than waste paper.

64. Drainage Problems: Current Issues

The Office has received further complaints about land-slip, flooding and erosion caused by stormwater runoff directed on to private property by various state and local government authorities. Section 241(1) 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" through both public and private lands. Similar powers allow such authorities as the Department of Main Roads and the State Rail Authority to collect stormwater which would otherwise flow within road or railway reserves and to discharge it on to private land. Section 241(3) of the Local Government Act provides that claims for damages can be made if an authority creates a nuisance to private property.

It appears that the authorities do not understand the powers they are exercising. One commonly-held view is that the authority can discharge stormwater on to private land where there is a natural depression. Some authorities believe that this frees them from the need to acquire easements, to build ditches or to lay pipes through land, but without damaging private property in the process. This view appears to derive from the judgment in *Savage v Kempsey Municipal Council* (1912) 1 L.G.R. 144, where it was held that a council is entitled to carry into any natural watercourse such drainage as would naturally flow there.

Stormwater flooding from the drains of public authorities raises two important issues: firstly, whether an authority should terminate its stormwater drains in a depression within private property, allowing stormwater to run where it may; secondly, where a natural watercourse exists, whether an authority should continue to discharge stormwater into the watercourse when, as a result of development in the area, the watercourse becomes inadequate to cope with the flow.

The Ombudsman believes that the case law on these issues is clear. In defining a watercourse, Barwick, C. J., in *Knezovic v Shire of Swan-Guildford* 118 C.L.R. 468, said:

> "It must, in my opinion, essentially be a stream and be sharply distinguished from a mere drain, or a drainage depression in the contours of the land which serves to relieve upperland of excess water in times of major precipitation . . . a drainage depression will lack banks and a bed in the proper sense of the terms, that is to say, identifiable margins of a continuous and permanent stream."

In *Stevens v Bowral Municipal Council,* (unreported), Helsham, J. drawing upon the above definition, found against the council because it had discharged stormwater from a road culvert on to private land and had not established that a natural watercourse existed on the land. The court restrained the Council from continuing the nuisance, notwithstanding the considerable cost involved.

During the year the Ombudsman found that Tumut Shire Council acted unreasonably when it terminated its stormwater pipes on two properties and caused flooding. The Council said that the Local Government Act allowed it to discharge stormwater on to a natural depression in the land. The Ombudsman found that a natural watercourse did not exist on either property, and that Council was not entitled to act as it had. He recommended that easements should be acquired through both properties and that proper drains should be installed. The Council referred the Ombudsman's report to the Local Government Association, which, in view of the significant policy implications, is seeking advice from counsel.

On the problem of watercourses becoming overloaded, it was held in *Rudd vs. Hornsby Shire Council* (1975) 31 L.G.R.A. 120:

> 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.

One complaint was that the amount of water flowing through Council's culvert had increased substantially following approval of a subdivision upstream of the complainant's property. The culvert was designed to cater for more than a one-in-fifty-year flood, but the increased run-off caused overtopping at the entrance to the watercourse and flooding of the complainant's property. After the complaint was investigated, Council improved the flow of the watercourse.

Several similar complaints are presently being investigated by this Office.

Left: For nine years this front garden and driveway of a house in Newcastle have been flooding every time there has been continuous rain over a couple of days. This complaint is currently under investigation.

The end result of a culvert discharging water on to private property.

65. Ancient Subdivisions: "Port Stephens City"

1. *History*

Since 1981, the Department of Consumer Affairs has, through its annual report, issued warnings to intending purchasers of sub-divided land that is zoned non-urban to carefully check future development prospects with local councils prior to purchase. According to the Department of Environment and Planning, some 13 million such blocks exist in New South Wales. Many of these were brought into existence by the entrepreneurial zeal of Henry Halloran, who from the turn of the century obtained subdivisional approval for several large tracts of land, including such areas as Stanwell Park, Lake Illawarra, Jervis Bay and Queanbeyan. In the more ambitious of these projects, whole new cities were envisaged.

One such project was "Port Stephens City". Walter Burley Griffin designed it during World War I and on-site work began in 1918. About 3,000 blocks were sub-divided and land was made available for large residential, commercial and municipal areas. Areas in the city were reserved for Federal and State government offices, two railway stations and a rail-ferry interchange. Deep water port facilities were also planned.

While the plans were approved by the then Stroud Council in 1919, parcels of land were sold piecemeal over the years, but large scale development of the site lapsed. In 1964 an interim development order in the area, now called North Arm Cove, was brought into effect, which created a "village" zone. The city in fact beceme a small vacation and retirement village of 100 or so houses until in 1982, Port Stephens Sales Pty Ltd began selling the remaining subdivisional allotments. According to Council, these allotments in most cases do not conform to current planning requirements, but were however, aggressively marketed. Over 2800 subsequently were sold. As none of the blocks could, under current local planning codes be built upon, the developers established a "fighting fund", raised from 2% of the cost of each block to represent the purchasers' interests before the local Council. The Sydney based principal in the firm of town planning and development consultants managing the estate was elected to the local Council. In 1982, a Department of Environment and Planning position paper was presented to Council. The basic conclusion of the study was that major intensified non-rural development was not at that time favoured in that section of the Shire of Great Lakes. In the 1982/83 Annual Report of the Department of Consumer Affairs, the department concluded that:

> . . . owners of land at North Arm Cove will only be able to use the land for camping purposes for quite some time into the future. They should note, however, that because of an anticipated influx of campers, the Council has instituted a system of permits with particular emphasis upon water supply, sanitation, waste disposal and protection of the environment.
>
> Consideration of investment potential, however, must be carefully weighed against the time which will elapse before the provision of services will become a viable proposition and the high cost per lot of providing those services.

The Department of Environment and Planning is currently undertaking a comprehensive rural environmental study of the position.

2. *Building Blocks or an Expensive Camping Site?*

In 1984, the Ombudsman received a complaint from the North Arm Cove Village Association, who claimed that the Great Lakes Shire Council had not been diligent in controlling its camping regulations in the non-urban zone and had failed to act in seeking the removal of unauthorised structures built on several blocks there. The purchasers of the blocks, not being able to build on the land were using them as camping sites; but that was never the intention of the development. The village residents claimed that purchasers of blocks in the non-urban zone were, in effect, creating a shanty town. More particularly in the holiday season, dogs were claimed to roam around the area uncontrolled, and tents and caravans with annexes were being erected on the blocks for periods of time in excess of the terms of Council's camping policies. In addition, facilities existing for the removal of effluent and garbage were considered inadequate.

The complainants were dissatisfied with Council's response to their protests. Council initially referred the residents' claims to the developers' solicitors who denied any wrong doing on the part of the landowners. For its part, the Council argued to the residents that the provisions of Section 288A of the Local Government Act did not afford it sufficient power to act on any offending landholders. Legal advice provided by Council to the Ombudsman supported its claim. The council, referring to Section 288A of the Local Government Act, wrote to the residents in these terms:

> "... you will appreciate that Council *has no right at law* to prevent the placement or occupation of moveable dwellings, when they are positioned on private land for two consecutive days only, provided all other provisions and requirements are complied with. You will understand that this creates problems of enforcement at such times as Christmas, New Year, Easter and during school holiday periods, when the actual number of camping licenses issued may be exceeded by actual camping sites.
>
> Further, there are other inherent difficulties associated with the implementation and enforcement of Section 288A of the Act regarding the permanent placement of moveable dwellings on private property, which are currently under investigation with Council's Solicitors."

An inspection by one of the Ombudsman's officers of the site confirmed that not all of the offending structures were of a moveable nature and action could therefore be taken to seek demolition of such structures under Section 317B (1A) of the Act. As a result of further enquiries, Council agreed to undertake a survey of the area and appropriate notices of warning have now been sent to the offending owners. Notwithstanding Council's decision it had earlier been put to the Ombudsman that the enforcement by Council of the relevant provisions of the Act against what it considered to be relatively minor breaches was extremely costly in terms of the use of Council's resources. In this respect, litigation by the Council before the Land and Environment Court to obtain orders to remove certain "non moveable" structures on the estate had not succeeded.

3. *The Ombudsman's view*

Clearly Council had been placed in an awkward position when seeking to enforce relatively minor provisions of the Local Government Act against people who, after all, are ratepayers of the Council. This was a particular problem when the Council provided few services to the ratepayers in question. The Ombudsman considered that in situations of this kind, arguably a failure of a public authority to enforce, by the investment of a disproportionate amount of resources, relatively minor restrictions, could not be considered to be wrong conduct in terms of the Ombudsman Act. However, the Ombudsman is of the view that the problems experienced by the village residents will probably become worse. The issues raised by this complaint are not isolated, and will be evident wherever sales of these old paper subdivisions continue to be allowed. Further, some form of government intervention is called for to protect both prospective purchasers and owners of properties whose amenity is being adversely affected by the erection of buildings which do not conform to local planning codes.

66. Disconnection of Electricity for Non-payment of Debt

Complaints have been received about the methods used by some County Councils to obtain payment of disputed accounts which are not for the supply of electricity but rather for goods, extension of supply or other services. These methods have taken the place of normal debt collection procedures. For example:

1. *Namoi Valley County Council*

After a dispute about payment for the repair of a washing machine, Council disconnected the complainant's electricity. The complainant maintained that the repairman could not do the job because he did not have all the necessary tools with him. Council contended that the complainant was still liable for travelling expenses and parts. For eighteen months Council made numerous attempts to obtain payment. Council then said that, if payment was not received within 14 days, it would apply any payments for electricity towards the other debt, and if necessary disconnect supply to force her to pay. The "goods and services" account was reduced to "nil", the amount was transferred to the electricity account, and supply was disconnected for the arrears of $66.66.

Council nominated section 167, 172 and 512F of the local Government Act as the legal authority for its action. However, a legal opinion made available to this Office showed that these sections referred only to situations where *electricity* charges were in dispute.

Council said that it had followed this procedure for many years and had often threatened to disconnect supply to force people to pay "goods and services" accounts.

Council's conduct was found to be wrong. It later obtained legal advice and issued a direction that supply was not to be disconnected to recover outstanding goods and services debts. Rather, civil action should be taken.

The Minister for Mineral Resources and Energy, who received a copy of the Ombudsman's report on this matter, said that he would bring it to the attention of all County Councils.

2. *Southern Tablelands County Council*

In this case the complainant disputed the amount required by Council to connect his electricity. His contention was that the cost of supply to his neighbours was approximately $2,000 less as a result of his contribution which was calculated at $5,480. He wished to negotiate with Council, but was threatened with disconnection of supply unless he paid the outstanding amount.

Council later agreed that is had no power to issue such an ultimatum, and removed the reference to disconnection of supply from its customer demand letter.

3. *Sydney County Council*

This dispute concerned relocation of electricity supply, not the supply of electricity as such. Council threatened legal proceedings, and then disconnected supply. It later said that the disconnection had been wrong, and that it was not Council's policy to disconnect supply in such a situation. Under its Act, Council probably has the power to disconnect supply for non-payment of debts incidental to the supply of electricity. However, it undertook to use this power only for debts for electricity.

In each of these cases the Councils agreed not to disconnect supply for debts for works or services. If a County Council has the power to disconnect supply for non-payment of debts other than for electricity, it has an obligation to use the power fairly and not as a means of coercion or intimidation.

67. Councils and the Dog Act

The Office of the Ombudsman receives numerous complaints about enforcement of the Dog Act. The Act provides that a dog should not be in a public place, unless it is under the effective control of a competent person by means of an adequate chain, cord or leash. Local councils and police officers can begin prosecutions for this offence. The Act also provides that local councils should maintain dog pounds. In practice, local councils are mainly responsible for enforcing the Dog Act.

Councils vary a good deal in their willingness to enforce this Act. An Alderman of Mosman Municpal Council complained recently that Council had in effect resolved not to enforce the Dog Act. The Alderman asked:

> "Is it proper conduct for the council to have a policy whereby it instructs its ordinance inspectors not to pick up dogs which are in a public place and not under the effective control of some competent person, unless the dog is causing a nuisance? In other words, can a council have a policy of intentionally condoning particular illegal acts?"

The Council claimed that the Ombudsman has no jurisdiction to investigate alleged failures of the Council to enforce the Dog Act. At his own expense, the Alderman obtained an opinion from experienced, independent counsel that such questions were within the scope of the Ombudsman Act. The Council has been given the opportunity to submit a counter legal opinion before investigation is commenced.

68. Denial of Liability by Councils

The general investigation by this Office of the procedures adopted by local government authorities for dealing with public liability insurance claims continued this year.

One pleasing development has been the number of Councils that have adopted the recommended procedures circulated in June, 1983 by the Local Government and Shires Associations. The procedures were developed as a result of discussions between the Associations and this Office and are set out below.

Regrettably, some Councils still resist giving claimants a brief statement of reasons for the rejection of their claims. Some of this resistance appears to stem from the attitude of the Council's insurers, some of whom are obdurate in their belief that to give reasons, however brief, for rejecting a claim, might weaken their position in the event of litigation. The Councils involved seem reluctant to push the issue with their insurers and fall back to the position of being bound to act in the way their insurers require.

This attitude on the part of both insurers and Councils is difficult to accept, given the number of Councils that have agreed to see that claimants are given reasons for rejection of their claims. The situation degenerates to the ludicrous where, as in the case of Gosford City Council, reasons are given to claimants where their claims are rejected by the council (under the excess provisions of its insurance policy) but are not given where the claims are rejected by the insurer.

Randwick Municipal Council

The attitude of Randwick Municipal Council was the subject of adverse comment in last year's report. It was not prepared either to monitor the progress of claims or to give claimants an adequate statement of reasons for denial of their claims. Council felt that, in giving reasons or ensuring that its insurer did so, its contract with its insurer would be jeopardised and that even implementing a monitoring procedure might prejudice Council's interests.

In May, 1984 in a report to Parliament, the Ombudsman commented that Council's attitude was intransigent.

It is pleasing, therefore, to report that Randwick Municipal Council has had change of heart. Shortly before the Ombudsman made his report to Parliament, this Office received a complaint about the way in which an insurance claim had been dealt with by Council. The complaint was investigated, and, in October, 1984 a report was made finding Council's conduct to be wrong on the basis that it had failed to give or to ensure that its insurer gave reasons for the denial of the claim.

The report again recommended that Council adopt appropriate and acceptable procedures for dealing with claims.

Some time elapsed, during which Council changed its insurer. Finally, in June, 1985, Council informed this Office that, following discussions with its new insurer, it had implemented the recommended procedures. Council's decision can only benefit those citizens who have cause to make a public liability insurance claim.

DENIAL OF LIABILITY BY COUNCILS

RESULTS ACHIEVED

(This Table includes results published in the 1982/83 and 1983/84 Annual Reports)

COUNCIL	PROCEDURES TO		
	Acknowledge Claims	Monitor Processing	Ensure Claimant receives reasons if claim denied
Albury	Existed	Introduced	Introduced
Ashfield	Existed	Introduced	Introduced
Auburn	Introduced	Existed	Existed
Ballina	Existed	Introduced	Introduced
Bankstown	Introduced	Introduced	Introduced
Barraba	Existed	Introduced	Introduced
Baulkham Hills	Existed	Existed	Existed
Blacktown	Existed	Existed	Introduced
Broken Hill	*Recommended	*Recommended	*Recommended
Burwood	Existed	Existed	Introduced
Concord	Existed	Introduced	Introduced
Drummoyne	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
Illawarra County	Existed	Existed	Introduced
Inverell	Existed	Introduced	Introduced
Kempsey	Existed	Introduced	Introduced
Ku-ring-gai	Existed	Existed	Introduced
Lane Cove	Existed	Existed	Introduced
Lake Macquarie	Introduced	Introduced	Introduced
Maitland	Introduced	Introduced	Introduced
Manly	Existed	Existed	Existed
Marrickville	Introduced	Introduced	Introduced
Mudgee	Existed	Existed	Introduced
Nambucca	Introduced	Existed	Introduced
Newcastle	Existed	Introduced	Introduced
North Sydney	Existed	Introduced	Introduced
North West County	Existed	*Recommended	*Recommended
Parramatta	Existed	Existed	Introduced
Queanbeyan	Introduced	Introduced	Introduced
Ryde	Existed	Existed	Introduced
Sutherland	Existed	Introduced	Introduced
Sydney	Existed	Existed	Introduced
Tamworth	Introduced	Existed	Introduced
Warringah	Existed	Introduced	Introduced
Willoughby	Existed	Existed	Introduced
Wingecarribee	Existed	Existed	Introduced
Wollongong	Existed	Existed	Introduced
Woollahra	Existed	Existed	Introduced
Wyong	Existed	Introduced	Introduced

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

COUNCILS WHICH HAVE ADOPTED RECOMMENDED PROCEDURES FOLLOWING CIRCULATION BY LOCAL GOVERNMENT AND SHIRES ASSOCIATIONS

Eurobodalla Shire Council
Junee Shire Council
Muswellbrook Shire Council
Prospect County Council
Scone Shire Council
Shellharbour Municipal Council
Southern Tablelands County Council

DENIAL OF LIABILITY BY COUNCILS

INVESTIGATIONS CURRENT

COUNCIL	STAGE	
	Enquiries Proceeding	Wrong Conduct Report in Progress
Armidale	X	
Bathurst	X	
Blue Mountains	X	
Campbelltown	X	
Canterbury	X	
Coffs Harbour		X
Cowra		X
Fairfield	X	
Gilgandra		X
Hawkesbury	X	
Maclean	X	
Port Stephens	X	
Rockdale	X	
Tweed	X	
Uralla	X	
Waverley		X

Recommended Procedures for Claims Against Councils Involving Insurers

1. When the claimant verbally contacts a council he or she should be advised to submit details of the claim in writing for consideration by the council.

2. Upon receiving the formal claim, the council should immediately undertake a preliminary investigation of the factual basis on which the claim is based. The Council should also immediately acknowledge receipt of the claim to the claimant on a "without prejudice" basis and forward the claim to the appropriate insurer. This advice of claim should be accompanied by or followed by a report from the appropriate council office detailing the results of the investigation of the incident by council.

3. The insurer upon receiving such claims information as is provided and conducting such further investigation as may be necessary examines details of the claim circumstances. Having determined its attitude towards the claim the insurer should communicate this advice directly to the council giving reasons for its decision especially if indemnity or liability is to be denied.

4. The council should request from its insurers reasons for any delay in the processing of the claim and should endeavour to ensure that the claim is finalised expeditiously. The council should advise the claimant of any reasons for delay.

5. The council upon receiving advice from the insurer regarding its attitude or recommendations regarding the claim should adopt one of the following courses of action:

   (a) If the insurer acknowledges that a liability exists to the claimant and also that indemnity will be provided to the council under the policy, the council should inform the claimant by letter that the matter has been reported to the insurer and further that such insurer or its legal advisers will shortly be in contact with the claimant on behalf of the council.

   (b) If the insurer acknowledges that a liability may or does exist to the claimant but that indemnity will not be provided to the council under the policy, the council should consult its own solicitors to confirm whether a liability exists to the claimant and further that denial of indemnity by the insurer is justified.

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

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

(c) If the insurer contends that a liability does not exist to the claimant and accordingly that liability should be denied, the claimant should be informed by letter from the council that liability is denied.

6. As soon as a final decision has been made on the claim either the council or the insurer will advise the claimant of the result and if liability is denied the reasons for such denial. It shall be the responsibility of council to ensure that this is done.

7. The foregoing procedures are in every case to be applied subject to any contrary provisions in the particular insurance policy and subject to any contrary legal advice received by the council or the insurer.

69. Suggested Code of Conduct: Present Position

The Ombudsman's Office continues to receive complaints which allege "conflict of interest" by members of Councils.

In April 1984 the Executives of the Local Government and Shires Associations invited Councils to adopt the following code of conduct 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.

As was mentioned in last year's report, a number of Councils have adopted the code; others have criticised it. Unfortunately, neither the Associations nor this Office are aware of how many or which Councils have adopted the code. Nevertheless, it is known that the question of a code of conduct for elected members of local government authorities has generated much discussion and debate within local government.

During the year one member of a metropolitan Council contacted the Office for advice about how he should behave when an issue involving a non-profit organisation, of which he was a director, came before Council. He was referred to the circular distributed by the Associations and, hopefully, was assisted in overcoming what he perceived to be a conflict between his public duty and private interest.

The Local Government and Shires Associations are preparing a submission to the Minister for Local Government, in conjunction with a review of the law relating to disclosure of pecuniary interests. The Ombudsman understands that the submission will suggest amendments to the law to reflect the positive approach inherent in the code of conduct supported by the Associations.

Developments in this matter will be watched with interest. In the meantime, the Ombudsman's Office will continue to regard the code of conduct as representing a reasonable standard of behaviour on the part of members of Councils.

70. Inability of Councils to Approve Existing Buildings: Slow Progress Towards Legislation

The last three Annual Reports referred to the legal requirement that building work must be authorised by Councils before it begins because Councils cannot give retrospective approval. This Office asked the former Minister for Local Government to have its recommendations on the subject considered in conjunction with the examination, then in progress, of possible amendment of Section 317A of the Local Government Act.

Several further investigations were carried out during 1983/84, and it was further recommended that any amendment to Section 317A should take certain principles into account; these were set out in the 1983/84 Annual Report. A draft revision of Section 317A was then drawn up by the Local Government and Shires Associations and the Department of Local Government. Councils had commented on the draft, but problems remained and they would have to be consulted again on revised proposals. The Minister said that other interested organisations would then be asked to comment. This Office believed that the long delays were unfortunate and undesirable.

In February 1985 the Minister for Local Government advised the Ombudsman that a report had been prepared for the Local Government and Shires Associations, which had not yet sent their recommendations to the Minister. A draft Cabinet Minute was being prepared; when the Associations' recommendations were received, the Minister would be able to present the proposed amendments to Cabinet.

In response to further enquiries from the Ombudsman, the Minister for Local Government said in July 1985:

> "A draft Cabinet Minute on the subject was prepared in early May 1985, by officers of my Department.
>
> On 21st May, 1985, the Law Society of New South Wales submitted a very detailed submission on the proposals and I have asked that the Society's submission be fully examined before the draft Cabinet Minute is submitted to the Cabinet Secretariat. That examination is currently taking place.
>
> The proposed amendment of Section 317A is just one of several high priority legislative projects currently being put together by the Legal Branch of my Department. Whilst every attempt is being made to ensure that the Section 317A proposal is presented to Cabinet at the earliest opportunity, I am also anxious to avoid a situation in which other programmes of equal or greater importance are compromised."

Amendment of Section 317A was first recommended in August 1982. The Minister, the Department, and the Local Government and Shires Associations all acknowledge that there are problems to be rectified. However, after three years of deliberations, the proposed amendment of Section 317A has only just reached the stage of a draft Cabinet Minute.

71. Notification of Building and Development Applications to Adjoining Owners: Unsatisfactory Position Continues

In the last three Annual Reports the Ombudsman has emphasised the importance of councils notifying adjoining owners of building applications and allowing inspection of the applications. Complaints about this issue usually result from new building or external alteration to existing buildings, by an adjoining neighbour or by a landholder close to the complainant's property. Complainants usually say that they were not notified about, or could not inspect plans of, building work likely to affect the use and enjoyment of their property.

A report on this matter was made to the Minister for Local Government and Lands on 9th February, 1983. It recommended that the Local Government Act be amended by:

1. 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";

2. 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;

3. 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 or height of a building;

4. 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.

The former Minister for Local Government and Lands, the Hon A. R. L. Gordon, in 1983 said that he would recommend to Cabinet amendments 1 and 2, but that he could not support 3 and 4.

In 1984, the present Minister for Local Government, the Hon K. J. Stewart, was asked whether progress had been made towards the amendment of the Local Government Act in accordance with the Ombudsman's recommendations. The Minister replied in October 1984 that the amendment of the Local Government Act was still proposed. However, the Minister said that the "recommendations in the draft Cabinet Minute, which has not yet been submitted to Cabinet, are in broad terms only. If Cabinet approves of the proposals the final details will later be incorporated in drafting instructions to the Parliamentary Counsel for inclusion in a Local Government Bill".

Since the Ombudsman's report in 1983, little action has been taken. For this reason the Ombudsman is considering a special report to Parliament.

In early 1985 the Ombudsman sent a questionnaire about building and development applications to every local council in New South Wales.

The survey covers notification and inspection of building applications, and the notification and inspection of development applications, where there are no existing statutory requirements. The questionnaire was expanded to include development applications, because the number of complaints showed that this was another issue where state-wide council practices should be reviewed. One hundred and seventy-five questionnaires were sent to 29 City Councils, 33 Municipalities, and 113 Shires. Responses to the questionnaire have been received from all local councils except Tallaganda Shire Council. Balranald Shire Council refused to fill out the questionnaire saying "the enquiry has arisen out of complaints from a relatively small area of Sydney and . . . this is not a matter of concern to the rest of the State".

The results of the survey are being correlated , and it would appear that local council practices differ throughout the State. In a small number of cases it has been found that differences of opinion within the councils themselves have led to delays in the return of the questionnaires. If the Ombudsman decides that a special report to Parliament should be made on the issue, a full table of the results of the survey will be attached to the report.

SECTION C: OMBUDSMAN ACT: PRISONS

72. Introduction

Prison Statistics

In line with the Ombudsman's belief that this Office should be highly visible in prisons, a more vigorous programme of visits to prisons was instituted this year. In the course of the year 39 visits were made to 19 prisons and 508 oral complaints were discussed and dealt with. The visits have the approval of the Corrective Services Commission and are additional to visits to gaols by investigation officers carrying out preliminary enquiries or formal investigations into particular complaints.

VISITS TO PRISONS and
ORAL COMPLAINTS DEALT WITH
1st July, 1984 to 30th June, 1985

PRISON	Number of Visits Made	Number of Oral Complaints Discussed
Bathurst Gaol	3	52
Berrima Gaol	2	5
Broken Hill Gaol	1	3
Central Industrial Prison	3	40
Cessnock Corrective Centre	4	43
Cooma Prison	2	43
Emu Plains Training Centre	1	13
Glen Innes Afforestation Camp	1	27
Goulburn Gaol	2	14
Grafton Gaol	1	11
Maitland Gaol	4	44
Metropolitan Reception Prison	3	42
Metropolitan Remand Centre	1	54
Mulawa Training and Detention Centre	1	27
Norma Parker Centre	1	2
Oberon Afforestation Camp	3	32
Parklea Prison	3	40
Parramatta Gaol — 4 Wing	1	8
Special Care Unit, Long Bay	2	8
TOTAL	39	508

Visits have a dual purpose. They provide prisoners with an opportunity to air their grievances directly to officers of the Ombudsman and enable those officers to gain an appreciation at first hand of the workings of prisons. As was noted in the last Annual Report, the vast majority of oral complaints raise issues which are relatively minor or involve "social welfare" matters affecting prisoners; these are usually resolved on the spot, often by discussion with the Superintendent.

The Assistant Ombudsman, John Pinnock, has the senior co-ordinating role in the prisons area and, in this, is assisted by the Principal Investigation Officer, Gordon Smith. John Pinnock has made a point of visiting as many prisons as possible; to date he has visited all prisons in the State (some on several occasions) with the exception of Emu Plains Training Centre and Mannus Afforestation Camp.

Some would say that the number of visits indicated above is inadequate and there should be more regular visits; other critics would say that prison visits by Ombudsman officers merely solicit complaints or "stir up" trouble. The latter type of criticism is rejected outright. The answer to the former criticism is more complex. Firstly, it overlooks the essential concept of the Ombudsman as a complaint body of last resort. It is for the prison authorities, like other government agencies, to develop their own internal complaint solving processes. The recently introduced Prison Visitors Scheme (see topic below) provides an example of this. Secondly, there is the problem of limited resources and the demands on the time of Investigation Officers; it is undesirable that the Ombudsman's Office should itself become large and bureaucratic. Finally, like other members of the community, prisoners can and do write letters of complaint to the Ombudsman. Where thought warranted, Investigation Officers, as part of their investigation, will visit a prison and take evidence or inspect the site of an alleged incident (these visits are not included in the above statistics).

The majority of complaints from prisoners are received through the mail; letters to and from the Ombudsman are privileged and cannot be opened by prison officers. By law, the Ombudsman can only investigate a complaint if it is in writing except where he exercises his "own motion" power to commence an investigation.

Categories of written complaints against the Department of Corrective Services dealt with during the year ended 30th June, 1985 are set out below, together with comparative figures for the previous year:

NO JURISDICTION	1985	1984
No public authority involved	5	(1)
Conduct is of class described in Schedule	16	(29)

DECLINED	1985	1984
*No prima facie evidence of wrong conduct	70)	
*Premature complaint	21)	(94)
Other	26)	
Insufficient interest, other means of redress, etc.	11	(10)
NO WRONG CONDUCT	1	(30)
+WRONG CONDUCT	35	(9)
DISCONTINUED		
Resolved completely	35	(99)
Resolved partially	19	(87)
Withdrawn by complainant	12	(21)
*No prima facie evidence of wrong conduct after preliminary enquiries	185)	
	)	(259)
	)	
Other	42)	
UNDER INVESTIGATION AS AT 30th JUNE, 1985	149	(179)
TOTAL	627	(818)

Notes to Statistics

*Indicates new statistical category.

+Although wrong conduct was found in relation to 35 complaints, only 15 wrong conduct reports were written. Several of these reports dealt with multiple complaints.

Investigating Complaints from Prisoners

The Ombudsman has continued with the system, introduced in early 1984, whereby complaints from prisoners are allocated throughout the Office and dealt with by the majority of investigation officers.

In addition to his co-ordinating role in the prisons area, the Assistant Ombudsman continues to deal with the major and more urgent complaints from prisoners.

Investigation officers and their responsibility for particular prisons are set out below:

PRISON	Responsible Officers	Back-Up Officer
Goulburn Gaol Berrima Gaol Parklea Prison	John Pinnock Alan Hartigan	Alice Mantel
Broken Hill Prison Special Care Unit, Long Bay	John Pinnock Jane Deamer	Margaret Tung
Emu Plains Training Centre Cooma Prison	Alan Hartigan Stephen Cook	Margaret Tung
Bathurst Gaol (including X-Wing) Oberon Afforestation Camp	John Morrow Margaret Cook	Alice Mantel
Metropolitan Reception Prison Metropolitan Training Centre Metropolitan Remand Centre	Andrew Paton Claudia Douglas	Kieran Pehm
Parramatta Gaol Central Industrial Prison Mannus Afforestation Camp	Geoff Walsh Helen Mueller	Jane Oakeshott
Silverwater Work Release Centre	Jane Deamer Sue Bullock	Jane Oakeshott
Mulawa Training and Detention Centre Norma Parker Centre Grafton Gaol	Gillian Scoular Andrew Paton	Sally Hawkins
Cessnock Corrective Centre Maitland Gaol Glen Innes Afforestation Camp	Gordon Smith Bruce Barbour	Kieran Pehm

73. Delays and Inadequate Replies by Department of Corrective Services

On several occasions in the last year, the Department of Corrective Services was very slow in replying to correspondence from this Office. The Ombudsman believes that long delay by a public authority in responding to this Office is unacceptable and is prepared to exercise his coercive powers under Section 19 of the Ombudsman Act to convene inquiries and obtain information. On two occasions in 1984/85 the Ombudsman was even forced to send the Chairman of the Corrective Services Commission lists detailing the delays by the Department in responding to a number of letters.

There were apparently difficulties in the Secretariat of the Department which is responsible for dealing with correspondence from the Ombudsman. In recent months, however, the communication between this Office and the Department of Corrective Services has greatly improved, replies are usually prompt and this Office is advised when delays are likely to occur.

The Ombudsman has also noticed instances where replies from the Department of Corrective Services have "taken into account" reports from individual officers of the Department. The Ombudsman notifies individual officers of investigations in which they are personally involved and seeks comments from them. The officers can then reply directly to the Ombudsman or through the Department of Corrective Services; prison officers often prefer to direct their replies through the hierarchy of command. In some instances the officers have written to the head office of the Department, which has then incorporated a condensed version of their replies in its response to the Ombudsman.

The Ombudsman is of the view that, when individual officers submit replies to the Ombudsman through the Department, the Department should ensure that those replies are forwarded to the Ombudsman in full.

74. Royal Commission (Section 19) Inquiries in the Prison Area

During the past year the Ombudsman has personally conducted two inquiries under the provisions of Section 19 of the Ombudsman Act into the conduct of the Department of Corrective Services. One of these inquiries resulted from a complaint by a prisoner, and the other was begun on the Ombudsman's own motion. A third inquiry was conducted by the Assistant Ombudsman. Section 19(2) of the Ombudsman Act gives the Ombudsman the powers, authorities, protections and immunities normally conferred on a Royal Commissioner under Division 1 of Part II of the Royal Commissions Act. Exercising these powers, the Ombudsman may compel witnesses to attend inquiries and to answer questions. Such inquiries are used to counter delays by government departments in providing information to the Ombudsman, when departmental officers have been reluctant to co-operate, or where there are serious conflicts of facts. It has been noted in previous Annual Reports that some officers are more willing to speak frankly and to be critical of their departments during inquiries than in written reports that pass through departmental channels and can be amended by their superiors. This frankness is appreciated and commended. The Ombudsman can also assess the credibility of witnesses where facts are disputed.

It is the Ombudsman's view that the use of his Royal Commission powers to investigate complaints under the Ombudsman Act achieves a speedy determination of these complaints. He intends to make further selective use of these powers.

75. Prison Visitors Scheme

Recourse to the Ombudsman should be a remedy of last resort. The Ombudsman applauds the introduction by some government departments of internal complaint handling bodies, such as the Complaints Unit in the Health Department and the Public Tenants' Appeal Panel in the Housing Commission.

The Ombudsman wrote to the Minister for Corrective Services in April 1984 expressing concern that there was no internal complaints unit in the Department of Corrective Services. The Ombudsman said:

> "Essentially, the Ombudsman Act provides for detailed investigations of complaints, and the writing of reports on those investigations. Inevitably if a matter goes to a conclusion there is a significant time period involved. On the other hand, in making visits to gaols both for the purpose of carrying out investigations and being available to prisioners, officers of the Ombudsman receive a number of "social welfare" type queries or questions. Within time and resource restraints our officers endeavour to be of assistance. However, in my opinion this essentially welfare or almoner type function is not within the true scope or capacity of the Office of the Ombudsman. It can also be said that these types of queries and the relatively minor non-administrative type of complaints are made to officers of the Ombudsman because there is no effective mechanism provided in the Department of Corrective Services for dealing with them. I appreciate that there are designated in each gaol one or two Welfare Officers. Some of my officers believe that the system of Welfare Officers is ineffective and indeed I have been considering whether to commence a formal investigation to determine whether the absence, if it be such, of an effective system for dealing with this type of prisoner complaint, constitutes wrong conduct on the part of the Department under the Ombudsman Act.
>
> Prior to commencing such an investigation I made some preliminary enquiries and spoke to Ms Jane Hyde who was then Acting Policy Analyst with Mr Peter Anderson. She suggested that it would be appropriate for me to stay any question of investigation because the Minister and Department then had under active consideration an Official Visitors Scheme based on the English model. My concern is that that scheme has not come to fruition, and indeed may be still-born. Another policy alternative would be the introduction of an internal complaints system along the lines of that introduced by the former Minister for Health, Mr Brereton. Under the scheme introduced by him complaints about hospitals and their administration are investigated by a specially formed unit under the head of Ms Phillipa Smith.
>
> It is not the role of the Ombudsman to be involved in policy issues. However, the current situation, in the belief of some of my officers, is such that an investigation by this Office of the existing inadequacies is called for."

The Minister replied that he proposed to introduce an Official Visitors Scheme for New South Wales prisons, and the Ombudsman decided not to begin an investigation at that time.

The Prison Visitors Scheme commenced operation in January 1985 with the appointment of Official Visitors to Goulburn Gaol and Mulawa Training and Detention Centre for Women. An additional Official Visitor has since been appointed to Mulawa and two Official Visitors have been appointed to each of the prisons constituting the Long Bay Complex of Prisons. Details are set out below.

The objectives and functions of the Official Visitors have been determined as follows:

Objectives

(a) To perform an inspectorial function independently of any similar Departmental function.

(b) To provide an outlet for enquiries/complaints for both staff and inmates and improve communications between the local institution and the Corrective Services Commission.

Relationship with the Corrective Services Commission and the Minister for Corrective Services

1. The Official Visitors are directly responsible to the Commission.

2. Where circumstances warrant, the Official Visitors may have direct access to the Minister.

Functions

(a) At least once each month, the Official Visitors shall jointly visit the prison to which they are appointed or, if they prefer, may visit separately, and report to the Corrective Services Commission.

(b) Deal with enquiries/complaints from staff and inmates without in any way interfering with the management or discipline of the prison, nor give or purport to give any instructions to an officer.

(c) The only limitation upon access of the Official Visitors to the prison to be where such visits would be detrimental to the security of the prison. As a general rule, access to prisoners to be similar to that applying to prisoners' legal representatives.

(d) Upon providing satisfactory proof of identity to the Superintendent, Official Visitors may enter and examine a prison at any time they think fit.

(e) Make such enquiries as may be deemed necessary as to the care, treatment and control of inmates.

(f) Official Visitors shall:

(i) have access to all necessary reports, documents and prisoners' files for the purpose of carrying out their enquiry;

(ii) on every visit to a prison, enter in the Official Visitors book the fact that they are visiting for such observations as they think fit;

(iii) ensure that enquiries/complaints are recorded on proforma type forms provided especially for this purpose. These forms are pre-numbered, in duplicate and are contained in bound books. The original copy of the complaint forms is to be used for action by the Official Visitor. Where the matter cannot be resolved locally the complaint is to be referred to the Commission;

(iv) forward to the Commission following each gaol visit and not later than 21 days after the visit, a report containing such information as they see fit, including delays being encountered in handling enquiry forms which are considered excessive or unreasonable;

(v) be available for interviews by staff and inmates;

(vi) meet regularly with representatives of the Unions and the prisoners to keep communication channels open between the Commission and Institutions;

(vii) not become involved in complaints from staff which fall within the scope of the procedures agreed to between the Commission and the Public Service Association of New South Wales for settlement of Prison Officer Grievances and Disputes (the Day Agreement) unless it appeared that the industrial issue being dealt with in accordance with the procedures was not being handled properly.

The Ombudsman believes that the Prisons Visitors scheme should be given a fair trial. For this reason, and because recourse to this Office should be a remedy of last resort, complaints received from inmates at prisons served by Official Visitors are carefully scrutinised and, where it is considered appropriate for them to be dealt with by an Official Visitor, this Office declines to take them up. The complainant is informed of the availability of the Official Visitor and is advised either to write to or see the Visitor at the prison. This Office, without disclosing the details of the inmate's complaint (the secrecy provisions prevent such disclosure without the complainant's express consent), alerts the Official Visitor to the problem and asks that the inmate be seen as soon as possible.

The effectiveness of the Prison Visitor scheme will be monitored with interest by this Office insofar as that is possible. If the scheme is not effective, the Ombudsman believes that further consideration will need to be given to some internal complaints unit in the prison system. Hopefully, the scheme will prove to be effective and successful and, within a reasonable period of time, will be extended to cover all prisons in New South Wales.

Prison:	**Official Visitors:**	
Goulburn Gaol	Dr G. Sutton	Ms J. Marnie
Metropolitan Reception Prison Long Bay	Mr B. Davies	Ms N. Kemp
Metropolitan Training Centre Long Bay	Ms C. McCaskie	Mr W. R. Hoyles
Metropolitan Remand Centre Long Bay	Professor D. J. Anderson	Ms C. Lyons
Central Industrial Prison Long Bay	Mr G. P. Nicholls	Ms B. D. Gilling
Mulawa Training and Detention Centre and Norma Parker Centre	Ms F. Byron	Ms R. Read

76. Women in Prison Task Force Suggest More Ombudsman Prison Visits

In March 1985 the Minister for Corrective Services tabled in Parliament the Report of the NSW Task Force on Women in Prisons. The report recommended among other things:

> An officer of the Ombudsman's Office should regularly (at least weekly) visit women's prisons and be available to receive prisoners' written or verbal complaints.

The Ombudsman believes that this recommendation shows a misunderstanding of the role of the Ombudsman as a complaint body of last resort. The report was written before the Prisons Visitors' Scheme had been introduced (in fact, the report recommended that an Official Visitor commence duty without delay) and without knowledge of the correspondence between the Ombudsman and the Minister referred to in the previous topic. The Ombudsman agrees that, to the extent that scarce resources allow, his Office should be highly visible in prisons, but he does not agree that regular weekly visits to any prison are either necessary or justifiable. A more vigorous programme of visits to prisons has been undertaken this year, but the visits, since the Prison Visitors' Scheme commenced, have concentrated on those prisons not served by Official Visitors.

The Ombudsman takes the view that the Prison Visitors' scheme should be given a fair trial. If it proves to be ineffective then, the Ombudsman believes, there would be a need for some internal complaints unit in the prison's system which has the respect of prisoners. Such a unit could be modelled on the Department of Health Complaints Unit or, alternatively, a special body could be set up to deal with prison complaints as was recommended by Mr Justice Nagle in the report of the Royal Commission into New South Wales Prisons.

The present Ombudsman is not opposed to the Nagle Royal Commission proposal which was made in 1978 in the context of the then current activities of the relatively recently formed Ombudsman's Office in the prison complaints area. The Ombudsman believes that, if any such body is set up:

(i) it should not use the name "Ombudsman"; and

(ii) any complainant prisoners dissatisfied with that body's handling of a complaint should, as a matter of last resort, have the right to complain to the Ombudsman.

Countervailing policy considerations to the Nagle Royal Commission proposal are those recently stated by the South Australian Ombudsman, Ms Mary Beasley, in criticism of that State's new Police Complaints Authority — namely, the advantages of "one stop shopping" at an existing agency (the Ombudsman) with an established public reputation for both independence and fair investigation. Further, a multi-purpose, regulatory agency is less likely than a single purpose one to be "captured" (to use an American expression) by any Department it is required to investigate.

Clearly, however, an effective regular complaints handling mechanism is needed. It is to be hoped that the Prison Visitors Scheme proves to be this.

77. Alleged Interference with Prisoners' Mail to Ombudsman: Women in Prisons Task Force Report

The New South Wales Task Force on Women in Prisons said in its report (p 269):

> "Prisoners have access to the Ombudsman. Some prisoners have recently stated that there has been no response to their complaints to the Ombudsman, *indicating that their complaints did not reach the Ombudsman or that that Office has been dilatory in responding.*" (Emphasis added)

Because the report had been tabled in Parliament and was a public document, this Office immediately conducted enquiries to ascertain whether the implied criticism of the Office contained in the statement had any basis in fact. Such enquiries, given that the names of the prisoners who made the statements alleged in the report were not known to this Office, revealed no evidence to support the theory that this Office had been "dilatory in responding".

This left, amongst others, the theory put forward in the report — that letters of complaint to this Office written by some prisoners at Mulawa and Norma Parker Centres had not been sent by prison officers to the Ombudsman, as required by Section 12(3) of the Ombudsman Act.

The Ombudsman viewed the matter seriously. Such conduct on the part of the prison officers, if in fact it had occurred, would be conduct contrary to law and wrong conduct in terms of the Ombudsman Act. Accordingly, preliminary enquiries were immediately commenced to determine whether the conduct suspected by the Task Force should be made the subject of an investigation.

The Chairperson of the Task Force, Mr F. D. Hayes, A.M., was invited to the Ombudsman's Office for discussions and to answer questions. Following that interview Mr Hayes was formally asked for:

1. the names of those members of the Task Force who conducted interviews and/or participated in group discussion with prisoners at Mulawa Training and Detention Centre and Norma Parker Centre;

2. advice as to when such interviews and discussions were held;

3. advice as to whether notes or other records made by members of the Task Force at such interviews and discussions, bearing on the issue, would be made available to this Office, and in any event, the names of those prisoners who claimed not to have received replies from this Office.

During the following weeks, Mr Hayes was in telephone contact with this Office on a number of occasions. From his conversations with officers of the Ombudsman, it was apparent that he was having considerable difficulty in:

— determining which members of the Task Force had spoken to prisoners;

— determining which prisoners had been interviewed;

— locating records of interviews with prisoners about the issue in question; and

— identifying in any way at all which prisoners had made complaints to Task Force members about delay in receiving replies from this Office.

An investigation officer at the Ombudsman's Office subsequently had discussions with a member of the Task Force, who said that the complaints referred to in the Report arose during group discussions between women prisoners and Task Force members. The matter had been raised in a general way, rather than by way of specific examples.

Mr Hayes, in an effort to overcome the difficulties he had encountered because of the lack of records kept by Task Force members (he explained that interviews were conducted "in confidence" and that prisoners were promised that identifying notes would not be taken), initiated a series of visits to prisons where women prisoners were accommodated (Bathurst X Wing, Mulawa, Norma Parker and Parramatta 4 Wing). He invited prisoners to raise with him any complaints made of the nature referred to in the quoted paragraphs from the Report. Unfortunately, this exercise proved of little utility. Mr Hayes relayed several prisoners' names to this Office, but most had not made complaints during the period referred to in the Task Force report. A check of this Office's files revealed no excessive delays or "dilatory" responses nor provided any evidence of unlawful interference with mail by prison officers. Investigation officers made similar enquiries during their visits to prisons, and found no instances of undue delay.

One factor which came to light during preliminary enquiries by this Office was that sometimes prisoners appear confused about to whom they are writing or speaking. This appears particularly so since the appointment of Official Visitors, who have sometimes been mistaken for officers of the Ombudsman. This problem should be reduced when a special brochure for prisoners, now being produced by this Office, becomes available, and as the role of Official Visitors becomes more widely known.

To summarise, the follow-up enquiries conducted by the Ombudsman do not support the quoted passage in the Task Force Report either on the basis of unlawful interference with mail or dilatory replies by officers of the Ombudsman. The Ombudsman regards as of great importance the statutory guaranteed, unconditional right of confidential correspondence between prisoners and the Office of the Ombudsman. If any satisfactory evidence of breach of this statutory guarantee is provided or obtained, the Ombudsman will have no hesitation in commencing a prosecution against those responsible.

78. Use of Telephone by Remand Prisoners to Contact Legal Representatives

Prisoners awaiting a committal hearing or trial often complain about the difficulty they have in contacting their legal representatives by telephone from gaol. Before a hearing, remand prisoners may require frequent contact with their legal representatives in order to prepare their case.

On 20th June, 1984, during a visit to Parramatta Gaol, two investigation officers received a complaint that remand prisoners were prevented from telephoning their legal representatives directly. It was alleged that, if a remand prisoner wished to speak to his or her legal representative, the prisoner was required to ask a Welfare Officer to telephone the solicitor on the prisoner's behalf. The Welfare Officer then acted as an intermediary in any conversation that took place, and relayed messages from one party to the other. The Superintendent of Parramatta Gaol later confirmed this practice.

Enquiries showed that an instruction dated 5th December, 1983 did *not* prevent prisoners telephoning legal representatives directly. However, Mr V. J. Dalton, Chairman of the Corrective Services Commision, said:

> "... bearing in mind that the number of telephones and permitted calls by inmates at Parramatta Gaol are limited, the Welfare Officer's involvement is considered to be an aid rather than a hindrance to inmates..."

Enquiries made by this Office of the Law Society of New South Wales and Macquarie Legal Centre at Parramatta revealed that both organisations considered the involvement of a Welfare Officer in the telephone contacts to be a matter of concern and a practice which had caused difficulties.

The Ombudsman concluded that the opportunity for remand prisoners to communicate freely and directly with their legal advisers was important; the intervention of a third party such as a Welfare Officer might create uncertainty, confusion and delay in communications between remand prisoners and their legal representatives.

The Ombudsman recommended that the Department should allow prisoners at Parramatta Gaol to speak directly to their legal representatives. It was further recommended that all remand prisoners at Parramatta Gaol should be advised that they could contact their legal representative by telephone if they wished, in accordance with departmental procedures.

The Chairman of the Corrective Services Commission advised this Office that the recommendations in the Ombudsman's report had been agreed to and implemented.

79. Identifying "Strict Protection" Prisoners

A large number of prisoners spend much of their time "on protection", isolated from the majority of the prison population. A prisoner may be placed on protection because there are fears for his safety, arising from threats, intimidation or assaults by other prisoners; these may result from such things as unpaid drug debts, sexual intimidation or suspicion of informing. Some prisoners must be placed on "strict protection", isolated from all prisoners, including others on protection. The classification or transfer of protection prisoners from one gaol to another raises a number of difficulties, particularly where the prisoner is on strict protection or is a "sensitive" prisoner. The reasons for placing a prisoner in the "sensitive" or strict protection category may be known only to a small group of senior officers of the Department. This information may not be generally available to officers at other institutions, including even the Superintendent, or officers escorting such prisoners between institutions.

This situation was highlighted by the case of a particularly sensitive prisoner who complained to the Ombudsman about a decision to transfer him from the gaol where he was on protection. This prisoner had vital information concerning a number of serious matters at a metropolitan Sydney gaol. The Ombudsman does not propose to give details of this complaint or any other information which might identify the prisoner concerned. Suffice it to say that the information the prisoner possessed was such as to place his life at risk. His sensitive position was known only to selected senior officers of the Department. After the Ombudsman's investigation began, the transfer of the prisoner was halted. The report of the Ombudsman said:

> "The sequence of events disclosed by this investigation represents a saga of carelessness and lax procedures which might well have cost an inmate his life.
>
> The safety of prisoners who have provided valuable information to the Department should not depend simply on whether or not an officer familiar with their circumstances happens to be available at the relevant time to ensure that fair or prudent decisions are made."

The report went on to note an apparent dilemma confronting the Department and its officers:

> "... procedures for ensuring that special consideration is given to such prisoners must take into account the fact that prisoners who provide information to the authorities place themselves at serious risk by doing so. It would therefore be entirely wrong to place such information on a prisoner's file, where officers and 'trustee' inmates might obtain ready access to it. Nevertheless, some procedure must be devised to ensure that the Director of Classification and members of Classification Committees are alerted to problems, such as existed in Mr ... 's case, and take steps to obtain proper advice before making any decision."

The report recommended the introduction of a system to identify prisoners on protection who are seriously at risk and to ensure that there is proper consultation before they are transferred.

In mid-1985 the Chairman of the Corrective Services Commission advised that these procedures had been introduced throughout the prison system. The procedure is simple, providing for one of the two stickers, marked "Protection" or "Check — Special Instructions", to be displayed on the front of a prisoner's warrant (or gaol file) which is available to a Classification Committee and which accompanies a prisoner when he is transferred.

80. Police Control of Prisons During Industrial Disputes

On numerous occasions over recent years prison officers at various gaols have gone on strike, sometimes for long periods. In these circumstances the gaols have been manned by the Superintendent, the Deputy Superintendent and other executive officers, with the assistance of police. In some cases the executive officers have carried out virtually all the duties normally undertaken by prison officers, while the police have been engaged only in maintaining perimeter security. In other instances police officers have entered gaols and carried out other duties, such as feeding and escorting prisoners for showers, which entail direct contact with the prisoners. The presence of police officers in gaols in these cases raises important legal and practical problems which were evident during an investigation by this Office.

On 6th February, 1983 a prisoner at Parramatta Gaol complained that he had been assaulted by police officers who were on duty at the gaol during a strike. The strike had commenced on 31st January and the gaol was being manned by four executive officers and an average of 40 police officers on each day of the strike. Normally 68 prison officers would have been on duty. The prisoner also complained that an Assistant Superintendent had failed to take any action to stop or investigate the alleged assaults after the prisoner had complained to him. The prisoner also complained that the Superintendent had failed to take any action on his complaint.

Police officers had escorted the complainant and other prisoners from 5 Wing to the showers in the "Circle" at Parramatta Gaol. The complainant alleged that he was assaulted in the shower by a police officer, and that further assaults took place as he was being escorted back to his cell and as he was placed in his cell. He further alleged that he had been sprayed with mace gas by a police officer on two occasions; aerosol packs of this substance are carried by many police officers when on duty in gaols during strikes. Prison officers do not carry this equipment when on normal duty. There was evidence of a scuffle between the complainant and police, although there was conflict as to the details of the scuffle and how it began. A witness, a male nurse, confirmed that the complainant had sought medical attention after being sprayed with mace; he noted that the complainant's eyes were red and inflamed. The male nurse habitually carried eye drops with him to alleviate eye irritation caused by the use of mace when police were on duty in the gaol. The complainant said that he had heard (but apparently not seen) the Assistant Superintendent, that he had called out to complain to him that he had been gassed, and that he asked the identity of the police officer involved. The Assistant Superintendent said that he had been on an upper level of the Wing and had heard a commotion on the ground floor. He did not see any assault on the complainant, but had seen police escorting him to his cell and holding him by the arms. The Assistant Superintendent said that he did not see undue force used against prisoners by police at any time during the strike. The Assistant Superintendent was at one time forced to wash his eyes at a basin on the upper level in the Wing because of the amount of mace in the air; gas had been used in considerable quantities by the police. While the Assistant Superintendent was washing his eyes he heard a prisoner calling out from his cell that he had been gassed. It could not be determined if it was the complainant's voice which the Assistant Superintendent had heard.

The complaintant also said that after the strike he had complained to the Superintendent, in the presence of the Assistant Superintendent, about the alleged assaults; he was advised to refer the matter to the Visiting Justice. The Superintendent recalled being approached by a number of prisoners with grievances about the strike, but he did not recall being approached by the complainant.

Sections 39 and 40 of the Prisons Act place a responsibility for the custody and superintendence of prisoners and prisons on the Superintendent of the gaol. In addition, the Prison Regulations and Prison Rules provide for a hierarchy of command within the prison. The legal position may be contrasted with the practical situation which executive officers face when police are on duty in prisons. In the above case, the Assistant Superintendent described what happened at Parramatta Gaol:

- a chief superintendent and inspector of police entered the gaol and all records were handed to them;
- executive prison officers returned to the main gate where all keys were held; keys were booked out as necessary by a police sergeant;
- executive officers remained in the gaol in an advisory capacity only, having no authority while police were in charge;
- police would not enter the gaol unless they were told they were in control.

The Ombudsman noted in his report that the Superintendent appeared to be of the opinion that he was not responsible for anything that occurred in the gaol during a strike by prison officers. This view had the implicit approval of the Chairman of the Corrective Services Commission, who informed the Ombudsman:

> "At all times during the abovementioned industrial strike, Parramatta Gaol was effectively and completely under the control and supervision of members of the Police Department. Executive officers of this Department, including the then Superintendent and Assistant Superintendent . . . were in attendance as observers and to provide assistance to the Police if and when requested by them to do so."

The Ombudsman concluded that there was no provision in the Prisons Act for a Superintendent to delegate the responsibility for the superintendence of his prison, and that he remained, in law, responsible for the control of the prison. This responsibility continued, notwithstanding the presence of police in the prison.

The Ombudsman recommended that:

(i) the Department of Corrective Services establish, in consultation with the Police Department, a command structure and guidelines for the control of goals during strikes by prison officers;

(ii) the command structure and guidelines recognise the statutory responsibilities of the Department of Corrective Services and its senior executive officers;

(iii) the Department of Corrective Services publish for the benefit of all senior executive officers circulars setting out the command structure and guidelines referred to.

A meeting of representatives of the Corrective Services and Police Departments has since occurred. The Ombudsman intends to follow up progress in the area covered by his recommendations. The present situation during prison industrial disputes is unsatisfactory and possibly illegal.

81. Searching of Visitors to Prisoners

Visitors to prisoners are able to have "contact" visits. Such visits allow prisoners and their visitors some physical contact; this is normal in most social environments, but was once virtually unknown in prisons. This reform was much needed and the Corrective Services Commission is to be congratulated for introducing it. Like all changes, however, the reform brought with it problems, not the least of which is the smuggling of contraband, particularly drugs, by visitors. The Department of Corrective Services has taken a number of steps to deal with the problem; for example, prisoners are strip searched before and after contact visits. In addition, Prison Regulation 96B provides:

> 96B. (1) The governor of a prison or a prison officer authorised in that behalf by the governor may require a visitor to the prison or to a prisoner to submit to being searched personally or by screening device or both.
>
> (2) Where a visitor refuses to be searched as required under clause (1) or is found to have contraband, the governor of the prison or a prison officer authorised in that behalf by the governor may refuse to allow the visitor to proceed with his visit and where he so refuses shall cause the refusal and the reasons therefor to be recorded and reported to the Commission.

Copies of Regulation 96B, together with a warning to visitors, are displayed in conspicuous places in most gaols. In its present form the Regulation raises a number of issues. The phrase "searched personally" is ambiguous; it is difficult to be certain whether it includes strip searching or merely refers to searching of clothes and possessions and "frisking". There does not appear to be any suggestion that it refers to body searches, that is, searches of body cavities. The Regulation contemplates that a search may only be undertaken with the consent of the visitor, but it does not provide a detailed procedure for the carrying out of the search. When a visitor refuses to be searched, the visit is usually terminated and no alternative, such as a non-contact visit, is provided.

Searches carried out under Regulation 96B have led to a number of complaints to the Ombudsman. For instance, a prisoner at Bathurst Gaol complained about the way that his wife and six year old daughter were searched in the visiting section at the gaol. The investigation showed that Regulation 96B was imprecise. It was unclear whether the prisoner's wife had truly consented to the search of herself or of her daughter. There was also a breakdown of communication between the officer in charge of the visiting section and the officers who conducted the search after permission was obtained from the Deputy Superintendent. The prisoner's wife and her daughter were escorted to an upstairs area of the visiting section which was not in use. They removed their clothes. The prisoner's wife was not aware that her daughter was to be searched, although the officer conducting the search understood this to be the case.

The Department of Corrective Services investigated the searches, and Deputy Superintendent Owens of the Custodial Services Division recommended:

> "That an urgent review be undertaken of the methods used when it is thought necessary to search visitors to prisoners, particularly in the area of how they are informed of their rights and the options available to them should they not wish to be searched.
>
> That a legal advising in regard to Regulation 96B be obtained as a matter of urgency so that the parameters of authority of that regulation could be clarified."

The Ombudsman endorses these recommendations. On 20th August, 1985 the Chairman of the Corrective Services Commission advised that he had recommended to the Minister the amendment of Regulation 96B, but gave no details of the proposed changes. This issue will be followed up by the Ombudsman.

82. Protection Prisoners: Mulawa, Parklea, Central Industrial Prison

A large number of prisoners are classed as protection prisoners. For their own safety they are isolated from the general prison population. The Department of Corrective Services is obliged to protect prisoners from the depredations of fellow inmates, so far as is reasonably possible, but it has little effective control over the reasons for which prisoners are placed on protection, and hence over the numbers of such prisoners.

Ideally, protection prisoners should receive the same privileges and amenities as prisoners in ordinary discipline, but this is rarely the case. The treatment of protection prisoners and the lack of facilities available to them is not a new issue. It has been raised previously in the report of Mr Justice Nagle and in various reports by the Ombudsman. The problems increase when there is overcrowding in prisons. The Ombudsman's 1981/82 Annual Report noted:

> New South Wales prisons were not constructed to cater for a large number of prisoners on protection, and the conditions under which these prisoners are held in many gaols are grossly inadequate. (p. 83).
>
> In the past year, further examples of the lack of facilities for protection prisoners have been investigated by the Ombudsman. One of these investigations concerned the transfer of a number of protection prisoners from Mulawa Women's Detention Centre to 4 Wing, Parramatta Gaol in December 1983. The decision to transfer these prisoners, as well as some prisoners on segregation, was made as the result of a recommendation by Mr Justice Watson of the New South Wales Industrial Commission, following an industrial dispute at Mulawa. Male prisoners had previously been housed in 4 Wing, which had been vacant for some time. Extensive renovations were needed to make the building habitable. Inspection of the Wing revealed a building that was old, dilapidated, cold and dank, with few facilities or amenities. A prisoner described it as "totally unfit for animals to live in, much less human beings". An officer of the Department remarked that he would not "put a dog out there" but added that, in these days of equality, what was good enough for men should not be complained about by women. Some of the oral complaints by the prisoners were:

1. They were locked in their cells at 4.00 p.m. and not let out until 10.00 a.m. (At Mulawa they had not been locked in until 8.30 p.m.)

2. They exercised in the "Circle", which was foul and filthy. There were other yards which were cleaner and more pleasant. They were not allowed to use them for security reasons.

3. There were no classes or activities to help them pass the time.

4. Concessions allowed at Mulawa had been denied because there were not enough officers to supervise the prisoners properly.

The prisoners were eventually transferred back to Mulawa, but complaints were received about conditions there. The Superintendent, Mrs Storrier, detailed the problems facing both protection prisoners and custodial staff. It was her opinion that protection prisoners at Mulawa could not be treated properly, because the Department had not provided the necessary special facilities. Moreover, it was not possible to separate protection prisoners from prisoners on segregation.

In his report the Ombudsman recommended that the Department of Corrective Services give immediate attention to providing female protection prisoners with the facilities, amentities and privileges to which they were entitled. The Ombudsman also recommended that under no circumstances should the Department place protection prisoners in accommodation where they are forced to associate with other prisoners from whom they would normally be protected. On 25th March, 1985 the Ombudsman made a report to Parliament on this issue.

A further example of the lack of facilities for protection prisoners came from a complaint by several inmates in the protection unit at Parklea Gaol. They complained that they spent less time out of cells than prisoners on normal discipline. Investigation confirmed the prisoners' claims. The Superintendent at Parklea said that the problem had arisen because there was insufficient staff in the unit for a second shift at 4.00 p.m.; prisoners were thus locked in their cells from about 3.30 p.m. Other prisoners in the gaol were allowed free run of the gaol from about 6.00 a.m. until 7.30 p.m. "Let-out" in the morning for the protection prisoners was at 8.00 a.m., and so they were confined to their cells for 16 hours every day. Moreover, lunch and dinner were served within approximately two hours of each other, so that the prisoners had to wait from around 3.00 p.m. until 8.00 a.m. the following day for their next meal.

After preliminary enquiries by this Office, the Superintendent decided to allow an additional out-of-cells time of two hours on three days of the week, by approving overtime. Conditions in the unit were still discriminatory and, recognising the problem, the Superintendent recommended that an extra shift be approved. The Corrective Services Commission rejected this request.

The Chairman of the Corrective Services Commission was then asked to consider the conditions in the Parklea Protection Unit in the light of Recommendation 134 of the Report of the Royal Commission into New South Wales Prisons, which stated:

> "Prisoners shall not be locked in their cells overnight for longer than ten hours."

In his reply, the Chairman made no reference to the report of Justice Nagle, merely stating:

> "The Department is operating under staffing constraints and it is simply not possible, without seriously depleting other areas of necessary supervision, to provide protection inmates . . . with the same time-out-of-cells privileges that apply to inmates in normal discipline."

The Ombudsman found that the Commission's decision to ignore the view of Justice Nagle in his Report was unreasonable and discriminatory in terms of the Ombudsman Act, and recommended an immediate staffing review at Parklea to remove that anomaly. On 18th July, 1985 the Chairman of the Corrective Services Commission, in response to the Ombudsman's report, advised that a staffing review had been completed and was under consideration. In the meantime, the Superintendent had re-arranged shifts at Parklea so that protection prisoners would spend the same time out of cells as prisoners in normal discipline.

The lack of facilities for protection prisoners is accentuated by severe overcrowding in gaols. The most obvious example is 1 Wing of the Central Industrial Prison, which houses only protection prisoners. It has single cell accommodation for 50 prisoners, but usually houses between 90 and 100 prisoners. Each prisoner shares his cell with one or two other prisoners. The facilities in this Wing are, in the opinion of the Office of the Ombudsman, totally inadequate and made a mockery of any modern notions of penology. Quite apart from the obvious problems facing prisoners, such conditions present an almost impossible task for prison officers and the Superintendent of the gaol, particularly where the Superintendent may be required to place some prisoners on "strict" protection — that is, isolated from other protection prisoners.

There is no doubt that the Department of Corrective Services, like all departments, has financial constraints imposed on it, particularly where the provision of adequate accommodation may require large capital expenditure. However, while the Department has recently tried to ameliorate the conditions of protection inmates (for example, by converting a wing at Maitland Gaol for such prisoners), the facilities available to the large majority of protection prisoners remain wholly inadequate.

83. Winter Clothing for Prisoners — Pullovers or Jackets

On 21st May, 1985 an inmate of the Metropolitan Remand Centre, Long Bay Prison Complex, complained to this Office about the alleged failure of the Department of Corrective Services to issue adequate warm clothes to inmates of the Centre or to allow them to wear their own warm clothes. Because of the proximity of winter, it was decided to hold an immediate inquiry into the complaint under Section 19 of the Ombudsman Act, rather than engage in protracted correspondence with the Department. Various departmental and prison officers gave evidence, including the Chairman of the Corrective Services Commission and the Superintendent and Deputy Superintendent of the Centre.

It appeared that the Department had an overstock of jackets for some years, and on 16th May, 1985 the Chairman directed that no new pullovers be issued to the Centre. Instead, prisoners were to be provided with jackets.

The daily turnover of prisoners at the Centre varied from 50 to 150. Prisoners spent a considerable amount of time each day outside during the winter months; their cells were not heated. At reception, prisoners were issued with a fleecy-lined T-shirt, short-sleeved shirt and a jacket. Both the Superintendent and Deputy Superintendent of the Centre were of the view that these prison issue clothes were adequate and warm enough for winter conditions. However, they felt that working prisoners needed to remove the jackets because they were clumsy. Both officers used their initiative and maintained a pool of non-prison pullovers, particularly for working prisoners.

During the inquiry, it was found that the complainant had received his own track suit prior to making his complaint, and that prisoners were allowed to wear their own clothes. This was contrary to the prisoner's allegation. He was interviewed again, and when the evidence taken during the inquiry was put to him, he admitted that prior to making his complaint the Department had approved his request for his own track suit and he was in possession of it at the time of making his complaint.

The Ombudsman's inquiry concluded that the standard prison issue of fleecy-lined T-shirts, short-sleeved shirts and cotton lined jackets (whatever one thought of the latter in terms of design) was adequate for warmth and comfort. He found that there was no wrong conduct by the Department of Corrective Services or its officers in relation to the particular prisoner or, given the orignal over-order of jackets some years before, the prescription of their use at some Sydney prisons in preference to pullovers.

84. Death of Drug Detection Dog

On 27th December, 1984, Mr Murray Trembath, a member of the editorial staff of the "Sun" newspaper, wrote to the Ombudsman alleging that there had been a failure to properly investigate the poisoning of a drug detection dog at Long Bay Gaol.

On the morning of 22nd August, 1982 Jupiter, a drug detection dog, was found dead in his kennel area at Long Bay. The circumstances of the dog's death led to suspicions that it had been poisoned; a quantity of green pellets similar to a commonly used snail bait was discovered in the kennel area. The death was immediately reported, photographs were taken and an autopsy was performed at the Veterinary Clinic, Sydney University. Enquiries were made of a manufacturer of commercial pesticides as to the lethal dose of metaldehyde, the active constituent of snail pellets, required to kill a dog of Jupiter's size.

On 24th August, 1982 the prison officer responsible for investigating Jupiter's death reported to the then Chief Superintendent of Long Bay Prison Complex, Mr Quarmby, that there was evidence suggesting that the dog had been poisoned. The report concluded that no prisoner could have poisoned the dog and that the person responsible could have been a staff member.

On 26th August, 1982 the Chief Superintendent reported to the Director of Establishments (now Custodial Services Division) and agreed with the conclusions of the investigating officer. The Director of Establishments, Mr McTaggart, noted that the conclusions were disturbing and decided that copies of the report should be given to the police. On 13th September, 1982 he asked a Superintendent of the Establishment Division the result of police action and investigation.

On 10th September, 1982, the investigating prison officer reported again to the Chief Superintendent, attaching copies of an autopsy report from the Veterinary Clinic, Sydney University, and a report from the Division of Analytical Laboratories, Lidcombe. The authopsy report concluded:

> "The post-mortem changes were consistent with, but not diagnostic of, death from metaldehyde poisoning. There were no other changes that could explain the sudden death of this dog."

The report by the Division of Analytical Laboratories found metaldehyde in the liver, stomach contents and saliva of the dog as well as in a sample of the pellets collected from the kennel area. A test on water in the dog's bowl did not detect metaldehyde.

On 14th September, 1982 Mr Quarmby again sent all of the reports to Mr McTaggart, recommending that urgent enquiries be made by police attached to the Department of Corrective Services. This recommendation was apparently ignored.

On 5th December, 1984 Mr J. Hatton, M.P., wrote to the Minister for Corrective Services, asking for a detailed report about Jupiter's death. This letter prompted yet another report; this time from Mr Quarmby, by now the Assistant Director, Custodial Services, to Mr McTaggart, by this time Director of the Custodial Services Division, in which the Assistant Director repeated the information in his earlier reports. This report concluded:

> "Upon receipt of the analytical reports all relevant reports were forwarded to the Director of Establishments with a recommendation that further enquiries be made by officers attached to the Special Investigation Unit.
>
> Since that time no further enquiries have been made and no action has been taken to clearly identify the person or persons responsible for the death of Jupiter."

(The Special Investigation Unit was the predecessor of the Internal Investigation Unit whose formation was advised by the Minister for Corrective Services in April 1985. Police officers were seconded to the Unit.)

In response to the last of the series of reports Mr McTaggart sought the comments of Detective Sergeant Reith, a police officer attached to the then Special Investigation Unit. Detective Sergeant Reith, who had not been attached to the Unit in 1982, ascertained that no enquiry had ever been officially referred to the Unit for attention, and that no investigation had been carried out. Detective Reith concluded his report:

> "... there would be little to gain from a fresh investigation being commenced at this stage as the matter is now over two years old and any evidence which would have been available at the time of the dog's death would now have been destroyed."

Detective Superintendent Loomes, Police Internal Affairs Branch, to whom Detective Reith submitted his report, agreed with this conclusion, as did Executive Chief Superintendent Pry, signing on behalf of the Assistant Commissioner (Internal Affairs), in a letter to Mr McTaggart on 22nd January.

A reply to Mr Hatton was then drafted for the Minister's signature. This letter referred to enquiries which had been undertaken at the time of Jupiter's death and confirmed the possibility that a member of staff had poisoned the dog. The letter also advised Mr Hatton that enquiries had proved inconclusive, considerable time had lapsed, and the Minister had decided, on the advice of the police, that little purpose would be served in pursuing the investigation any further. The advice to Mr Hatton did not mention the failure to refer Mr Quarmby's recommendation to the Special Investigation Unit in September 1982.

It is difficult now, given the lapse of time, to argue with the conclusion of Detective Sergeant Reith. The Ombudsman, however, has decided to undertake a formal investigation of the reasons for the failure to refer Mr Quarmby's recommendation to the Special Investigation Unit.

85. Substandard Conditions for Difficult Women Prisoners

Protection and segregation prisoners require special treatment. However, they are kept apart from other prisoners and so are restricted in the facilities and activities available to them. There are special problems with "difficult" women prisoners. A difficult male prisoner (for example, guilty of some assault), can be sent to a variety of other gaols, whereas a difficult woman prisoner in the same situation can be moved only to the segregation cells at Parklea or to 4 Wing at Parramatta.

Conditions at Mulawa are overtaxed. In July 1983, there was a prison officers' strike about overcrowding at Mulawa and the lack of facilities for disruptive women prisoners. In an attempt to solve the industrial dispute, in December 1983, ten female segregation prisoners were moved to 4 Wing at Parramatta.

Inspection by this Office showed that 4 Wing was not suitable for the accommodation of women prisoners. The Wing had earlier been closed for renovation. The Department said that women prisoners would be placed in 4 Wing only in the short term. Some steps were taken by the Department to improve conditions but in March 1984, the women were moved back to Mulawa.

4 Wing was left vacant between March and December 1984 but the proposed renovation did not take place. Following a riot at Mulawa in December 1984, some women prisoners were returned to 4 Wing. Again this was said to be only a short term option. However, in September 1985 there were still women prisoners in 4 Wing and renovations are still "proposed".

Conditions in 4 Wing are much below standard. Reports by the Public Works Department show that the buildings are of historical importance — so much so that the cells have bad ventilation and light and would be dangerous in emergencies.

Various concessions have been allowed to the women; they have a later lock-up time, and some activities have been introduced. However, the future of 4 Wing is uncertain and it is extremely difficult for prison officials to make planning decisions.

The Minister for Corrective Services wrote to the Premier, following a visit to Parramatta Gaol in February 1985, and stated — "I was appalled by what I saw. The oppressive conditions at Parramatta Gaol, and in other older institutions, are not acceptable in the 1980s".

During a Section 19 hearing in July 1985 it became clear that uncertainty about the physical facilities to be provided for women in New South Wales gaols was a key factor in delaying the renovation of 4 Wing. The Chairman of Corrective Services, Mr Dalton, attended the Section 19 hearing and said that the renovation to Parramatta Gaol, which the Commission favoured, was a matter for political decision.

The Minister for Corrective Services has since commented that there is no short term alternative to using 4 Wing for troublesome women prisoners. Recently he wrote to the Ombudsman stating, "The uncertainty about the use of 4 Wing rests with Government decisions. Because of the costs . . . to either provide a new women's facility or to radically renovate and redesign Mulawa, it is not within my authority to provide funding at this level. Decisions of this substance are made by Cabinet and it is to this extent that political decisions are factors in the use of 4 Wing at Parramatta Gaol".

In August 1985 it was decided not to redevelop Parramatta Gaol but merely to make the southern precinct habitable. As well, plans have been drawn up for a programme for women in 4 Wing. Some decisions have at last been made. However, Parramatta will remain a men's gaol. The problem of "difficult" women prisoners and where to place them will still exist. Some further difficult decisions need to be made.

The entrance hall to 4 Wing

The "library"/washing-up area.

Shower and laundry facilities for up to 20 inmates.

86. Internal Investigation Unit: Case History of Drug Distribution in Gaols: Newly Expanded Unit

The 1983-84 Annual Report discussed allegations by a prisoner of distribution of drugs in a major Sydney metropolitan gaol. Initially, with the consent of the prisioner, the matter was referred to the Chairman of the Corrective Services Commission for investigation by his officers. The Ombudsman later investigated the manner in which the prisoner's detailed allegations had been dealt with by officers of the Department of Corrective Services, that very few of the allegations had been directly investigated by the Department, that little detailed attention had been given to the allegations by the Unit and that the information was regarded as uncorroborated hearsay and useful only for intelligence purposes. The Ombudsman could not carry his investigation further because police officers seconded to the Department were involved, and there is no power for the Ombudsman to investigate police of his own motion.

The item in the Annual Report generated considerable publicity in the media and *The Sydney Morning Herald* reported on 19th October, 1984:

> The Minister for Corrective Services promised to have a detailed look at Mr Masterman's report.

On 18th December, 1984 the Ombudsman wrote to the Acting Chairman of the Corrective Services Commission, commenting on the investigation and referring to the Minister's reported call for a review of the Department's resources for the detection of drugs in prisons. On 26th March, 1985 the Ombudsman wrote to the Minister for Corrective Services inviting his comments on the results of the review of the Department's resources. On 22nd April, 1985 the Minister replied:

> "As you are aware, the Department has for some time recognised the problem of drugs in gaols, and has adopted a number of measures designed to control it. While there has been considerable success in those efforts, the Department agrees that more concerted action is still required.
>
> With that in mind, I am pleased to report that approval has been given for the formation of a new investigative body, known as the Internal Investigation Unit. The Unit will comprise twelve departmental officers, who will be directly responsible to the Chairman of the Commission. Its brief will be to investigate and report primarily on drug related matters, and also on any other matter as directed by the Chairman.
>
> The unit will work in close association with two senior detectives from New South Wales Police Drug Squad who will be seconded to the Department once the unit is operational. It is anticipated that the unit will be established by the end of April, 1985.
>
> The establishment of this unit is seen as the most significant step so far in the area of drug control in gaols. With this innovation and the continuation of those measures already in use, it is firmly anticipated that there will be considerable improvement in the rate of drug detection and much progress towards the eradication of this problem in New South Wales prisons."

The Ombudsman agrees that the establishment of the unit is a significant step towards controlling the distribution of drugs in prisons.

87. Compensation for Prisoners Injured while Working

In last year's Annual Report, the Ombudsman outlined important issues concerning compensation for prisoners injured while in custody. These issues arose from a complaint, at that time still under investigation, from solicitors acting for a former prisoner who had suffered permanent incapacity as a result of injuries that he sustained while felling trees at the Glen Innes Afforesation Camp.

The Department of Corrective Services said that it had based its offer to the prisoner of $2000 "on advice from the Crown Solicitor". However, a copy of that advice revealed that the Crown Solicitor made no assessment of the amount to be paid. The advice contained options which were presented to the Department. One of these options was a payment similar to that provided under workers' compensation. The Ombudsman asked the Crown Solicitor about the basis of the $2000 offer. The Crown Solicitor advised:

> "It is not for me to decide what basis would be adopted for ex-gratia payments. If a client was prepared to make an ex-gratia payment on the basis of the amount to which the injured person would have been entitled for Worker's Compensation, had it been applicable, then, of course, I would attempt to give that advice or at least (as here) suggest the lines of inquiry that the client might pursue in order to ascertain that amount. If, on the other hand, the question is one of making a sympathy payment, then I am under precisely the same difficulties as anyone else would be in reaching a figure: it is a question of attempting to draw some balance between giving some solace to the injured person, and recognising that (in the circumstances hypothesised) there is no enforceable claim at law on public revenue."

The Ombudsman concluded that the department had attempted to "pass the buck" to the Crown Solicitor, when it could have applied appropriate criteria to decide on proper compensation.

The Ombudsman found that there was no evidence that the prisoner's claim had been assessed on its merits. The prisoner was not even interviewed by the Department to assess the extent of his incapacity. The Ombudsman believed that the fact that a payment was made as an act of grace did not preclude it from being properly assessed.

The Minister for Corrective Services responded to the draft report by recommending to the Treasurer that the prisoner be paid an advance sum of $10,000, pending further enquiries. The Ombudsman after consulting with the Minister, reported:

> "On the facts of this case, my concluded view is that assessment of compensation for permanent, work-related injury to inmates should not be left to bureaucratic discretion, but should be placed on a statutory basis, allowing for clear standards to be applied.
>
> I consider also that appropriate amendments could be drafted to the Prisons Act, enabling such assessments to be made by reference to an inmate's earning capacity and employment history prior to imprisonment. Entitlement to lump sum compensation for loss or partial loss of a limb, along the lines provided for in Section 16 of the Workers' Compensation Act, could also be included. It clearly could not be envisaged that inmates would receive any compensation in respect of income lost during the balance of imprisonment following the date of injury; compensation being intended merely to reflect any permanent disability suffered and loss of earning capacity following release.
>
> Accordingly, I recommend that compensation for permanent, work-related injury for inmates to placed on a statutory basis, as a statutory right, and that the Corrective Services Commission prepare an appropriate draft amendment to the Prisons Act, for submission to the Government, to give effect to this principle.
>
> I further recommend that, as a consequence, the draft amendment should exempt the proposed compensation scheme from the operation of Section 46 of that Act.
>
> In this case whatever might be the more general situation, [the prisoner] was an experienced forester whose services were being utilised in that capacity during a relatively short period in prison for a motor traffic offence. The injury occurred to him under the lawful direction of a prison officer and very shortly before he was due to be discharged. At the time of his injury he had prospects of relatively long term employment in his trained field. In these circumstances, the provisions of the Workers' Compensation Act provide an appropriate measure of compensation for the incapacity he sustained.
>
> I recommend that the Commission immediately obtain appropriate advice as to the amount [the prisoner] would be likely to obtain if he had been covered by Workers' Compensation and that the Department should recommend to the Minister and Treasury that such sum be paid to [the prisoner] by way of an ex-gratia payment. I note with approval that the Minister has already sought and obtained Treasury approval to an advance payment of $10,000 and that this sum has already been paid to [the prisoner]."

The Ombudsman is following the progress being made in giving effect to those recommendations.

88. Segregation of Prisoners

The last Annual Report referred to continuing complaints from prisoners about the use of segregation orders. The complaints covered a wide range of matters, including using segregation as a punishment, failing to provide documentary evidence of segregation orders, denying to prisoners' legal advisers access to segregation orders (other than on subpoena), and depriving amenities and privileges to prisoners on segregation.

The Ombudsman then decided 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 and sought large amounts of statistical and other information from the Department of Corrective Services. The Department was eventually able to provide the Ombudsman with all the information and documents sought. In particular, more than 170 segregation orders were made between 1st July, 1983 and 30th September, 1984. The Ombudsman had hoped that a wide ranging investigation of this nature could combine the flexibility of a broad approach with the more specific nature of investigations of individual prisoners complaints, targeting, in the latter area, Parklea Prison. Unfortunately the mass of information obtained, though valuable in itself, proved difficult to assimilate and place in a coherent framework. In the course of the investigation, however, several complaints from prisoners on segregation at Parklea Prison were received which appear to highlight problems associated with the use of the cells and attached yards in the segregation unit at that gaol. The Ombudsman has therefore decided to discontinue his own motion investigation and pursue the individual complaints mentioned above. The investigation of these complaints will draw upon the more general information obtained as a result of the own motion investigation.

89. Peter Schneidas

In the last Annual Report the Ombudsman referred to investigations of several complaints by Mr Schneidas. Further complaints by Mr Schneidas and his wife have raised the issue of his ultimate placement in the prison system, as well as other important matters.

On 28th October, 1984 Mr Schneidas was assaulted by another prisoner at 5 Wing (the Segregation and Protection Unit) at Parklea Prison. Mr Schneidas sustained first and second degree burns to his face and body when boiling water was poured over him. A prisoner was charged with this assault. Mr Schneidas was transferred to the Metropolitan Reception Prison hospital. He complained to the Ombudsman that there was delay in providing him with proper medical treatment. Following an investigation by the Assistant Ombudsman, this complaint was found to be not sustained and a finding of no wrong conduct on the part of the officers of the Departments of Corrective Services and Health was made. Other aspects of the complaint by Mr Schneidas are continuing and should be concluded in the near future.

Earlier Mr Schneidas had been placed in the Special Care Unit at Long Bay. The Unit is intended to assist prisoners to develop their personality and skills and to provide a "therapeutic community", with active participation by prisoners, prison officers, psychologists and other professional workers. As part of the admission procedure, a prisoner enters into a written contract setting out the goals he hopes to achieve in the Unit. Mr Schneidas was removed from the Unit and sent to Maitland, and then to Parklea. On 1st October, 1984 he was presented with an interim contract setting out the terms for any future re-entry to the Unit. Two of the clauses of this document were:

8. No media publicity will appear regarding this inmate's stay in the Special Care Unit, terms of past/interim/future contracts or course of this inmate's therapy.

9. The inmate will not enter into any bargaining over the terms of this contract for potential re-entry with members of the Corrective Services Commission, officers of the Department of Corrective Services, members of the Parliament of New South Wales, authorised prison visitors or members of the general public. *This condition also applies to the family and friends of the inmate.*

Mrs Schneidas complained about these Clauses, in particular the last sentence of Clause 9, arguing that they represented unwarranted interference with her civil liberties and prevented public scrutiny of her husband's situation. The inclusion of these terms in the interim contract was made part of a complex investigation, during which the Chairman of the Corrective Services Commission wrote to this Office:

> "The interim 'contract' specifically included Clauses 8 and 9 as a management strategy to restrict his manipulation of the Department in an attempt to extend indefinitely his stay in the Special Care Unit and to limit his use of others in bringing pressure for change in the therapeutic environment. Dr Schwartz, particularly, was concerned that Mr Schneidas's tenure in the Special Care Unit be 'time-limited' as is the case for all other prisoners entering the Unit. It was also considered necessary to protect other prisoners in the Unit from media pressures which might have disrupted their therapeutic programmes. Additionally, there was concern that the use of the media by Mr Schneidas, his family or friends might have incurred the anger of other inmates who may have felt that Mr Schneidas was receiving 'special' attention.

> While the terms of the contentious clauses might be seen to infringe on the civil liberties of Mr Schneidas's friends and family, they specifically do not preclude access to the Ombudsman or other agencies which have a legitimate right to monitor the treatment of prisoners. The clauses also reflect a concern for rights and privacy of the other residents of the Special Care Unit."

These clauses were deleted from a subsequent contract when Mr Schneidas re-entered the Unit.

On 18th June, 1985 Mrs Schneidas complained to this Office about a proposal to transfer her husband from the Special Care Unit to the Metropolitan Reception Prison, on normal discipline, asserting that his safety would be at risk. Mr Schneidas was, in fact, transferred to the Metropolitan Reception Prison and was allegedly assaulted in his cell on 22nd July, 1985. The Ombudsman determined that an inquiry should be held pursuant to Section 19 of the Ombudsman Act into the transfer of Mr Schneidas and the Department's apparent failure to protect Mr Schneidas in that prison. The conduct of the inquiry was delegated to the Assistant Ombudsman. Numerous witnesses gave evidence to the inquiry and that evidence is now being considered by the Assistant Ombudsman.

90. Juveniles in Prison

In the 1983/84 Annual Report, the Ombudsman expressed concern at the arrangements within the NSW prisons system for the accommodation and management of young offenders. More complaints have been received from this group of prisoners and there are still inadequate facilities within Corrective Services institutions for them. In a letter to the Ombudsman in August 1985 the Chairman of the Corrective Services Commission said:

> "Prisons were not designed to accommodate young offenders, and the acute overcrowding makes it difficult to provide more than basic facilities... Acute overcrowding is inhibiting the Commission's ability to provide improved facilities for a number of groups within the prison system."

The Chairman went on to say that young offenders who were regarded as being at risk were "placed where there is least threat to their safety". Young people continue to be placed in protective custody in the same areas as adult prisoners on segregation. Their confinement under maximum security conditions may last for many months.

In one complaint, a sixteen year old boy was placed in the segretation unit at Maitland Gaol. This area, known as the Maitland "tracs" because it was originally intended to confine some of the most intractable prisoners in the system, was the only area in the gaol which could be used to guarantee the boy's safety. The boy, in his letter to the Ombudsman said:

> "the conditions in hear are in human and have never experience this life styel before no one has told me or seen me why I am hear when I am under age. My parents don't know I am hear and I am afraid for my life. I am appealing to you because I have no one else to turn to to help me get out of this place."

The boy had absconded from Endeavour House, a Department of Youth and Community Services institution, he was arrested for absconding, and was brought back to Tamworth. He had also attempted to escape at Mascot Airport, and had damaged property there. He was sentenced to prison by Tamworth Court and taken to Maitland Gaol where he had to be isolated from the rest of the prisoners because of his age.

The Department of Youth and Community Services told this Office that it was aware that the boy was in gaol; steps were being taken to "prepare a report". The boy was later transferred to maximum security at Long Bay and was again placed in protective custody. About five weeks after his complaint to the Ombudsman, the boy was tansferred back to Endeavour House under Section 94 of the Child Welfare Act, which enables the Minister for Corrective Services, with the consent of the Minister for Youth and Community Services, to transfer a convicted inmate under 21 years of age to a juvenile institution. It took six weeks to return the boy to Endeavour House from where he had escaped in the first place.

Complaints were also received from three young offenders remanded to prison by court orders. If unsuccessful in obtaining bail, young offenders must remain in maximum security (generally in protective custody); there is no power under the Act to remove from prison a juvenile placed there on remand by the courts, even when the remand could be for a long period. Juveniles are often kept in caged yards awaiting sentencing, something that can take many months.

Because the facilities in prisons for young offenders are so bad, the Department of Youth and Community Services is under pressure to place them in its institutions. It can then be decided whether they are suitable for such things as day and weekend leave and work release.

Some initiatives have been taken by the Government in this area. A Leave Review Committee has been formed, chaired by Mr Justice Stein, to determine the suitability of young offenders to participate in programmes within the Department of Youth and Community Services, and an Interdepartmental Committee, comprising representatives of the Youth and Community Services, Attorney-General's, Police, Corrective Services and Premier's departments has been established. The Ombudsman understands that the Committee is to examine:

— communications between the department of Youth and Community Services and Corrective Services for the remanding and sentencing to gaol of young persons;

— arrangements for vulnerable 18-21 year old persons in prison;

— policy guidelines for the placement of young persons sentenced to long periods in custody.

The issue remains one of considerable concern.

91. Misuse and Invalidity of Gaol Superintendent's Disciplinary Powers — Prison Rule 5(b)

This matter was covered in considerable detail in the last Annual Report. In the event, the Minister for Corrective Services repealed Prison Rule 5(b) on 18th December, 1984.

However, it was reported in the *Sydney Morning Herald* in July 1985 that the government was preparing legislation about discipline procedures in New South Wales gaols "to clear the backlog of offences committed by prisoners". The report went on to say that the legislation would return to prison superintendents the power to deal with minor offences by prisoners.

The Chairman of the Corrective Services Commission advised this Office that the matter has not yet been considered by Cabinet. Consequently, apart from what has been reported in the press, the Ombudsman is unaware of the details of the changes proposed.

92. Prison Medical Service

In his last Annual Report the Ombudsman advised that, after extensive investigation, a draft report about the operation of the Prison Medical Service had been forwarded to the Deputy Premier and Minister for Health and the Minister for Corrective Services, pursuant to the provisions of Section 25 of the Ombudsman Act. This Section provides an opportunity for the relevant Minister to consult with the Ombudsman on a draft report.

On 18th December, 1984 the Ombudsman consulted with the Minister for Corrective Services. The Deputy Premier was unable to attend this meeting due to the then continuing dispute involving specialists at public hospitals. Representatives of the Department of Corrective Services and the Prison Medical Service were present. In the course of what proved to be a spirited meeting, criticisms, some of them trenchant, were directed at the draft report and the conclusions, findings and recommendations in it. A number of these criticisms had not previously been raised by either the Department of Health or the Department of Corrective Services, despite the fact that each Department had been given the opportunity to make and had in fact made lengthy submissions on the draft report before it was forwarded to the relevant Ministers for possible consultation. Indeed, the draft report as forwarded to the Ministers had taken into account submissions made by each Department.

Following the consultation, the Assistant Ombudsman, at the request of the Ombudsman, conducted a lengthy review of the draft report. This review examined the objectives of the Prison Medical Service, an issue the subject of comment during the consultation, and considered, item by item, the criticisms which had been directed at the report.

As a result of this detailed review, the Ombudsman has decided not to make the report final. The Ombudsman's decision had regard to significant improvements and advances in the provision of medical services by the Prison Medical Service in recent times. It is the Ombudsman's view that many of these improvements have been the result of the diligence and commitment of the former Acting Director of the Service, Dr J. Ward. The Ombudsman is also of the opinion that the investigation conducted by this Office has played some part as a catalyst in bringing about reforms in this area.

PART II

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT

93. Introduction

The central test of the effectiveness of a civilian oversight body is how it deals with the inevitable problem of differing accounts of an event or events by police officers and civilians. The typical situation following internal police investigation of a civilian complaint is conflicting versions of the same incident. Often there will be one version given by the complainant, supported in some cases by one or more friends and another version by one or more police officers. Sometimes there may be statements from one or more independent witnesses whose statements have also been taken by the investigating police officer (who may or may not have a bias towards the police the subject of complaint).

The only solution to this problem is for the civilian oversight authority itself to question the police officers, the complainant and all witnesses and make judgments of credibility, and form a view as to what happened. This questioning is time consuming, difficult and requires high calibre personnel and ample staff resources. However, a civilian oversight body which does not extensively utilise direct questioning itself but relies on paper statements taken by police officers, is deluding itself and the public. Such a body is a charade and a dangerous one at that. It deceives the public into believing that there is an effective watchdog or review body when there is not.

The position just described — mere paper review of police investigations by the Ombudsman — was the position in New South Wales between 1978 and 1983. By Act of Parliament in late 1983, there was grafted on to the then existing system a power in the Ombudsman at his discretion to reinvestigate conflicting fact situations, utilising Royal Commission powers if he wished. The essential features of that system and a description of its early operation in practice follows.

94. Outline of the New South Wales Police Complaints System

The essential features of the New South Wales police complaints system which became effective in March 1984 pursuant to legislation passed by the State Parliament in November 1983 are as follows:

(i) initial investigation by police;

(ii) as a matter of discretion, re-investigation by the Ombudsman;

(iii) in re-investigating, only police officers seconded to the Ombudsman's Office to be used;

(vi) after enquiry, findings on the complaint and recommendations by the Ombudsman as to institution of disciplinary or criminal proceedings against any police officer, pecuniary compensation to complainants, and/or change of police procedures;

(v) right of appeal by Ombudsman to a judge of the Police Tribunal if the Ombudsman's recommendations are not accepted by the Police Commissioner.

The two features of this new New South Wales system which are most important are:

(a) use of Royal Commission powers in re-investigations

(b) the use of seconded police

These will be discussed more fully in the following topics.

95. Re-investigation by Ombudsman Utilising Royal Commission Powers

The re-investigations carried out by the New South Wales Ombudsman's Office are, in effect, mini Royal Commissions. The armory of powers available include the right to summons witnesses, to seize documents, to search premises and the capacity to conduct full hearings.

The procedures which have been developed for these hearings are set out in the next topic.

During the 12 months ended 30th June, 1985 — the first full year of operation of the new system — 65 re-investigations were commenced. 40 hearings have been held. The results of completed re-investigations in the year to 30th June, 1985 are set out in the following table:

Complaints Against Police
Police Regulation (Allegations of Misconduct) Act
Re-investigations concluded by Ombudsman during 1984/85

Sustained	13
Not sustained	9
Re-investigation discontinued *	6

* Discontinued re-investigations occurred in several cases where the complainant immediately before the fixed date for hearing decided not to proceed, was not available and, on one occassion, where a report under Section 33 was made to the Minister for Police and the Commissioner of Police (see topic on Section 33 reports).

At the time of writing (October 1985) there are approximately 90 re-investigations current. Delays have occurred in listing hearings as a result of a "legislative foul-up" which, contrary to what the Minister for Police had said to Parliament, excluded the Deputy Ombudsman from conducting re-investigation hearings. (See topic on Legislative Foul-up.) Despite this legislative mess, 40 hearings were held in the year ended 30th June, 1985. These included investigation of:

(i) a complaint by a large manufacturer of poker machines that two New South Wales police officers, engaged in an investigation of the company, had provided false information to the New Jersey Gaming Commission and, more importantly for local purposes, to the staff of the Leader of the Opposition in the New South Wales Parliament. The defence of the police officers concerned was both that the information was correct and, putting it broadly, that their superiors were corruptly interfering with their investigations and that they had no alternative than to take out some "protection" or "insurance" by going to the Leader of the Opposition. Such was the detail and scope of the alleged corrupt attempts to interfere with their investigations that it was necessary to take evidence from 53 witnesses, involving 27 hearing days. (A statement of provisional conclusions and recommendations has been sent out in this matter.)

(ii) complaint by a civil rights association in a country town about actions of police in helicpoter drug raids and road blocks. (45 witnesses.)

(iii) complaint by Sydney homosexuals about a police raid on one of their clubs. (27 witnesses.)

(iv) complaint by an intoxicated university student celebrating a football victory that he was assaulted while detained in police cells. (On the particular fact, he was believed as against the evidence of four police officers.)

(v) several complaints against highway patrol officers of extreme rudeness and, in one case, assault.

(vi) two complaints of solicitation of bribes for dropping charges.

(vii) a complaint that a charge of horse stealing had been brought without any reasonable grounds. (A recommendation for $20,000 compensation has been made in this case.)

(viii) failure to properly investigate a motor vehicle accident involving an Assistant Commissioner of Police. (4th ranking police officer in State.)

(ix) complaint by alleged illegal off-course bookmaker about a raid on his premises including cutting off electricity to his shredder. (This complaint was found not sustained.)

(x) Numerous complaints about detention under the Intoxicated Persons Act which avoids, when people are picked up by the police for being intoxicated, the stigma of an offence or trial but leaves open the possibility of arbitrary detention.

A significant number of reports, draft reports, and statements of provisional conclusions and recommendations have been prepared in the above and other matters. These have been sent to the complainant, the Commissioner of Police, the police officers concerned and, in cases of sustained reports, to the Minister for Police in accordance with the procedures set out either in the Act or developed by the Ombudsman with counsel's advice. The results of many of these matters will be reflected and, where appropriate, made the subject of comment either in next year's Annual Report or in Special Reports to Parliament during the year.

96. Procedures Adopted at Royal Commission Hearings

Legislation was introduced in late 1983, becoming effective in February 1984, giving the Ombudsman power to directly re-investigate allegations, by members of the public, of misconduct by individual Police officers.

Under the legislation the results of the initial police investigation of the complaint together with copies of various statements and other evidence obtained during the investigation are forwarded to the Ombudsman. The Ombudsman in turn forwards copies of this material unless specifically prohibited by the Commissioner of Police to the complainant, invites comments from the complainant and asks whether the complainant wishes to have a re-investigation of the complaint carried out by the Ombudsman. The Ombudsman then reviews such comments and request. In those cases where there is a substantial conflict of evidence and as a result where the Ombudsman is not satisfied the complaint has been sustained or not sustained he may carry out his own investigation with the assistance of police officers seconded to the Office of the Ombudsman. No other investigating officers of the Office of the Ombudsman may be involved in this second stage investigation. In conducting his investigation under the Ombudsman Act the Ombudsman may first instruct his seconded special officer to conduct further inquiries. Such inquiries may consist of interviewing the Police the subject of the complaint, the complainant and any witnesses and other in the field inquiries.

At the completion of these inquiries, and in some cases without instigating such inquiries, the Ombudsman may conduct an inquiry under Section 19. Where the Ombudsman decides to re-investigate a matter he may also decide to conduct a hearing pursuant to the provisions of Section 19 of the Ombudsman Act (Section 19 inquiries). When conducting these inquiries the Ombudsman has the powers, authorities, protections and immunities conferred upon Royal Commissioners. Both the complainant and the police officer(s) the subject of complaint are notified in writing setting out the conduct the subject of complaint. Such notice is accompanied by a document entitled "USUAL PROCEDURES ADOPTED AT INQUIRIES INTO POLICE CONDUCT PURSUANT TO THE PROVISIONS OF SECTION 19 OF THE OMBUDSMAN ACT (SECTION 19 INQUIRIES)". The content of that document is set out in the following paragraphs together with additional relevant information.

The Section 19 hearings are conducted by the Ombudsman (and, until the "legislative foul-up" was discovered, the Deputy Ombudsman — see topic below) at the Ombudsman's Office in Sydney or at other places convenient to the parties including country centres.

The hearings are conducted on an informal basis and are not subject to the rules of evidence.

The usual order for taking of evidence during Section 19 inquiries is as follows:

(i) the complainant

(ii) civilian witnesses

(iii) police officers who are witnesses but not the subject of complaint

(iv) police officer(s) the subject of complaint(s).

Police officers the subject of complaint are invited to produce any document, provide any information or call any witness that may be of assistance in the inquiry.

The complainant and the police officer(s) the subject of complaint(s) are entitled to be legally represented during the giving of their respective evidence, but this is certainly not necessary. To date, the great majority of complainants and some police officers have not been legally represented.

Persons giving evidence as witnesses, other than the complainant and the police officer(s) the subject of complaint, are not entitled to be legally represented but may make application to be legally represented if they can show special circumstances. Such circumstances include the possibility that evidence they will give may make them subject of complaint, liable to criminal charges or liable to departmental charges. It is entirely up to the Ombudsman's discretion to allow such representation. Applications should be made prior to the date of the hearing.

The hearings are conducted in private. The only persons present during the giving of evidence by any person (other than their legal adviser, if they are represented) will be:

— the Ombudsman

— the seconded Special Officer(s) assigned by the Ombudsman to the particular matter

— the Executive Assistant (Police) or her alternate

— a sound recordist (on occasion).

A seconded Special Officer is a police officer seconded to the Office of the Ombudsman pursuant to an Act of Parliament. Seconded Special Officers have an obligation to assist the Ombudsman and are subject to the direction of the Ombudsman, and are not subject to the direction of any other person. The hearing is usually conducted by the seconded special officer asking questions; the Ombudsman may intervene at any time. Alternatively a witness who is legally represented may be taken through his or her evidence by his or her legal adviser. Witnesses may refer to any statements previously made by them. After the witness has given an account of a matter at issue, the Ombudsman and the seconded Special Officer(s) have an obligation to test the evidence which has been given by means of probing questions. At the conclusion of the evidence, the witness will be asked whether there is anything further that he or she wishes to say and will be given a full opportunity to do so. If a legal adviser is present, the legal adviser may ask further questions arising out of the evidence given or other relevant matters.

The usual procedure developed and adopted by the Ombudsman is indicated above. The Ombudsman has a discretion to grant a person the status of a party entitled to be present during the whole of the proceedings, and a party may be permitted, in the Ombudsman's discretion, to cross-examine other witnesses. This is not a procedure usually adopted. However, if for good reason a person wishes to seek to be made a party, to be given the right of attending during the evidence of others and to cross-examine, written application should be made to the Office of the Ombudsman immediately. The letter of application should set out the reasons why, as a matter of law or in the exercise of discretion, the Ombudsman should grant the application. It may be that before embarking upon the Section 19 hearing, the Ombudsman will convene a preliminary meeting (a "directions hearing") to hear argument from all interested persons about whether the application or applications should be granted. Whether or not such applications are granted will depend on the circumstances of the case.

The legislation does not permit the Ombudsman to pay costs which may be incurred by a witness in attending the inquiry. For this reason, the Ombudsman is prepared to hold hearings in country centres rather than require witnesses to incur the expense of coming to Sydney.

Similarly, the Ombudsman does not have power to pay the cost of a person being legally represented at an inquiry or to order anyone else to pay that cost, but in some cases legal aid may be available from other sources.

Following the taking of evidence in a Section 19 inquiry, a report setting out the provisional findings and recommendations of the Ombudsman will be prepared. This initial report will be sent on a confidential "not to be published" basis to the complainant and the police officer(s) the subject of complaint and any witnesses who may have been the subject of critical comment. Persons to whom the report is sent will have a full opportunity to make submissions relating to the report and to give or bring further evidence relating to any of the matters the subject of the report.

Following receipt and consideration of further submissions or any further evidence, the Ombudsman will complete the report which, after any consultation required by the Minister for Police, will then be made final and sent to the complainant, the police officer(s) the subject of complaint, the Commissioner of Police and the Minister for Police. Unlike the report of provisional findings and recommendations, this final report is not confidential. Under the existing secrecy provisions in the Ombudsman Act, however, while the complainant, the police officers the subject of complaint and the Minister of Police may distribute copies of the report to whomever they please — subject only to the laws of defamation — the Ombudsman may not do so.

An article in NSW Police News June 1985 "Police and the Ombudsman" by Sergeants Bob Heanes and Michael Gallagher (two Legal Officers attached to the Legal Advising and Police Appeals Section, who appeared on behalf of police officers before Ombudsman inquiries during the course of the year) fairly describes the procedures adopted in such inquiries. A copy of the first page of the article follows.

POLICE AND THE OMBUDSMAN

Since the inception of the State Ombudsman a number of changes have been made to his powers to investigate complaints against Police Officers.

The purpose of this paper is to give Police a broad view of the powers and procedures under which the Ombudsman conducts his inquiries. It is not intended to be a legal paper and will not delve deeply into the legal implications of the various Acts.

By
Sergeant R. R. Heanes (BAB)
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Legal Officers attached to the Legal Advisings and Police Appeals Section

Acts of Parliament

The Office of the Ombudsman is created through the provisions of the Ombudsman Act No. 68 of 1974 as amended. By the provisions of that Act the Ombudsman was prohibited from investigating the conduct of a member of the Police Force when acting as a Constable.

The provision is still contained in the Ombudsman Act and prevents the Ombudsman from commencing an inquiry into such conduct directly under the Ombudsman Act. When a complaint is lodged which relates to the conduct of a member of the Police Force certain pre-requisite steps must be followed. It is proposed to briefly outline those steps.

The provisions of the Police Regulation (Allegations of Misconduct) Act No. 84 of 1978 as amended (which will be referred to as the Act) now provides the procedure for dealing with complaints against members of the Police Force.

The Act provides for the lodging of a complaint about the conduct of a member of the Police Force. Once the complaint has been duly processed the Act provides for either conciliation or investigation.

If the complaint is of such a nature that it can be brought within the conciliation provisions then it may be suitably dealt in that manner without the necessity of an investigation under the Act.

If conciliation fails or the conduct complained of is such that the conciliation provisions cannot be utilised then the complaint will be investigated under the provisions of the Act.

Such investigation may be conducted either by the investigative staff of the Internal Affairs Branch or in certain circumstances by such member of the Police Force as the Commissioner directs.

Once the Internal Affairs Branch or other nominated Officers have completed their investigation, the findings of that investigation and any recommendations are

ABOUT THE AUTHORS

Bob Heanes *is a Sergeant Third Class with 18 years service. Since joining the Police Force he has served on general duties in both country and metropolitan stations. He then joined the Prosecuting Branch and qualified as a Police Prosecutor where he remained until taking up his present position as a Legal Officer. On the 16 December, 1981 he was admitted as a Barrister after completion of a law course through Sydney University.*

Michael Gallagher *is an Acting Sergeant with 13 years service. Since joining the Police Force he has served on general duties in the metropolitan area. He then joined the Prosecuting Branch and qualified as a Police Prosecutor where he remained until taking up his present position as a Legal Officer. On the 20 December, 1984 he was admitted as a Barrister after completion of a Bachelor of Laws Degree through the New South Wales Institute of technology.*

97. Legislative Foul-up Delays Ombudsman's Re-investigations

As already indicated two legislative amendments to the police complaints legislation introduced in the 1983 Spring Session of Parliament enabled the Ombudsman to directly re-investigate complaints against police. (1) When the Minister for Police and Emergency Services, Mr Anderson, introduced the important amendments he stated in Parliament that although civilian investigators were to be excluded from this area the Ombudsman would be entitled to delegate direct investigation of police complaints to the Deputy Ombudsman. The Minister's actual words were:

> "To correct the shortcomings I have outlined, provision is made for the Ombudsman, where he is is unable to determine whether a complaint is sustained or not sustained on the basis of police investigations, to initiate and direct his own independent investigations. *The Ombudsman will also be able to delegate this power to the Deputy Ombudsman."* (Emphasis added)

Until June 1985 it had always been thought that these amendments introduced by the Minister for Police successfully achieved the objective stated by the Minister and empowered the Deputy Ombudsman to be involved in this area. However, a further amendment to the Ombudsman Act, prepared by the Premier's Department, was introduced during the same session of Parliament (2). It dealt with quite different aspects of the scheme and was prepared without proper consideration of its relationship to the other amendments. (A classic case of "the left hand and the right hand"). The Premier's Department amendment had the effect of negating the intended amendment of the other two Acts which allowed the Deputy Ombudsman (and Acting Ombudsman) to participate in re-investigations. It brought the Deputy Ombudsman into the definition of "officer of the Ombudsman" thus also within the prohibition which precluded "officers of the Ombudsman" from being concerned in Ombudsman Act investigations of complaints against the police ("re-investigations").

It was not until early June 1983, following consolidation in printed form of all the legislation, that this position came to the attention of the Ombudsman. Although there is some argument for a contrary view, it is the Ombudsman's opinion, supported by that of counsel, that the three amending Acts when read together prohibit the Deputy Ombudsman from conducting Section 19 hearings or indeed participating in any way in the re-investigation of complaints against police.

Immediately upon receipt of counsel's advice, the Ombudsman brought the involvement of the Deputy Ombudsman to an end. Until the unintended consequences of the conflicting amendments became apparent, the Deputy Ombudsman, Dr Jinks, had participated in a significant number of re-investigations and allocation of future dates had proceeded on the basis that both he and the Ombudsman would share, approximately equally, the burden of re-investigations. All matters listed for hearing by the Deputy Ombudsman have been adjourned indefinitely, resulting in a serious backlog of cases. The Ombudsman decided to give priority to those cases which had a particular public interest. However, in August 1985 the situation became so critical that all but a very few Section 19 hearings were adjourned indefinitely to await parliamentary rectification of the system and to enable completion of outstanding reports.

The delay and the backlog which have developed have had adverse effects primarily on the police the subject of complaint and, to a lesser extent, on complainants. It is in the interests of police and the public that the position be rectified as soon as possible. It is unfair that these allegations should hang over the heads of the police officers under investigation for an extended period. One police officer's protest made through the Legal Advisings and Police Appeals Section of NSW Police Force, highlights this problem. The police officer was notified by the Ombudsman that a Section 19 inquiry would be held in mid June 1985 and he was invited to attend that inquiry. He was subsequently notified that due to the problems posed by the legislative amendments the matter would be adjourned indefinitely. The anonymous complaint in question had been lodged some 11 months earlier and had been the subject of investigation by the Internal Affairs Branch. The police officer holds a senior position within the Force and claims that the complaint has caused him great personal stress as he strenuously denies any impropriety on his part and having the matter adjourned indefinitely merely exacerbates the situation. Additionally police feel (hopefully wrongly) unresolved complaints can jeopardize applications for promotion.

1. Police Regulation (Allegations of Misconduct) Amendment Act, 1983, (Act No. 191 of 1983) and Ombudsman (Police Regulation) Amendment Act, 1983 (Act No. 193 of 1983)

2. Ombudsman (Amendment) Act 1983 (Act No. 189 of 1983).

The Ombudsman forwarded a copy of this letter from the police officer outling the unfair position in which he finds himself to the Minister for Police and informed the Minister that he fully sympathises with the problems faced by the officer and undoubtedly numerous other officers in a similar position. The position calls for urgent remedial legislation. The drafting error is seriously affecting the operation of new legislation which had the unanimous support of Parliament.

On 3rd September, 1985 the Premier wrote to the Ombudsman:

> "I wish to advise that a proposal which recommends an amendment to the Ombudsman Act to make it clear that the Deputy Ombudsman and Assistant Ombudsmen have the power to conduct re-investigations of police conduct has been prepared for consideration by Cabinet.
>
> This proposal will also ensure that an acting Ombudsman, in the absence of the Ombudsman, is able to exercise the same powers and functions in relation to investigations as the Ombudsman."

At the time of writing (October 1985) this very necessary amendment has not been introduced.

98. Secondment of Police Officers to the Office of the Ombudsman

The New South Wales legislation of November 1983 was something of a compromise. While giving for the first time a civilian body, the Office of the Ombudsman, the power to directly question police and other witnesses, it provided that this could be done only by the Ombudsman personally and police officers seconded to the Office. Existing Ombudsman civilian investigators were, by the legislation, prohibited from becoming "concerned in" investigations of alleged police misconduct.

Civil liberties groups were highly critical. The then third ranking officer in the Ombudsman's Office, Assistant Ombudsman Susan Armstrong, resigned in protest. While not unsympathetic to those views, the Ombudsman took the stance that the new legislation had been passed unanimously by the State Parliament and that he should lend his energies to attempting to make it work. If, after a year or so's trial, it was not working, he could criticise it vigorously and publicly.

The task seemed daunting. First a figure of ten police officers was set after discussion. The term of secondment was fixed at two years with an option on each side of a further two years. The then Police Commissioner suggested five inspectors (salary $35,251.00) and five first class sergeants (salary $30,879.00). The Ombudsman demurred — wanting a greater spread of age and experience. Ultimately a circular was sent out by the Commissioner seeking volunterrs from all ranks. Four weeks later he delivered (personally for some reason) a list of 30 police officers (all male) who had volunteered, accompanied by short particulars of their service careers. Some six applicants were inspectors. The Commissioner, perhaps wisely, refused to indicate his own preferences. He inferred, with good humour, that he wished the Ombudsman to make his own mistakes.

With one or more senior civilian officers of the Ombudsman Office, the Ombudsman interviewed 29 of the applicants for at least an hour each. Having got the list down to 15 or 16 the Ombudsman made certain discreet enquiries. As a result several names disappeared rapidly from the list. Partly on the theory of equal employment opportunity and more pragmatically on the ground that women might well be less part of any brotherhood, the Ombudsman sought to ascertain whether any women police officers would be interested in joining the Office. Ultimately, one very experienced police woman, Detective Sergeant Gwen Martin, was prepared to venture her career in the experiment. The ultimate complement selected by the Ombudsman comprised 1 inspector, 3 first class sergeants, 1 second class sergeant, 2 third class sergeants and 2 senior constables (deliberately a relatively junior group).

The ten police, who arrived at the Ombudsman's office in April 1984, were spread geographically around the Office so that they were placed alongside civilian investigation officers who were engaged in ordinary investigations of State and local government instrumentalities.

Each police officer became an officer of the Ombudsman and was given an individual delegation of investigatory powers under the Ombudsman Act. This delegation was made subject to express conditions that during the term of employment at the Office of the Ombudsman the officers would not take any directions from the Commissioner of Police, or any police officer of superior rank, including other more senior officers seconded to the Ombudsman's Office. Rank, within the Office, was not to exist. Individual complaints were allocated to individual officers for investigation by them subject only to directions by the Ombudsman. Their salaries were paid by and out of the (increased) budget of the Ombudsman.

After the experience of 18 months operation of the seconded police officer system some evaluation can now be made.

First, the failures:

(a) The most senior seconded police officer, while pleasant in personality, turned out to be a reluctant questioner of police officers. Somewhat incautiously, over dinner with others, he admitted that he had not wanted to come to the Office of the Ombudsman and had only done so at the behest of a very senior police officer who is not known for his enthusiasm for the Ombudsman system of investigating complaints against police. Within a very short time his Ombudsman delegation was withdrawn and he was back with the Police Department.

(b) Another seconded officer, as a result of excellent "in the field" investigation by another junior seconded officer, was identified as a previously unidentified police officer the subject of a complaint already lodged with the Ombudsman. He had to leave the office during the investigation. He now does not want to return.

(c) Two other seconded police officers proved quite incapable of the admittedly difficult task of investigating and asking probing questions of their former colleagues. After discussion each made application to return to the Police Department.

The other side — the successes:

(a) The Office now has an enthusiastic and dedicated group of police officers who see their role as Ombudsman's officers as important and challenging. The now most senior seconded officer, Mervyn Schloeffel, gives calm and wise advice to seconded police officers and civilians in the Office alike.

(b) In addition to the first police woman, Sergeant Gwen Martin, the office has attached another police woman, Sergeant Barbara Fraser. She has an outstanding law degree. She has won a three months' Churchill Fellowship to the United States and at a conference of US police women in Alaska a short time ago received an award as the outstanding foreign police woman of the year. She has participated very effectively in the lengthy investigation of the complaint against two members of Special Task Force Two. During her absence, another very able seconded police woman, Barbara Murphy, with exellent scientific qualifications, has carried out a splended investigation of a man found in a coma in a police cell.

(c) Four seconded police have been promoted while on secondment — so that service at the Office is not seen as necessarily detrimental to a police officer's future career.

(d) The presence of police officers at the Office of the Ombudsman has contributed somewhat to the reduction of the natural hostility of those police who are called to a civilian office to be questioned.

(e) The capcity of seconded police 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 evenutally 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".

Another reflection of the capacity for independence of the present seconded police officers is in the increasing criticism being mounted against them by their own trade union, the New South Wales Police Association. Its volatile president has dubbed them as "spies"; branch resolutions have called for their expulsion. It would seem they are doing their job too well!

(f) Finally, there has been an interesting and stimulating cross fertilisation of ideas and ethics between seconded police officers and civilian investigators working alongside them in police/governmental investigations. The Office of the Ombudsman has come to be known as a good place for good police officers to work. Through word of mouth there is now developing a waiting list for positions. With the advice of trusted police officers presently on staff there should be fewer mistakes in selection in the future.

On balance, therefore, the secondment of police officers to the Office of the Ombudsman has been a substantial success. However, the ideal remains one which would enable the Office of the Ombudsman to utilise in its investigations a mix of police and civilian investigators.

In April 1985, after one year's operation of the new legislation, the Ombudsman made a report to the New South Wales Parliament calling for a lifting of the ban on Ombudsman civilian investigators participating in the re-investigation stages of police complaints.

99. Exclusion of Civilian Investigating Officers from Police Complaint Investigations: Report to Parliament.

On 11th April, 1985 the Ombudsman made a report to Parliament which highlighted problems being caused by one of the elements of the revised procedures for the investigation of complaints about police conduct.

The revised procedures empowered the Ombudsman to re-investigate police complaints if he considered that he could not determine a complaint on the evidence provided by the police investigation. Police officers have been seconded to the Ombudsman's Office specifically for this re-investigation function. Non-police (or civilian) investigation officers employed at the Ombudsman's Office and the assistant Ombudsman are excluded from re-investigating police conduct. The special report to Parliament focused on that exclusion.

The Ombudsman pointed out initially that the secondment of police officers to his Office had been a substantial success. However, the exclusion of the Assistant Ombudsman and civilian investigation officers from police re-investigation work has proved wasteful and has caused unnecessary delays. There is double handling of files in the Office; it would be more efficient if civilian investigation officers and seconded police officers were able to work together on re-investigations.

At the time of the report to Parliament, it was thought that the Deputy Ombudsman could re-investigate police complaints. Since then it has been found that the legislation excludes the Deputy Ombudsman from re-investigations. Even when the Ombudsman and Deputy Ombudsman shared the re-investigation of police complaints, there were considerable delays in completing reports of re-investigations. In the present situation, where the Ombudsman is the only civilian able to be concerned with police re-investigations, the delay in completing police re-investigations has reached unacceptable proportions. The principal losers in this delay are the police officers the subject of the complaint because the complaints hang over their heads. From the citizen's point of view, it is in the public interest that allegations of police misconduct be investigated and reported on promptly.

The Ombudsman can see no justification for maintaining that part of the legislation which excludes civilian investigation officers from being involved in re-investigating police conduct. The current provisions cause a waste of public resources and delay in the finalisation of reports. Virtually all other public sector bodies and their employees are subject to investigation by the Ombudsman's civilian investigation officers, and there is no valid reason why police officers should be treated differently.

In this report to Parliament the Ombudsman recommended that the Ombudsman Act be amended to allow civilian investigation officers to participate in the re-investigation of police conduct. If the Government was not prepared to take that step, the Ombudsman recommended, as a second best course of action, that an amendment be introduced which would provide that any Assistant Ombudsman may participate in the re-investigation of police conduct.

On 3rd September, 1985 the Premier wrote to the Ombudsman:

> "I wish to advise that a proposal which recommends an amendment to the Ombudsman Act to make it clear that the Deputy Ombudsman and Assistant Ombudsmen have the power to conduct re-investigations of police conduct has been prepared for consideration by Cabinet.
>
> This proposal will also ensure that an acting Ombudsman, in the absence of the Ombudsman, is able to exercise the same powers and functions in relation to investigations as the Ombudsman."

At the time of writing (October 1985) amending legislation had not been introduced either along the lines indicated in the Premier's letter or in the broader terms advocated by the Ombudsman in his April 1985 Report to Parliament.

The unacceptable delays continue.

100. Police Complaints — Basic Data

The results of completed investigations of allegations of misconduct against members of the New South Wales police force are set forth in Part III.

Results of investigations of the 1397 allegations dealt with in the year ended 30th June, 1985 are as follows:

Declined		498
Conciliated		250
Discontinued		308
Complaint not sustained:		
Finding on undisputed facts	48	
No request for re-investigation (deemed not sustained Section 25A(2))	235	
Ombudsman decided re-investigation not warranted despite request (deemed not sustained Section 25A(2))	25	
Following re-investigation by Ombudsman	9	
Total not sustained		317
Complaint sustained:		
Finding on undisputed facts	11	
Following re-investigation by Ombudsman	13	
Total sustained		24
		1397

Notes explaining these categories appear in Part III.

Once again, the number of allegations of misconduct against police officers has arisen. The comparative statistics are as set out in the table below:

Year	Complaints Received	% Increase
1978/79*	244*	
1979/80	741	
1980/81	830	12%
1981/82	1121	35%
1982/83	1349	20%
1983/84	1550	15%
1984/85	1830	18%

*First year of operation of the Act which commenced on 19th February, 1979.

Of all complaints, 39 percent were made direct to the Police Department, 8 percent were made to the Minister for Police and 50 percent were made to the Office of the Ombudsman. In addition 2 percent of complaints were made to both the Police Department and the Ombudsman and 1 percent were made to the Minister for Police and the Police Department or the Minister and the Ombudsman's Office.

These figures show a significant change in the mode of making complaints. The number of people complaining directly to the Office of the Ombudsman has increased by 20 percent.

101. Anonymous Complaints

Number of anonymous complaints

Of the 1,798 complaints received during the year, 1.7% were made anonymously, as follows:

	1983/84	1984/85
Received	15	31
Finalised	8	20

The Police Regulation (Allegations of Misconduct) Amendment Act 1983 precluded the Ombudsman from investigating anonymous complaints made prior to 31st December, 1983 or about conduct occurring before that date.

Of the 20 complaints finalised in the 1984/85 year, 11 were declined, one was discontinued and eight were determined to be "not sustained".

A relatively large proportion of anonymous complaints are "not sustained" because the Ombudsman believes that anonymous statements cannot be treated as "evidence" for the purpose of making decisions as to fact.

Given that 55% of all anonymous complaints were declined, another 40% were "not sustained" and the remaining 5% were discontinued, it is evident that the anonymous complaint amendments to the legislation did not lead to persecution of police through false and mischievous allegations, contrary to the fears expressed earlier by certain police. There has been no flood of anonymous complaints as predicted. However, some anonymous complaints not yet finalised may produce valuable results in the public interest.

Ballina Anonymous Complaint

Last year's Annual Report referred to an anonymous complaint received in the Office in January 1984 but which could not be investigated because it concerned events which occurred before 31st December, 1983. The complaint was sent to the Commissioner of Police with a request that the Ombudsman be told of the result of any enquiries into the matter.

The complaint appeared to be serious, but the Commissioner's reply contained little information. In July 1984 the Ombudsman wrote to the Minister for Police suggesting that he or his personal staff look at the police papers on the matter to see whether the police had dealt with it properly. In June 1985 the Minister wrote:—

> "I refer to the matter of the anonymous complaint from Ballina and to my undertaking to you to have a member of my staff look at the police papers in relation thereto.
>
> The Police Commissioner was again asked to further report on the matter, and Crown Solicitor's advice was obtained on the papers.
>
> Both have advised that there is no evidence of the commission of any criminal offences or misconduct or that there was the existence of any influence being exercised on the police officer involved."

As this letter contained little more information that that previously supplied to the Ombudsman by the Commissioner of Police, the Minister was asked for copies of the Police Commissioner's report and the Crown Solicitor's advice. So far these have not been provided. This is an example of an anonymous complaint — replete with detail and seemingly from an "inside" source — which would have been vigorously investigated by the Ombudsman had it concerned matters arising after the legislation was amended. The information so far given to the Ombudsman is bland and uninformative.

On 26th September, 1985 the Ombudsman received further correspondence from the Minister proposing that the matter be dealt with by way of consultation at their next meeting. This is a constructive suggestion welcomed by the Ombudsman.

102. Possible Serious Misconduct: Four Reports to Minister and Commissioner (under Section 33)

Section 33 of the Police Regulation (Allegations of Misconduct) Act provides that where the Ombudsman is of the opinion that a member of the Police Force is or *may be* guilty of such misconduct as may warrant dismissal, removal or punishment, he must report this opinion to the Minister for Police and the Commissioner of Police, giving his reasons.

Four such reports were made in the year ending 30th June, 1985.

The first arose out of a complaint that arson squad detectives investigating a suspected case of arson solicited a bribe from the prime suspects in the case. Following upon the police investigation of the complaint, the complainants sought an Ombudsman re-investigation. Following notice of the intention to re-investigate the complaint, the complainants' solicitor sought to withdraw their complaint on the ground that "our clients, as well as the children and other witnesses, are not desirous of giving evidence at the hearing". The Ombudsman, acting on the advice of senior counsel in another matter, and having regard to the seriousness of the original allegations, decided to continue with the re-investigation. A number of witnesses, including the police officers the subject of complaint, were questioned using Royal Commission powers. The evidence obtained was reviewed and a decision taken to discontinue the re-investigation on the basis that:

(a) there were clearly conflicting accounts as to the serious central allegations of soliciting a bribe which were better determined in a court or the Police Tribunal rather than in proceedings before the Ombudsman;

(b) as the complainants did not wish the complaint to be further investigated by the Ombudsman, there seemed, on balance, no utility in proceedings to require the complaints to attend for questioning pursuant to the Royal Commission powers in the Ombudsman Act; and

(c) a decision had been made to refer the matter to the Minister and the Commissioner under Section 33.

The Ombudsman, in his Section 33 report, stated that:

"On the evidence in the Police investigation and before the Ombudsman I am of the opinion that there is clearly a situation where the three Police officers may be "guilty of such misconduct as may warrant dismissal, removal or punishment". The issue depends ultimately on the respective credibility of the Police and civilian witnesses as assessed ultimately by the tribunal of fact.

Notwithstanding the discrepancies in the evidence of the civilian witnesses which, in particular, could be due to language difficulties, there remains two starkly different stories which depend ultimately on an assessment of credibility. In my opinion, the evidentiary material should be put before an independent solicitor or counsel to determine whether criminal or other proceedings should be instituted."

The report, and the evidence collected by the Ombudsman were, in the event, referred to the Department of the Attorney-General and, from there, to the Solicitor-General. She determined that there was not sufficient evidence for proceedings against the police to be instituted. The Ombudsman has sought, so far unsuccessfully, to obtain copies of the Solicitor-General's opinion. The history of the Ombudsman's frustrating and fruitless attempts to extract this opinion is set out in a later topic.

The second Section 33 report arose out of an investigation into complaints about police actions during a drug raid in a north coast town. One of the complainants had alleged that threatening language was used by a detective who had charged two young men with "Cultivate Indian Hemp". The detective, reporting during the police investigation of the complaint, had claimed that the "two young men were located attempting to hide their Indian Hemp plants in bushland". Evidence given to the Ombudsman by another police officer at the scene suggested that this statement may have been deliberately false, in that his evidence clearly indicated that no police officer had observed the two young men "attempting to hide their Indian Hemp plants in bushland". The Ombudsman reported this view to the Minister and Commissioner, saying that they might urgently wish to consider the Detective's statement, and that the Commissioner, in particular, might urgently review the evidence intended to be given by the police witnesses at the trial of the two young men.

No final indication has been given as to the action, if any, proposed to be taken as a result of this report. The charges against the two young men were dismissed at court.

The third report arose out of a complaint that a police officer had given false evidence in the Children's Court in connection with the hearing of shoplifting charges against a juvenile. The girl's parents complained that the constable swore, contrary to the truth, that their daughter did not commence to make a statement until after her mother arrived at the police station (such statements are inadmissible in evidence unless the parent of the juvenile or some other acceptable adult is present when they are made). The Ombudsman, in re-investigating the complaint, had taken evidence from all relevant witnesses except the police officer the subject of complaint. After receiving submissions from the solicitor acting for the constable, the Ombudsman adjourned the inquiry. The Ombudsman reported to the Minister and Commissioner that the evidence taken by him established in his mind a prima facie case that the constable had instructed the complainant's daughter and another child to commence writing statements prior to the arrival of their respective parents at the police station. He indicated that he believed that, as a matter of discretion, he should defer further investigation of the allegation of perjury pending consideration by the proper authorities, and also that he believed that it was in the public interest that allegations of this nature should be determined in the ordinary courts or tribunals. He recommended that advice be obtained from either the Attorney-General, the Solicitor for Public Prosecutions or counsel or solicitors independent of the Commissioner of Police as to whether the evidence was sufficient to warrant the institution of perjury proceedings against the constable.

Such advice has been obtained, and perjury proceedings have been commenced in accordance with it.

The fourth report under Section 33 arose out of re-investigation by the Ombudsman of an allegation that an extremely senior police officer had, with his police vehicle, wilfully damaged a motor vehicle which had "parked in" his own vehicle, and that the police investigation of the incident had attempted to "cover up" the facts. A Royal Commission power inquiry was held by the Ombudsman into the complaint and a draft report has been forwarded to the Minister for Police. The report under Section 33 related specifically to the submission, by an as yet unidentified police officer, of a false "Report of Motor Vehicle Accident" form. The form, which bears in place of a signature the ink printed name of the senior officer the subject of complaint, gives a totally false account of how and where damage was caused to his police vehicle. The Ombudsman has recommended that the false motor vehicle form should be the subject of prompt and vigorous investigation by the Police Commissioner in an attempt to determine who prepared and submitted it. He has expressed the view that the investgiation should involve the utilisation of handwriting and typewriter experts. He has further recommended that the results of a full enquiry into this matter, and all other relevant material, should be submitted to counsel or solicitors independent of the Police Department to determine whether there are grounds for criminal or disciplinary proceedings against any police officer.

He has not been informed of the action, if any, proposed to be taken as a result of this report.

103. Police complaining against Police to Ombudsman

This year, for the first time, police officers came to the Ombudsman to discuss making complaints about the conduct of their colleagues. This shows that police are becoming aware of the advantages of having an independent body of review, but it is nevertheless disturbing that police lack confidence in the ability of the Force to deal with complaints about its members.

Such a lack of confidence is justified by the events surrounding the making of a complaint by two police officers from Sydney's North Shore area. The consistent and extraordinary harassment visited upon these officers, evidently in an attempt to have them withdraw their complaints, was the subject of extensive media coverage during the year. It was only after repeated action by the Ombudsman's office and indications of support from the Office of the Minister for Police that the complaints were afforded an investigation worthy of the name.

Two police from Sydney's North Shore area alleged serious administrative improprieties, prejudice and favouritism by senior officers towards the police under their control. In other cases police have raised with Ombudsman officers allegations of very serious criminal activities by their colleagues. Still more questioned administrative procedures within the Force.

Police officers complain to the Ombudsman as a final resort, and in doing so they find themselves under serious strain. They are seen as betraying the Force. The Ombudsman's officers must therefore deal with them with great sensitivity, and be alert for signs of victimisation of the complainants. Prospective police complainants must be warned of the difficulties they face if they go ahead with their complaints, and several have decided that they will not proceed formally to complain, in light of the limitations on this Office's ability to protect them from retribution.

It is worrying that some prospective complaints of very serious criminal activity have not been made because the officers involved have felt that they would be running too great a personal risk should they speak out: one constable quite seriously feared for his life. In each case the officers said that they could not rely on the Police Force to protect them during an investigation. Whether or not they are correct in this, the fact that this is their perception of the truth indicates that there is much work for the Ombudsman and the Police Internal Affairs Branch to do in this area.

104. "Age Tapes" and the Ombudsman

Few subjects have attracted such intense public and media interest as the so-called "Age Tapes" material. Much of the public speculation about this material has focused on the alleged involvement of prominent citizens and underworld figures in conduct suggestive of impropriety or wrong-doing. A central issue is the authenticity of the material and, if authentic, the alleged involvement of members of the New South Wales Police Force in illegal tapping of telephone conversations. The question of authenticity was explored by Mr I. Temby, Q.C., pursuant to his appointment as a Special Prosecutor by the Governor-General on 21st February, 1984. In his report of 20th July, 1984, Mr Temby noted that:

> "Technical assessment cannot establish that the tapes are tapes of interceptions of telephone conversations." (at p. 12)

Later in his report, Mr Temby, referring to certain transcripts, adverted to the possibility of identifying those responsible for any illegal interception of telephone conversations. He said (at p. 15):

> "Portions of the transcript relate to one Trimbole, an alleged malefactor who is now overseas. At the time of my interim report the Honourable Mr Justice Stewart, in his capacity as a Royal Commissioner, had that portion of the materials. He had been requested by the Commonwealth and New South Wales Governments to give priority to investigating matters arising from the relevant transcript. I have had discussions with him on several occasions. It seems likely that in the course of that investigation the Judge will see fit to enquire into the circumstances in which the transcripts came to be prepared. That might well assist in identifying the person or persons responsible for illegal interception of telephone conversations, if that is what has in fact happened. At this stage there is room for strong suspicion to that effect but the gulf between suspicion of whatever strength on the one hand and proof on the other is very wide."

On 7th September, 1984, an article appeared in the Sydney Morning Herald suggesting that copies of tapes referred to as the "New South Wales Police Tapes" would be made available to the New South Wales Commissioner for Public Complaints. On 12th September, 1984, the Ombudsman wrote to Mr Temby enclosing a copy of the article and stated:

> "The role of the Commissioner for Public Complaints is limited to dealing with allegations concerning conduct which constitutes an offence punishable by penal servitude or imprisonment. The role of the New South Wales Ombudsman, on the other hand, is concerned with the investigation of conduct of public authorities where the alleged conduct may constitute wrong conduct in relation to a matter of administration. Further the Ombudsman, in relation to conduct relating to a matter of administration, does not require a formal complaint in order to commence an investigation and may commence enquiries on his own motion.
>
> It may be that the tapes referred to in the article as the "New South Wales Police Tapes" may contain material which, if the tapes are authentic, may suggest wrong conduct by a public authority under the Ombudsman Act falling short of conduct constituting the commission of an offence punishable by penal servitude or imprisonment. The latter, of course, is more properly the province of the police and/or the Commissioner for Public Complaints.
>
> Accordingly, I would appreciate your consideration as to whether the tapes contain material which may be relevant to the jurisdiction of the NSW Ombudsman and if so making such recommendation as you think fit with respect to the possible transmission of a copy of the material or any part of it to this Office.
>
> I would be happy to discuss the matter with you if you wish."

On 20th September Mr Temby replied stating that the newspaper report, as printed, was incorrect. He noted the respective roles of the Commissioner for Public Complaints and the Ombudsman and went on to say:

> "My own view, for what it might be worth, is that if you think there is a useful role for your Office to play, by all means go to it. However, I should make clear that I have no further interest or involvement in the matter generally, and that will continue to be the case unless and until material indicating Federal criminality emerges."

On 26th September, Mr J. Hatton, M.P., wrote to the Ombudsman complaining about the alleged activities of members of the New South Wales Police Force in conducting illegal interceptions of telephone conversations which gave rise to the "Age Tapes" material. Mr Hatton stated:

> "As a member of Parliament, and as a citizen, I ask that you instigate a formal investigation as to how such a wide-ranging and time-consuming illegal activity can be indulged in by members of the NSW Police Force."

The Ombudsman decided that this complaint should be investigated under the provisions of the Police Regulation (Allegations of Misconduct) Act, 1978 as amended. On 8th October, 1984, the Ombudsman notified the Commissioner of Police and the complainant of this decision and suggested that the investigation be conducted by the Internal Affairs Branch. Mr Hatton was also advised that other aspects of his complaint, relating to the administrative support which would have been necessary to enable such alleged illegal activity to be carried on, lacked sufficient detail to enable the Ombudsman to conduct an enquiry under the Ombudsman Act. Mr Hatton was invited to submit a more precise complaint about this aspect and did so on 30th October, 1984. The Ombudsman then commenced an investigation under the Ombudsman Act and on 9th November, 1984, served notices under Section 16 of the Ombudsman Act on the Commissioner of Police and the Secretary of the Police Department specifying the conduct the subject of the investigation. The Ombudsman also required the Commissioner and Secretary, pursuant to Section 18 of the Ombudsman Act, to furnish him by 7th December with a statement of information as to their respective knowledge of the conduct the subject of the investigation, as well as other relevant documents.

There has been an exchange of correspondence between the Ombudsman and Mr Hatton regarding complaints made by a person with no direct personal interest in the matter, but where the matter has public interest considerations warranting investigation. The Ombudsman acting on Queen's Counsel's advice takes the view that once such an investigation has commenced the matter is entirely within the general discretion of the Ombudsman. In such cases, the Ombudsman keeps the complainant very generally informed of progress.

The next development in the invstigation under the Ombudsman Act was the failure of the Commissioner of Police and Secretary of the Police Department to comply with the Ombudsman's requirement under Section 18 to produce the statements and documents by the deadline of 7th December, 1984. Following numerous telephone calls, the Ombudsman again wrote to the Commissioner and Secretary on 12th December, 1984, notifying them that, without prejudice to his right to commence legal proceedings in respect of the failure to comply, he was prepared to allow them until 18th December, 1984 to comply with his requirements, as the Commissioner and Secretary had indicated they required this additional time.

In the meantime from some source other than the Ombudsman a report appeared in the Sydney Morning Herald on 11th December, 1984 headed *Ombudsman on Trail of Police Tapes* and referring to both investigations which had been commenced. This report touched on the position of the Ombudsman in relation to the investigation being conducted by Mr Justice Stewart.

Subsequently, the Commissioner of Police and Secretary of the Police Department complied with the Ombudsman's requirements. Each indicated that he had no knowledge of the conduct the subject of the complaint nor was he aware of any reports by any members of the Police Department or officers of the New South Wales Police Force concerning that conduct. The Commissioner advised, however, that he would direct police to closely co-operate with the staff of the Ombudsman's Office to provide any information required. The Ombudsman delegated to the Assistant Ombudsman the subsequent conduct of the investigation.

It became apparent that the investigation being conducted by His Honour Mr Justice Stewart could have considerable bearing on the course of the investigations under the Police Regulation (Allegations of Misconduct) Act and the Ombudsman Act. Accordingly, on 30th January, 1985, the Ombudsman wrote to Mr Justice Stewart stating:

> "Clearly the whole question of the Age tapes is a matter of considerable public importance. Clearly also the various issues involved can be approached from different points of view. The role of the Ombudsman as originally conceived and as amplified by the legislation is to provide outside scrutiny of Public Service institutions, including the Police Force.
>
> In order that I may fully understand the role of your Royal Commission in relation to the investigation of the question whether members of the NSW Police Force were involved in either illegal or wrongful taping of telephone conversations, I would appreciate such information as you or your officers can give me on the following:—
>
> (a) What are the specific terms of reference of your Royal Commission which relate to this topic?
>
> (b) What information (if any) can you provide to me as to the progress and results of investigations you have conducted?
>
> (c) It has been said in the press (but not, as I understand it, officially) that application has been made by a very large number of police officers for indemnity from prosecution and that you are prepared to recommend this course. Is there any information which you feel free to provide for me on this issue?
>
> (d) Whether you suggest that further enquiry by this Office under the Ombudsman Act and/or Police Regulation (Allegations of Misconduct) Act, will in any way prejudice the investigations that you are carrying out.
>
> (e) If the answer to (d) is yes, such indications as you feel free to provide as to the manner in which investigations by this Office under the Ombudsman Act and/or Police Regulation (Allegations of Misconduct) Act may prejudice your investigations.
>
> I take the view that having regard to the importance of the issues for an institution in respect of which the Ombudsman under two pieces of legislation is given surveillance powers that I should proceed with the enquiries already initiated. Further, ideally, I would wish to do so with as much knowledge as practicable of the ground that you have already trod and with the least practicable risk to your own investigations."

On 15th February, 1985, His Honour advised the Ombudsman that he had delivered an interim report to the Commonwealth and New South Wales Governments and noted that he felt it inappropriate at that time to discuss the matters raised, or furnish the information sought, by the Ombudsman. His Honour also advised that he had forwarded a copy of the Ombudsman's letter to the Prime Minister and the Premier of New South Wales. On 30th January, the Ombudsman had also sought advice from the Commissioner of Police as to the progress of the investigation under the Police Regulation (Allegations of Misconduct) Act. The Commissioner advised, in his reply, that he had sought from His Honour Mr Justice Stewart, access to all Police Department documents previously made available to Mr Justice Stewart and had been informed by His Honour:

> "I consider it would be inappropriate for me to return this material to you at this stage. As you are aware, I have delivered to the Government of New South Wales and the Commonwealth an interim report in relation to my enquiry. The recommendations contained in my report are still under active consideration by the Governments and pending the conclusion of these processes and the determination of any further action, it is proper that I retain this material for the time being."

The Commissioner was accordingly of the view that the investigation could not be concluded while the critical documents remained under the control of Mr Justice Stewart.

On 27th February, 1985, the Ombudsman also sought various documents from the Commissioner for the purposes of the investigation under the Ombudsman Act. These documents included reports prepared for the Special Prosecutor Mr Temby in the course of his investigation. The Commissioner advised that these documents were also held by Mr Justice Stewart and had formed part of his request to His Honour for access noted above.

A further serious matter arose on 1st March, 1985 when the Commissioner informed the Ombudsman of the receipt of an anonymous complaint alleging the involvement of a very senior police officer in the alleged illegal interception of telephone conversations. The Commissioner advised that the Minister for Police had sought his personal involvement in the investigation of this matter.

Media speculation over the alleged activities of New South Wales police officers in illegal telephone interceptions continued unabated. The question of the authenticity of the "Age Tapes" material continued as a topic and there was lively public debate on the issue of whether the police officers involved should be granted immunity from prosecution if they were willing to give evidence which would reveal the extent of their activities and hence lead to the authentication of the material.

On 29th March, 1985 and 3rd April, 1985 respectively, following earlier press coverage of meetings between the Commonwealth Attorney-General, the Hon Mr Lionel Bowen, Mr Justice Stewart and Mr Temby which suggested differences of view between the latter, the Governor-General and the Governor of New South Wales issued further Letters Patent to Mr Justice Stewart. These Letters Patent were in similar terms, whereby His Honour was authorised, inter alia, to enquire into whether there existed any information or material including documents or tape recordings arising out of or relating to the unlawful interception of New South Wales telephone communications. His Honour was also authorised to identify any person for whom he might recommend the grant of an indemnity against prosecution in connection with such interceptions, where it was considered such person could give evidence which would tend to render such material admissible in a prosecution or could give information that might lead to the discovery of such evidence. The Letters Patent required the Royal Commissioner to report by 31st December, 1985.

In response to this development, the Commissioner of Police wrote to the Royal Commissioner seeking advice as to the propriety of the Commissioner continuing with his investigation under the Police Regulation (Allegations of Misconduct) Act in view of the terms of the Letters Patent. His Honour responded, in part, that:

> "In my view, the allegations which are the subject of your investigations fall within the scope of the matters dealt with in the Letters Patent, and I accordingly agree with your decision to suspend further enquiries in relation thereto."

Subsequently, the Commissioner notified the Ombudsman of this advice and requested that the Ombudsman also suspend his investigation under the Ombudsman Act.

It is clear from the provisions of Section 20 of the Police Regulation (Allegations of Misconduct) Act that the Commissioner can only defer or discontinue an investigation under that Act with the consent of the Ombudsman or, on appeal, of the Police Tribunal. The Ombudsman advised the Royal Commissioner of this fact and, in an effort to resolve the obvious impasse which had developed, sought further information from His Honour including his views as to whether continuation of the investigation by the Commissioner under the terms of the Police Regulation (Allegations of Misconduct) Act and any re-investigation by the Ombudsman would be likely to prejudice enquiries

being conducted by the Royal Commissioner. The Ombudsman also sought His Honour's views as to whether any indemnity granted by him would, as a matter of law, preclude the Ombudsman from making one or other of the findings under the provisions of Section 25A, 27 and 28 of the Police Regulation (Allegations of Misconduct) Act. On 5th June, 1985 His Honour wrote to the Ombudsman advising that he was authorised only to recommend the granting of indemnities. His Honour also indicated that, assuming that the investigation of Mr Hatton's complaint touched matters upon which he had been directed to enquire, such an investigation would prejudice the conduct of his enquiry. His Honour felt that he should not express any views as to the legal effect of any indemnity recommended by him upon the Ombudsman's powers to make findings under Section 25, 27 and 28 of the Police Regulation (Allegations of Misconduct) Act. His Honour also considered that, having regard to the prejudice to his enquiry which he had referred to, no good purpose would be served by conducting both enquiries simultaneously, and that there could well be a needless duplication of effort.

It is the Ombudsman's view that, in general, precedence should be given to a specailist enquiry, such as that being conducted by Mr Justice Stewart, and that the Ombudsman should and would be prepared to defer, but not discontinue, an investigation under the Ombudsman Act into the same or similar matters. This view is based upon related considerations of the public interest and the Ombudsman's statutory duty to ensure that an investigation under the Ombudsman Act, once commenced, is pursued to a proper conclusion and is not discontinued prematurely. Accordingly, on 1st July, 1985, the Ombudsman advised the Commissioner of Police that he had decided to defer the investigation under the Ombudsman Act until the results of the inquiry by Mr Justice Stewart were available, or until further notice on the basis that photocopies of any relevant information forwarded to the Royal Commissioner also be forwarded to the Ombudsman.

Different considerations may well arise in respect of the investigation under the Police Regulation (Allegations of Misconduct) Act. It has already been noted that the Commissioner has not power unilaterally to defer or discontinue that investigation. In particular, it is clear from the provisions of that Act that the Commissioner may only apply for, and the Ombudsman may only consent to, a deferral of an investigation pending the conclusion of any criminal proceedings which have been instituted and in which the subject of the complaint is, or may be, in issue. Clearly, a Royal Commission cannot be considered to be a criminal proceeding. In light of the Ombudsman's views about any premature discontinuation of an investigation, he suggested to the Commissioner of Police that the letter and spirit of the legislation would be complied with if the Commissioner were to provide information to the Royal Commissioner as requested by him and, at the same time, provide copies of such information to the Ombudsman by way of progress report, invoking, if necessary the provisions of Section 26(1) of the Act in respect of that material. That Section precludes the Ombudsman, except in some circumstances, from publishing information the subject of an order under the Section.

In response to this invitation, the Commissioner formally sought the consent of the Ombudsman to discontinue the investigation in accordance with Section 20(2)(b) of the Act. This provision gives a discretion to the Ombudsman to consent to the discontinuance of an investigation if a continuation would be:

> In the circumstances of the case, unreasonable or impracticable.

On 17th September, 1985, the Ombudsman after seeking the advice of senior and junior counsel wrote to the Commissioner of Police in the following terms:

> "I refer to your letter of 5th July, 1985 in which you seek my consent to discontinue investigation of these complaints in accordance with Section 20(2)(b) of the Police Regulation (Allegations of Misconduct) Act, 1978, as amended.
>
> In my view, there are a number of factors to be considered on the question of whether I should consent to the present application. The first and foremost of these factors is the public interest. Upon receipt of Mr Hatton's complaint, I gave consideration to his interest in the complaint both as a citizen and Member of Parliament. Whilst it appeared that he had no direct interest in the matter, I concluded that, on the basis of the public interest, the complaint should be investigated.
>
> One view of the seriousness of the public interest considerations can be seen in the remarks of Mr R. Mochalski, M.L.A., in a speech to the Legislative Assembly in which he said, inter alia:
>
> > "I am sure that no one here will agree per se with the notion of illegal tapping or the use of listening devices. However, the point of departure for some would be the argument based on a notion of some sort of overriding duty or higher purpose in the interests of law and justice or the fight against crime and corruption. One might describe this as the Nuremburg defence with moral overtones. One of the issues, in my contention, is that the police must never in future be able to present this argument with any credence, cogency or

acceptability to the news media or anyone else . . . in future, the illegal use of tapping or listening devices by police be prohibited with the most powerful sanctions for transgressors. Third, that police are made aware of the implications that stem from these courses of action; and fourth, that a mechanism be established whereby the Minister of Police can easily establish whether activity of this sort is being perpetrated. Just imagine how much deceit has been perpetrated upon the Minister and the budgetary process in the administration of the police force. Just imagine the deceit imposed upon Parliamentary processes, within the context of civil liberties and within the context of ministerial and parliamentary control of a police force, in a democracy.

The role of the police in a democracy is basic and overrides all other issues. Consider for the moment that some of the highest ranking police officers in New South Wales were, according to news media inferences, involved. How is it possible for these officers now to pretend to work with the Minister and the Government? How is it possible for there to be any trust in any continuing relationship, especially when the Minister and the Government have been subjected to deceit and covert operations by officers responsible to a Minister."

Without necessarily agreeing with these sentiments and certainly not prejudging whether there has been any illegality, the importance of the public interest issues can be readily seen.

In general terms, it is consonant with the role of the Ombudsman that, where a specialist tribunal such as a Royal Commission is established to deal with a matter which the Ombudsman is investigating, the Ombudsman should defer his inquiry until after the work of the specialist body has been completed. After the specialist body has reported, it is then the appropriate time for the Ombudsman to consider whether in his discretion his inquiry should be resumed and pursued to finality including a finding and, importantly, recommendations for the future. Factors that affect this later decision include the composition and background of the members of the specialist tribunal, the approach adopted by it in its investigations and, of course, the terms of its final report. One important distinction often is that the Ombudsman has a continuing role in the scrutiny of government authorities (including police) and has power to follow up recommendations made to see how they operate in practice and, if necessary, to ensure that they are carried out. Moreover, the extent to which the matter before the Royal Commission (as defined by its terms of reference) and the matter of complaint to the Ombudsman coincide or overlap would normally be a relevant consideration.

With these type of factors in mind, I wrote to His Honour Judge Stewart by letter dated 17th May, 1985 (copy annexed). His Honour replied by letter dated 5th June, 1985 (copy annexed). Having considered the material forwarded by His Honour, I advised His Honour by letter dated 25th June, 1985 that I had decided to defer the Ombudsman Act investigation and that I had written to you suggesting a course which would comply with the spirit and letter of the Police Regulation (Allegations of Misconduct) Act.

As you are aware, Mr Hatton made two complaints, one under the Police Regulation (Allegations of Misconduct) Act and one under the Ombudsman Act and investigation commenced in each case. Another detailed anonymous complaint was received which falls under the first Act. Your letter relates only to the complaints under the first Act. That Act provides a mechanism for the investigation of complaints about the conduct of members of the New South Wales Police Force and for the determination of such complaints. It gives to the Ombudsman the power to re-investigate such complaints where he so determines. Further, the grounds upon which the Ombudsman may find conduct to be wrong pursuant to Section 28(1) of the Act are extremely broad and comprehensive. I have examined the Letters Patent granted to His Honour. It appears that in carrying out his duties as required under the Letters Patent His Honour will consider and report upon aspects which are involved in the above complaints. I have already indicated that I am content for the investigations under the Police Regulation (Allegations of Misconduct) Act to be conducted in a manner which takes account of the operations of the Royal Commission and which accords precedence to those operations. The proposition, however, does not lead to the conclusion that those investigations should now be discontinued. I note that His Honour is required to report his findings and recommendations no later than 31st December, 1985. The report is then a matter for the Governments who may choose to release or withhold it or portions thereof. It is possible I will wish to see the investigations under the Act pursued after His Honour has reported. There could be a number of reasons for this. In the meantime, as previously suggested, I believe the letter and spirit of the Police Regulation (Allegations of Misconduct) Act can best be served as indicated in the penultimate paragraph of my letter of 25th June, 1985.

Accordingly, for the reasons above, I do not consent to a discontinuance of the investigation."

The Ombudsman's concern in this matter is to ensure not only that the procedure laid down by the Police Regulation (Allegations of Misconduct) Act is adhered to but, just as importantly, that meaningful effect is given to the scheme of the Act where a serious complaint is under investigation. Clearly, the legislation was designed to provide a system whereby complaints against members of the New South Wales Police Force can be properly investigated. The system ensures that the Ombudsman is able to monitor the progress of such investigations and is able, where necessary, to re-investigate complaints and make findings as provided by Sections 25A, 27 and 28 of the Act. This scheme envisages that the Ombudsman in carrying out his statutory duties will act as a guardian not only of the interests of an individual complainant but of the public interest generally. It should be borne in mind that the objects of the legislation are not necessarily the same as the terms of reference of the Letters Patent under which Mr Justice Stewart is authorised to conduct his enquiry. Whilst the Ombudsman does not wish to prejudice or place impediments in the path of that enquiry, he has a duty to ensure that the provisions of the Police Regulation (Allegations of Misconduct) Act are carried out. The Commissioner of Police has stated that he agrees with this position.

105. Bogdan Ostaszewski Case

On the evening of 31st May, 1984 a Polish migrant, Mr Bogdan Ostaszewski, who was a boarder at a guest house in Wollongong, was evicted from his lodgings by the owner of those premises. An argument had taken place and police were called to the address. Mr Ostaszewski was taken into custody as an intoxicated person and was placed in the cells at the Wollongong Police Station.

Early the following morning, almost 11 hours after Mr Ostaszewski had been placed in the cells, police attempted to awaken him, but to no avail. An ambulance was called and Mr Ostaszewski was conveyed to the Wollongong Hospital, where he was found to be suffering from a massive brain haemorrhage. To this day, he has never regained consciousness. His prognosis is grim.

Following Mr Ostaszewski's admission to the hospital, various injuries, such as bruises and abrasions, were observed. Yet, according to police, Mr Ostaszewski had displayed no visible signs of injury, nor had he complained of any. Speculation grew as to how these injuries, and the head injury, had been sustained. The matter attracted considerable public attention and there were several reports in Wollongong and Sydney newspapers. It appears that police and doctors disagreed on several crucial aspects of the case.

During August and September 1984 the Ombudsman received complaints about the conduct of police from a member of the New South Wales Parliament and the leaders of two migrant organisations.

A police investigation tried to determine the cause of Mr Ostaszewski's injuries, and whether police had delayed seeking medical treatment for him. The police found that Mr Ostaszewski had not received his injuries whilst he was in custody and recommended that no further action be taken. Police scientific and medical evidence suggested that Mr Ostaszewski fell backwards over the balcony of the boarding house, thereby sustaining the injury to his head.

The complainants to the Ombudsman were not satisfied that the findings of the Internal Affairs Branch were correct, and requested the Ombudsman to re-investigate. This the Ombudsman decided to do. Because the matter involved extensive medical and scientific evidence, the Ombudsman, with the consent of the Premier, engaged the services of an independent expert, Mr Michael Fearnside, a neurological surgeon. Mr Fearnside prepared a detailed report on the matter and helped to clarify many of the case's medical aspects. The Ombudsman's enquiry, in addition to the taped on the spot preliminary enquiries, involved taking extensive oral evidence from police, doctors and civilians over the months of July, August and September, 1984. The Ombudsman's enquiry was substantially carried forward by Ms Barbara Murphy, a seconded police officer with both scientific and legal qualifications and an indefatigable zeal for getting at the truth.

During the investigation police procedures for dealing with intoxicated persons came under close scrutiny.

The Ombudsman's Provisional Findings and Recommendations are in an advanced stage of preparation and will be sent to interested parties for comment before a final report is issued.

106. Complaints by Constables Miles and McKinnon: Hardly a Storm in a Tea Cup

Two police officers, Constables Paul Miles and Max McKinnon, who have since received a great deal of media attention, brought to the Ombudsman (after the Police Force had apparently ignored them) a detailed set of complaints about the conduct of senior police in Sydney's North Shore area. Briefly, the complaints cover allegations of:

1. Consorting with criminals

   Detective Sergeant A and Superintendent B are close friends and associates of C (a notorious person). Evidence of seeing them together on several occasions.

   (A has threatened Miles: Miles fears for his life.) (A and C are co-accused in a famous drug case.)

2. Conspiracy to pervert the course of justice

   The persons allegedly involved are a Magistrate and two very senior police (D and E).

   (a) D is alleged by the licensee of X hotel to have fixed traffic matters for him. The licensee has boasted that the Magistrate and D fixed his son's drink-driving charge.

(b) As a result of the publican's telephoning D, McKinnon was questioned over a two-up game in the hotel. Others had already been charged. There was an Internal Affairs investigation which was dropped when McKinnon mentioned "a" above. The other defendants had their cases dismissed without conviction.

The file was shredded on the orders of Deputy Commissioner E.

3. Drunkenness on duty

Persons allegedly involved are Chief Inspector F, Inspector G and commissioned officers generally.

There are no fewer than six specific allegations.

The two most colourful are:

(a) In September 1984 F came into a police station when a group of boy scouts was visiting — he was embarrassingly drunk and gave a fingerprint and baton demonstration, making himself look like a fool.

(b) When the shooting of Senior Constable Drury was reported, F was on duty, but was at a football game, drunk. He tried to make a 'phone call but fell down in the 'phone booth. Police had to hold him up and dial for him.

4. Failure to attend the scene of a serious crime

See 3(b) above.

5. Mishandling of court exhibits

Under F's authority a heroin exhibit in a defended trial was destroyed 8 months before the trial.

Previously a similar thing happened to a sawn-off rifle.

6. Victimisation

Both Miles and McKinnon complain of numerous incidents of victimisation against themselves and others:

(a) Transfers

Miles to the Police Transport Branch, as a result of his bad relations with F and G. (This transfer was rescinded because Personnel Branch thought it unjustifiable — Miles was sent to North Sydney instead.);

Miles' girlfried to Transport (instead of Miles). (Also rescinded — she was sent to another station.);

An officer — over a fight with Superintendent H over who owned some liquor;

A sergeant, taken away from his position as officer in charge of a station and sent to another station because he had criticised to F senior officers' practice of drinking on duty;

A parking patrol officer, as a favour, because she was sleeping with F;

A sergeant replaced as office in charge of a station. F married the replacement shortly afterwards;

McKinnon from a station to another on traffic duties and then to a further station where he was not allowed to be let out of the office;

Any junior officers who supported Miles and McKinnon — a threat by an unnamed senior officer.

(b) General victimisation

F pursuing the question of a warrant against Miles while ignoring several in the names of other police and his own son;

Inspector G telling other police that the complaints were against them (when they were not);

G having his sergeants research Miles' history to find something to charge him with;

Numerous incidents of senior officers calling Miles and McKinnon names, saying they were finished, etc.;

Pressure placed on local meetings of the Police Association to pass "unanimous" resolutions of support for the officers named in the complaints.

(c) Tunks Park incident

Miles and his girlfried (an officer) were rumoured to have had sex in the back of a police vehicle while on duty. They deny this.

Chief Inspector F failed to take action to stop the rumours.

F failed to investigate this allegation of a serious breach of Police Rules.

(d) Parading off duty

Chief Superintendent I required all uniformed police to parade off duty after each shift, thereby lengthening their working day, until Miles apologised to him. The directive was rescinded immediately Miles did so.

7. Misuse of police

(a) At an Assistant Commissioner's send-off a constable was rostered on plain-clothes duty and detailed to drive senior police officers to a send-off function at Canterbury Racecourse;

(b) A car was taken off duty at Christmas and sent to collect a Christmas ham from Marrickville.

8. Breach of law

After 7(a) above, drunken senior officers drove themselves home.

9. Avoidance of duty

(a) Chief Inspector F and Inspector G taking time off to go to football matches;

(b) Football players getting time off;

(c) Supervising Sergeants doing nothing, sitting in the station and getting constables to fetch the newspapers for them;

(d) G playing tennis (at courts next to the station and, later, at northern beaches) during working hours;

(e) Non-commissioned officers' meetings regularly conducted during working hours at licensed clubs;

(f) Chief Superintendent I working on his central coast house while supposedly on duty.

10. Police investigation of the initial complaints

(a) The first investigator of the complaints was seen drinking with the police he was supposed to investigate;

(b) The second investigator threatened to charge junior police who supported any complaint;

(c) He investigated by means of a document handed to numerous police which

— misrepresented the matters of the complaint;

— suggested that junior police were being complained about;

— clearly identified everybody involved in the complaint (contrary to the requirements of the Act).

When the complaints had first been made to the Police Commissioner, a member of the Police Internal Affairs Branch had been detailed to investigate them. After it was alleged that this officer had subsequently been seen drinking with some of the police complained about he was removed from the case and another officer placed in charge. The conduct of this second officer was made the subject of further complaint. After this Office had spent some effort in attempting to have the matter properly investigated an article appeared on the front page of The Sydney Morning Herald on Saturday, 20th July, 1985.

The article was headed "Some Long Lunches Just Go On And On" and it was illustrated by Tandberg. (See below.)

The article said that the complaint was about police taking long lunches and little else and it concluded with this paragraph:

> "A Police Department Spokesman said yesterday that although he was not able to comment on internal inquiries, the whole matter appeared to be 'a storm in a teacup'."

Whatever the Herald journalist was led to believe by the Police Department Spokesman, the Ombudsman and the Minister for Police regarded the complaints as serious and worthy of careful and thorough investigation. The Ombudsman and the Minister consulted on the matter and were concerned not only at the seriousness of the allegations but also at the poor standard of the police investigation to date.

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Miles made his first complaint in December, 1984, to his senior officer. Not until some six weeks later was he interviewed by an Internal Affairs detective. That interview broke down for procedural reasons and was resumed two weeks later. At that later interview the complaint about the investigator's fraternising with the accused police was brought up.

Some action was taken in March, but despite the continual urgings of Miles and McKinnon the complaint was not forwarded to this Office until mid-April. (By a coincidence, a copy of the complaint arrived at the Ombudsman's Office from the Police Department on the very morning that the two police officers come in to complain to the Ombudsman personally.)

During April and May large numbers of police were interviewed by the second investigator in connection with the complaints. It is alleged by Miles and McKinnon that junior police were told that those who gave evidence to support the complaints would be charged with neglect of duty for not having themselves reported the matter earlier. Not surprisingly, the interviews produced little evidence.

It was not until early September, 1985, that the third police investigator appointed interviewed the two complainants. That was nine months after the complaints had originally been made to the Commissioner.

107. An Alleged Extraordinary Party

In addition to the serious complaints of Constables Miles and McKinnon set out in the previous topic, the original complaint by McKinnon included a report of an extraordinary party. After the 'E' District Policewomen's Netball team won their grand final in late December 1984, they and the spectators were allegedly taken to a hotel by Inspector K. There they were entertained by the licensee, who is also the proprietor of a tow truck company. Constable McKinnon continues the story:

> "As the afternoon and evening wore on, Inspector K insisted to the junior police that the party adjourn to his private residence. Upon arrival of the party there, due to it being a hot night, Inspector K stripped to his swimming costume and positioned himself in a spa pool, adjoining the swimming pool. Constable 1st Class Miles of Chatswood, who is a close friend of one of the team members, at her invitiation, attended the party after finishing duty at Chatswood at 11 p.m. Constable Miles had never met Inspector K at this stage. He informs me that when he arrived at the house, the Inspector appeared 'cross-eyed', drunk and sat in his spa pool drinking spirits. At the time, he was exhorting some of the women police to dive into his pool and get a wet 'T'-shirt competition going.
>
> At the same time, Miles heard the Inspector boasting to a man sitting with him in the spa pool of his exploits whilst he was a Detective Inspector at the Internal Affairs Branch. He boasted that on one occasion he had gone to Bathurst and Orange to investigate a complaint. He boasted that he had instructed the police there "what to say and what not to say" and as a result, "they beat the blue". At this same time, a naked young man hovered nearby at the Inspector's beck and call, to fetch him drinks. The Inspector addressed this young man, who is apparently a member of the New South Wales Police Force, as "Gay Boy"..."

108. Low Flying by Police Helicopter in Search Operations

The Ombudsman received complaints about low flying by a police helicopter searching for Indian Hemp plantations in the north of the State. The Ombudsman heard evidence from several complainants and witnesses about the manner in which the helicopter was flown.

For example, a couple said that they were asleep in bed with their skylight window open. They were naked. The noise of the police helicopter woke them, and they saw two people in the helicopter peering into the room, one with a pair of binoculars. The helicopter was so close that its down-draft blew debris into the house.

The police officer who was the observer on the helicopter said that it flew as low as 30 feet above the undergrowth, and on some occasions as low as 50 to 60 feet above the ground while photographs were taken. He denied that there had been any peering into a bedroom.

There was evidence that the helicopter few close to children playing in an open field, approximately 30 to 40 feet above their heads. It then landed only 30 to 40 yards away from the children. On another occasion a child became frightened by the helicopter's noise and started to scream with fright. This evidence was supported by a Forestry Commission employee. Officers of the Forestry Commission and the North Coast County Council told the Ombudsman that they had seen and been in the police helicopter while it flew close to houses; at times they thought that it was unnecessary to fly in certain areas, particularly where there were ground parties and houses. On one occasion the helicopter flew so low that the down-draft blew down paw paw trees.

While en route from Sydney to Byron Bay the helicopter was forced to land because of a generator problem. The police pilot and his observer told the Ombudsman that, while searching at low altitudes, they were keenly aware of the risks posed by power lines, banana wires (flying foxes) and other hazards. The pilot said that he had served in the Royal Australian Air Force in Vietnam, flying helicopters; he maintained that pilots with air force experience were more skilled than others.

This matter has been the subject of a draft report, which is now in the hands of the Minister for Police. In this draft report the Ombudsman recommended that approval should not be given by the Police Department for the use of police helicopters to search private properties (except for search and rescue operations) at altitudes below 1500 feet in the cities, towns and populous areas, or 500 feet in other areas, unless such searches are authorised by warrant, and that the helicopter does not fly below these altitudes for any purpose unless authorised to do so by warrant.

109. Random Breath Testing: Do Police Guidelines Fail the Test?

Complaints about police random breath testing stations have fallen into three main categories:

1. From proprietors of licensed premises alleging that the stations are too close to them.
2. From residents objecting to the stations being located outside their homes.
3. From motorists maintaining that the stations are in unsafe locations.

1. The guidelines for random breath testing say:

> "A random breath testing station is not to be established in the immediate vicinity of licensed premises."

This section of the guidelines was criticised by the Ombudsman, who could not see why testing should not take place everywhere, irrespective of licensed premises, provided that no single club or hotel was singled out from others.

In response to the Ombudsman's comments, Acting Assistant Commissioner for Traffic, John Dunlop, informed the Ombudsman that the guidelines for licensed premises were still part of government policy and were strictly adhered to. Mr Dunlop also indicated that he had proposed three variations to the random breath testing guidelines when he made a submission to the "Staysafe" committee. These variations were that:

(a) Stationary testing operations be supported by testing in the mobile mode.

(b) Joint radar and R B T operations be permitted.

(c) Warrant checks be carried out in conjunction with random breath testing in specified circumstances.

At the present time all R B T operations are carried out in a stationary mode and police are required to find a suitable stretch of road, that is, one with clear vision in both directions plus an adequate width to allow cars to be stopped while untested drivers can proceed on their journeys unimpeded. Further, there must be sufficient room to keep the R B T vehicle off the trafficable portion of the road. At night, the area should be well lit and the police vehicles must afford approaching motorists a clear view.

This situation has led to the police R B T station being located in particularly major thoroughfares, and then only on certain areas along those roads; the consequence of this is that it allows the alcohol impaired driver freedom to negotiate his vehicle through the back streets, that is, areas where R B T guidelines restrict its operation. This situation undermines the effectiveness of the legislation and provides a haven of safe, detection-free motoring for the very class of motorist it was enacted to deter and prosecute. It could be argued, therefore, that the stationary mode R B T is counter-productive to the purpose of the legislation and as a consequence only re-directs the potential offender to make use of residential and back roads.

The advisability of varying the guidelines to allow police to operate R B T in a mobile mode is easily seen as every highway patrol car becomes a potential R B T station as it operates its usual patrol along the major highways and residential byways.

Mr Dunlop suggested that stationary R B T supported by mobile operations would be more flexible and would increase the expectation of the likelihood of detection. He further suggested that mobile operations would be accepted near licensed premises and not appear to be specifically aimed at those premises.

2. R B T stations outside private premises have brought complaints of vehicles blocking driveways while their drivers are being tested, of noise from police radios early in the morning or late at night, and of restricted vision for drivers emerging from their homes.

   In some cases the operator and the citizen may not necessarily see R B T in the same light. In one complaint the following conversation is reported:

   > "As I approached my car I saw the constable and said to him, 'Are you filling up your quota?' He replied, 'I don't understand you.' I replied, 'You don't.' He replied, 'I don't.' I said, 'You amaze me.' The constable then moved towards his vehicle, flagged another vehicle down which stopped across my driveway."

3. The location of R B T stations has brought complaints about safety of motorists and police. In one incident a station was operating at night just over the brow of a hill. Two motorists had stopped to take tests and a third ran into the back of one of their vehicles. This caused the first stationary vehicle to be pushed into the second vehicle, which was then pushed into the police patrol car. All the vehicles in the incident were damaged. The driver of the third vehicle was sober. Therefore, the need to choose a location with care and with an eye to the current guidelines often places the police in a difficult situation.

110. Investigations by Police of Sexual Assault Matters

In August 1984 police were advised of new policy and procedural guidelines for dealing with cases of both child and adult sexual assault. The guidelines were designed to "assist police and health personnel to provide a service in an area of considerable legal and social complexity to understand each other's different functions and skills, and, where appropriate, to work together in the interest of the person who had been assaulted".

The Ombudsman's Office has received relatively few complaints about police investigations of cases of sexual assault, whether because of improved police procedures, or from reluctance to complain to the Ombudsman because of the sensitive nature of the complaint, or from ignorance of the Ombudsman's ability to investigate such complaints.

Complaints about police investigation of sexual assault on adults have so far concerned the following matters:

1. Alleged failure of police to produce all evidence to court.
2. Alleged failure of police to fully investigate allegations of sexual assault — for example, failure to interview people suggested as witnesses.
3. Alleged failure of police to inform victims of sexual assault of their rights and of the services available to them — for example, Sexual Assault Centres, interpreting services. Such complaints refer mainly to the interview procedure of the police.
4. Alleged unsympathetic attitude of police investigating officers and questioning of the veracity of the victim.
5. Alleged coercive methods of police investigating officers to force pleas of guilty — for example, threat of gaol.

Complaints about police investigation of sexual assault on children mainly concern the Child Mistreatment Unit, for example:

1. Failure of the Child Mistreatment Unit to fully investigate allegations.

2. Alleged intimidation by police of child victims unable or unwilling to identify their assailant.

3. Alleged invalid reasons for failing to investigate child sexual assault, such as the detrimental effect on the child and his or her character; the child is a poor witness.

All but two of the complaints received during the past year about police investigation of cases of sexual assaults are still under investigation. The Ombudsman is concerned that complaints about police investigation of sexual assault matters be carefully monitored and investigated. Such issues as the training provided to police in dealing with these cases has been highlighted in the complaints to date.

111. 'No-Bill' Decisions: Desirability of Giving Reasons

A nolle prosequi, better known in New South Wales as a 'no-bill', is a formal statement by the Crown that it does not intend to proceed with a particular charge. The procedure is usually utilised between committal for trial and trial. In theory, a 'no-bill' with regard to a particular charge merely stays proceedings, which can be recommenced at any time in the future, but in practice the entry of a no-bill virtually always means that no further action will be taken. A no-bill is thus tantamout to a pre-trial acquittal.

The power to enter a no-bill is part of the broad power exercised at common law by the Attorney-General as the chief legal representative of the Crown. A no-bill can only be entered by the Attorney-General or on his authority. The power to enter a no-bill is not subject to any controls by the courts, the only form of accountability being through Parliament. When a no-bill application is made, usually by the legal representative of the person charged, the brief of evidence is submitted first to a Crown Prosecutor and subsequently to the Solicitor-General or Crown Advocate, finally passing to the Attorney-General with a recommendation which he can accept or reject, thereby exercising his prosecutorial discretion.

Statistics indicate increasing use of the power. During 1982, some 372 cases, over 7% of all cases disposed of in the Supreme and District Courts of New South Wales, were no-billed. There is little known of the criteria on which such decisions are based. As Sallmann and Willis wrote in *Criminal Justice in Australia*, the nolle prosequi is:

> "... a very important power. It is used frequently, it is discretionary, virtually invisible and very few people, even within the legal system are aware of it, and, in particular, of its implications. The scope for misuse is clear; it is an act of faith that the power is used in the public interest ..."

Recent information obtained by the Ombudsman would suggest that such acts of faith are not universally accepted and that the procedure provides a fertile ground for rumour and suspicion of misuse.

During the course of a current investigation the Ombudsman was given evidence from a number of intelligent and concerned witnesses to the effect that a major prosecution had been no-billed in scandalous circumstances. In relation to this particular prosecution, the rumour in question was given added impetus and credence by beliefs that amply strong evidence supported the committal for trial and that senior police, connected with the prosecution, had expressed surprise at the no-bill and were mystified as to why the matter was not allowed to proceed to trial.

Whether or not such a scandalous rumour has the slightest basis in truth is beside the point. What is important, in the view of this Office, is that such rumours are abroad and appear to be all too common. Such rumours can only further harm the reputation of the administration of justice in this State and the causes should be eliminated and the rumours prevented if at all possible.

One of the main causes of such rumours is that the Attorney-General's Department never publishes or gives reasons to anyone for its decision to file a no-bill; not even to the informant, usually a police officer, who is responsible for commencing the prosecution and who, up until committal, carries personal responsibility for the prosecution. It would not be unreasonable, in the view of this Office, for the informant and also the prosecutor at the committal proceedings to be consulted prior to any decision being made and the reasons for any proposed no bill discussed. This slight modification of the present decision making procedure would have some effect on stifling adverse inferences being drawn by the failure of the authorities to give reasons and would go some way towards preventing rumours of malpractice or corruption motivating such decisions.

The Ombudsman, prevented by Section 12 of the Ombudsman Act, with its incorporated Schedule 1, from investigating such conduct, is nevertheless of the view that the present practice of making such important and far-reaching decisions without the necessity of giving reasons should be seriously reviewed in the public interest. To say that the present system is in accordance with tradition is not necessarily an adequate answer in a modern, democratic society with a tendency towards a more visible and open form of government administration.

112. When Should Police Officers be Prosecuted?

In a paper entitled "Prosecution Discretions — Director of Public Prosecutions Act 1983" delivered at a conference of the Australian Institute of Criminology on 7th November, 1984, Mr Ian Temby, Q.C., the Commonwealth Director of Public Prosecutions, said:

> "... in particular allegations against police officers go to the heart of the prosecution process, and they should not be allowed to fester, but should be exposed to the light of day. There is a lot to be said for prosecution in such circumstances, even if it results in an acquittal: that will serve to clear the air. Finally, with particular reference to allegations against police officers, the relationship between those who investigate crime and those who are responsible for prosecutions can be so close as to make it difficult for the latter to view the evidence in an impartial way. For all these reasons the best course may be to institute a prosecution if there is a prima facie case, even if a conviction is reckoned to be unlikely."

It is part of the Ombudsman's function, where complaints against police officers are found to be sustained, to determine whether he should recommend that any criminal or disciplinary proceedings be taken against such officers.

The Ombudsman's present practice is not to recommend the institution of criminal or disciplinary proceedings, unless he has obtained advice from experienced independent counsel to the effect that they should be brought.

Currently, where the Ombudsman, after direct investigation, concludes that there is credible evidence available to him which suggests that a police officer has committed wrong conduct (within the broad definition of the Police Regulation (Allegations of Misconduct) Act) of a sort which would render him or her liable to disciplinary or criminal proceedings his usual recommendation is that competent legal advice, independent of the Police Department, should be obtained on the question of whether such proceedings are likely to be succesful, and that, if so, they should be brought.

The bringing of criminal proceedings, in particular against police officers (given the reluctance of juries to convict) in circumstances where, on balance, such proceedings would not be pursued against a civilian may seem to discriminate against them. However, the necessity of restoring public confidence in the Police Force and its members makes Mr Temby's expressed opinion an arguable one. The same argument also applies to judges, magistrates, Crown law authorities, barristers, solicitors and all those concerned with the law enforcement process. Police ought not to be in a more disadvantageous situation than other law enforcement officers.

113. Execution of Warrants on Prisoners

At the time they are taken into the custody of the Department of Corrective Services, many prisoners have warrants outstanding against them. These are usually Warrants of Commitment under which a person who has not paid a fine may be committed to prison in default. People imprisoned for this reason are referred to as "fine defaulters". A person imprisoned for some other offence can "call-in" outstanding commitment warrants and satisfy unpaid fines concurrently with the sentence they are serving. A police officer usually brings the relevant warrants to the gaol. In some cases, however, the outstanding warrants take the form of First Instance Warrants or Warrants of Apprehension which, in order to be executed, require the person to be brought before a court for a criminal offence. A police officer may not enter a prison for the purpose of executing such a warrant on a prisoner; the prisoner must be brought before a court, usually the court from which the warrant was issued or, alternatively, the court closest to the gaol where the prisoner is in custody.

An investigation by this Office revealed deficiences in the system of executing First Instance Warrants. In one instance a note on a prisoner's gaol file read:

> "Hold for Maroubra Police. First Inst. Warrant
> Number 12552806 steal motor vehicle at Gosford"

This note had been placed on the file by a police officer in charge of the warrant section at Maroubra Police Station, where the warrant had been received. This officer gave evidence to the Ombudsman, at a hearing under Section 19 of the Ombudsman Act, of the regular practice of placing such notes on prisoners' files; he said that the word "hold" meant "advise". However, a solicitor from Redfern Legal Centre maintained that prisoners released from gaol were sometimes met by police at the gates where outstanding warrants were executed against them; he believed that the practice of not executing warrants, but rather noting their existence on files, allowed this to happen. The Centre believed that, if there was a warrant in existence, it should be executed at the earliest possible opportunity.

The police officer told the Ombudsman that notes about warrants usually remained on gaol files until prisoners were due to be moved; his section was then asked the status of warrants. The police officer said that at one time the presiding magistrate at Redfern Local Court had been prepared to issue orders to produce prisoners at that court for the purpose of executing First Instance Warrants; when only one warrant was involved and there was a plea of guilty, the matter could be dealt with at that court. The magistrate had later agreed to issue orders to bring prisoners before the court in order to execute warrants, then adjourning the matters to other courts at dates suitable to those courts. This system had on one occasion been aborted by the sudden transfer of prisoners. The police officer believed that a Visiting Justice at the gaol should issue orders where warrants were outstanding. He had attempted since 1979 to have the system streamlined, but no satisfactory action had been taken.

In the case investigated by the Ombudsman, a prisoner released on bail was immediately arrested, under the outstanding warrant, by police who had been told by gaol authorities of his imminent release. The prisoner was taken to Maroubra Police Station, where another outstanding warrant was discovered. However, the warrant upon which he had been arrested at the gaol was for the very offence for which he had been bailed. This had happened because the warrant had not been "flagged" when first received at the Central Warrant Index; that was after the initial arrest of the prisoner. The warrant then appeared on the records of the Central Warrant Index and ultimately found its way to the warrant section at Maroubra Police Station, after it was learnt that the prisoner was in custody at Long Bay.

In a draft report, issued following a re-investigation of that part of the complaint involving the conduct of police officers, the Ombudsman concluded:

> "It seems to me that the placing of notations such as 'hold for Maroubra Police' on prisoners' gaol records is utterly objectionable, in that it invites what must be strongly suspected on the present state of evidence to have occurred on this occasion, that is, that because of delays on the part of the arresting officials prison officers yield to the temptation of delaying the release of prisoners until their new guardians arrive."

The Ombudsman recommended that police officers immediately cease making notes on prisoners' gaol files. He recommended that the Police Department, together with the Attorney-General's and Corrective Services Departments, develop an efficient system for the speedy execution of outstanding warrants upon prisoners; legal safeguards against releasing prisoners with outstanding warrants should be considered.

114. Police and Civil Disputes

Police should normally not become involved in civil disputes between citizens unless criminal conduct is involved. It is sometimes difficult for them to decide whether or not they should take action in a particular case.

Some complainants have alleged that police declined to take action in cases where there was evidence of criminal activity, saying, "This is a civil matter".

In one case a police officer decided that an alleged assault was a neighbourhood dispute which ought to be resolved by private prosecution. His conduct was found to be wrong because he failed to investigate the allegation properly. The ultimate decision whether to prosecute was a matter for his judgment, but he made his decision prematurely, and did not obtain all of the available information.

In another case the complainant alleged to police that a substantial amount of his property had been stolen. The police made enquiries and decided not to prosecute, on the grounds that the dispute was a civil matter. Preliminary enquiries by this Office showed that, although there had been civil disputes between the complainant and the alleged thief, there was evidence suggesting that serious criminal offences may have been committed. The Commissioner of Police has been required to commence a formal investigation into the complaint that action should have been taken by the detective.

In deciding whether or not to prosecute, the law grants to individual police officers a very wide discretion. Normally the Ombudsman will not review the exercise of a discretion by a public authority unless there is evidence that the decision made is clearly wrong or based on improper considerations. However, it is not sufficient, where the evidence suggests the commission of a criminal offence, to leave victims to seek their own remedies, simply because there are some non-criminal issues involved.

Other complainants allege that police become involved in civil matters between citizens and damage the rights of one or other of the disputing parties.

In one case the complainant and a contractor were disputing payment for a swimming-pool. The contractor entered the complainant's property and attempted to remove the filter pump, the value of which was about equal to the amount he alleged was owing to him. The complainant called the police. The officer who attended read the contract for the construction of the pool and told the contractor to remove the pump and take it away.

In another case a landowner tried to stop a logging company moving its equipment over his property. As a result, a large amount of plant was lying idle. During a confrontation, a police officer prevented the loggers from bulldozing the landowner's fences, but allowed them to sever a chain across a gateway. He said he would remain on the scene to prevent a breach of the peace. The officer countenanced the commission of two offences: malicious injury and trespass. He said, however, that if he had denied access and insisted that the parties settle the matter in court, it would have needed a large number of police to spend several months securing the landowner's property. The Ombudsman found that, although the officer had erred, his conduct was not wrong within the meaning of the Ombudsman Act.

The area of civil disputes involving possible breaches of the criminal law is a difficult one for police officers. If they avoid the extremes of high-handed intervention in a purely civil matter and the easy path of inaction, even though criminal conduct is involved, their conscientious decisions should not be judged harshly in retrospect.

115. Police Prosecutors: Open to Ombudsman's Scrutiny

There are about 140 police prosecutors in the New South Wales Force. Most of them have undergone a period of training as Court Constables and the majority of them have legal qualifications or are part of the way to getting these qualifications. Several practising barristers and at least one judge have served as police prosecutors.

This small branch exercises a significant function in the administration of justice in New South Wales. As well as representing police in prosecutions in the lower courts, prosecutors advise police on legal interpretation and procedure, the obtaining and preparation of evidence and on the line to be taken in prosecutions. Each year a large number of applications are made to the Police Commissioner for the withdrawal of proceedings against defendants: these applications are reviewed by experienced prosecutors at the Police Prosecuting Branch and their recommendations are given substantial weight in the making of decisions. The prosecutor pleading a case before a court exercises a substantial control over the running of the case.

There has been considerable, learned debate in New South Wales about whether the prosecutor's job ought to be taken over by lawyers attached to an independent prosecuting office. The results of some Ombudsman investigations support the view that a change is needed: they have revealed instances of very poor, unprofessional and, indeed, sloppy procedure.

In one case a detailed and well-reasoned application for the withdrawal of a prosecution was dealt with in so perfunctory a manner as to merit criticism. The prosecution was, in the words of the prosecutors, "left in the hands of the court". The court found it had no alternative to dismissing the charge. Investigations revealed that on the evidence before the prosecutors there was simply no case to support proceeding with the charge and it was difficult to see how any reasonably competent person could believe there was. In another case, the subject of current investigation, the complainant, whose brother was killed on a pedestrian crossing, believes that the prosecutor appeared in court almost entirely unprepared and that his running of the case was so careless as to be negligent.

For the protection of the citizen wrongfully accused, and to protect the public interest in the proper prosecution of crime, it is necessary for the Ombudsman from time to time to investigate complaints made about the alleged incompetent exercise by police prosecutors of their junctions and their discretion in pleading cases.

116. Problems with the Intoxicated Persons Act

The Intoxicated Persons Act needs urgent reform. The police have found the laws difficult to administer. Citizens are very confused about their rights when they come into contact with this legislation.

These are the messages coming from a series of complaints from citizens about the Intoxicated Persons Act and the police who are charged with its administration. Two examples which have been recently re-investigated by this Office have exposed major weaknesses in the laws on public drunkenness and have produced a series of recommendations.

In the first case, after finishing his baked dinner one cold July night, L left his home to walk to his local hotel. As he planned to have a few schooners of beer he left his car in the garage. The hotel was five blocks away from his house. At the hotel he drank 3 or 4 schooners with his friends from 7.20 to 9.30 p.m. He said he felt 'quite alright' as he left. As he walked home along the footpath of Parramatta Road, a police car approached him. An officer alighted from the vehicle and approached L.

The police officer said that at one stage he had seen L stumble out of the hotel onto Parramatta Road and had decided to detain L under the Intoxicated Persons Act as he appeared to be "in need of physical protection because of his incapacity due to his being intoxicated". L could not remember whether or not he had stumbled onto Parramatta Road.

When questioned about the meaning of the word "intoxicated", as defined in Section 3 of the Intoxicated Persons Act, the police used words like "fairly" and "moderately to well" to describe the affect of alcohol on a person's state before he can be considered to come within the definition. In fact, the acutal definition speaks of "intoxicated" as meaning "seriously affected apparently by alcoholic liquor".

L also claimed that the Station Sergeant had refused to make a telephone call to L's wife.

On the evidence, the Ombudsman concluded that L had been "intoxicated" within the terms of this legislation and that the police officers had acted properly in detaining L. However, the Ombudsman also found that L had been denied an opportunity to call his wife by the police, as required by the procedures.

The Ombudsman's report stated:

> "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 1979. It seems from this case and others that have come to my attention, that the Act remains, after 5 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 L used the term 'seriously affected apparently by alcoholic liquor' as required by the Act, to describe his state on the night of July 15 and morning of July 16, 1983. Some described L as 'well affected' and still others admitted that they were not aware at all of the requirement 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.

Unfortunately, the forms which the police officer filled out in accordance with the provisions of the Intoxicated Persons Act at Burwood Police Station after detaining L were themselves lacking in a number of respects. Form 1 under the Intoxicated Persons Act, 1979 was filled out by the arresting officer and Form 2 by the Station Sergeant. Both forms do not define the word 'intoxicated' which under the Intoxicated Persons Act means 'seriously affected apparently by intoxicating liquor' nor do they give police officers any opportunity to outline the characteristics which led them to believe that the person detained was an intoxicated person and there is no record of this unless supported by an official notebook entry.

Finally, I would like to comment on the confusion expressed by the complainant 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. L thought it odd that he had been locked 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 breath analyser test to test the assessment of his intoxication by the arresting police officers. (This is not required by the legislation.)

His friends at the hotel were surprised when L. later 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."

In his report the Ombudsman recommended to the Commissioner of Police:

1. That Forms 1 and 2 which police fill out under the Intoxicated Persons Act be re-drafted to include the words "seriously affected apparently by alcoholic liquor".

   That space be provided on these forms for the insertion by police of the indicators which convinced them that the detainee was "intoxicated" (in the relevant sense).

2. That the Act be once again the subject of police lectures.

3. That a poster be designed and placed in places where intoxicated persons are detained explaining the provisions of the Act to both police and detainees.

4. That a publicity campaign be organised to inform citizens of their rights under the legislation.

5. That the police officer who denied L access to a telephone be counselled.

At the time of writing the Commissioner of Police had carried out recommendations 2 and 5. The other proposals are apparently under consideration pending the possible amendment of the Intoxicated Persons Act.

Another complaint which was fully investigated also revealed problems with regard to the position of the family and friends of a citizen detained under the Act. In this case S, like L, was walking home when he was picked up by the police. He admitted to having been intoxicated and was walking it off. S complained that police had refused to allow him to make a telephone call. His wife also complained that she had phoned the police station where her husband was being detained and was told that he was not there. These complaints were both found sustained by the Ombudsman even though, given the intoxication of the complainant and the number of police at the station, it was not possible to identify the particular police at fault to the requisite degree of satisfaction.

It was recommended that police rules be changed to include a provision requiring police to inform intoxicated persons, at the police station, that they are entitled to make a telephone call or have one made for them and that a form be provided which records when this has been done and by whom. Provisions should also be made on the form for the detainee's signature where possible. This will hopefully give the detainee's family and friends a chance to take the citizen home and out of police custody as provided for in the Act.

Other complaints under investigation stemming from the Intoxicated Persons Act suggest its arbitrary misuse to secure temporary unappealable lock up of difficult persons thought to be passively hostile to police authority and also raise very important issues as to procedures which should be adopted by police to determine whether a person who has undoubtedly been drinking may have suffered some serious internal injury not readily apparent from the outside. These and other issues will be considered in detail in individual reports and in the next Annual Report. On the present information the value of the Act — at least in its present form — must be subject to considerable doubt.

117. The Traffic Branch — A Compendium of Errors (but with hope in sight)

The processing of Traffic Infringement Notices (1,656,271 for this year) is still causing concern. For example, the transcribing of an incorrect licence number led to warrants being issued to an innocent person, who had to go to court in order to clarify the matter and obtain direction as to the action she should take. The complainant had already made numerous attempts, by both correspondence and telephone, to clarify the matter with the Traffic Branch. In desperation she approached this Office:

> "I am deeply distressed and anxious to clear up the following matter. I have already taken time out of my job to do everything in my power to assist to clear things up but feel that I am presumed guilty until I can prove myself innocent which will further involve more time off work, which I can ill-afford. I feel very frustrated and angry about the whole matter."

In a report to Parliament in September 1984 the Ombudsman documented the assurances of the Secretary of the Police Department that steps had been taken to overcome the problems highlighted by the two complaints which were the subject of the report. The problems had been:

1. the issuing of a summons and court order, although the fine had been paid and payment accepted;

2. delay by the Traffic Branch in replying to correspondence;

3. the failure by the Traffic Branch to respond to a reasonable request for information within a reasonable period of time.

The Secretary reported to this Office in July 1984:

> "... the turnaround for representations has been significantly reduced and a turnaround period of one month established;
>
> an improved computer system has been implemented."

As this was an area that affected the average citizen, the Ombudsman decided to monitor and investigate, where necessary, any further complaints which were received. It was hoped though that the action claimed to have been taken by the Secretary would eliminate the majority of the problems which had resulted in complaints and significantly improve the situation. Unfortunately, this was not the case. In fact, during 1984/85 (July 1984 to June 1985) complaints increased by almost 400 per cent, although there has been a decline in recent months.

Information provided by the Secretary showed that turnaround figures for correspondence in the Review Section of the Traffic Branch did not reach the "established" one month period until April 1985, some eight months after he had given that figure. In fact, at one stage in January 1985 the Review Section had in excess of 17,800 items on hand and a turnaround period of 104 days. This delay in replying to correspondence was a major cause of complaint to this Office. Other complaints concerned the issue of summonses and warrants even though payment had been made, inappropriate responses to correspondence, delay in receipt of courtesy letters and failure to review representations about traffic and parking infringement notices.

Whilst recognising the large volume of payments and correspondence dealt with by the Traffic Branch and that extensive arrears existed, these factors should not be offered as a continuing excuse for causing inconvenience to members of the public. The Department knew for a long time that a new system was to be introduced. As the rationalisation of problems within the Traffic Branch took place, many members of the public could be excused for thinking that they were merely guinea pigs as the Traffic Branch tried to sort out its problems.

Set out below are examples of problems that people have had in their dealings with the Traffic Branch:

1. *Complaint by Ms R.*

On 17th March, 1984 Ms R. received an infringement notice for speeding. She made representations which were unsuccessful and was given an extended payment date. On 6th June, 1984 she paid the fine; her cheque was accepted by the Department. On 31st July, 1984 she received a summons for the infringement; she returned this to the Department, saying that she had paid the fine. On 6th September, 1984 she received a letter from the Traffic Branch saying that, because of a processing error, the matter was inadvertently forwarded for possible court action; she was asked to return the summons. Ms R. advised the Branch that the summons had already been returned. She then received a letter dated 25th September, 1984 advising that an adjournment of court proceedings would be sought and that there was no need to attend court.

The court hearing had been set down for 2nd October, 1984, and Ms R. did not attend. She then received notice of penalty from the court, because the case had been heard. A fine was payable by 22nd October, 1984. She then received a letter dated 19th October, 1984 from the Traffic Branch advising that a request had been forwarded to the Court of Petty Sessions to withhold the enforcement of court fines and costs, pending completion of enquiries.

The Department investigated the matter and substantially agreed with the facts above. However, it appears that a telex message requesting an adjournment was sent on 25th September, 1984, but was either overlooked by court staff or became detached from the court papers.

The Department arranged for the annulment of the conviction recorded against Ms R.

Ms R. queried the cost to the public of all this "mucking around".

2. *Inappropriate Responses*

In Mrs D.'s case, she maintained that she had not received the original of an alleged parking infringement notice (P.I.N.) and on receipt of the Department's courtesy letter wrote to find out the details of the offence. This information was necessary for her to determine whether or not someone else had been driving the car, and so whether she should fill in the statutory declaration or pay the fine. In reply she received a letter which informed her that her representations had been unsuccessful and that the matter would now be referred for court action. She then received a summons which set out the information she had originally requested.

The Secretary agreed that the Department's reply to Mrs D. did not supply the requested information and that it could have and should have been supplied. A further opportunity to pay was provided to Mrs D. and the matter was discontinued as resolved.

However, Mrs D. was not the only person to be annoyed by inappropriate responses to requests for information. The despatch of form letters without considering their appropriateness was a frequent source of complaint.

As the result of another complaint, the Secretary advised that he had directed that staff preparing responses to enquiries ensure they answer the specific questions asked. Such action was welcomed by this Office as it is hoped that staff compliance with this directive would result in fewer complaints.

3. *Delay by the Traffic Branch in Replying to Correspondence*

Both complainants and this Office have complained to the Secretary about such delay.

In Mrs R.'s case, her daughter received a P.I.N. on 23rd April, 1983 which she paid on 25th April, 1983. As Mrs R. was the registered owner, a posted infringement notice was forwarded to her and she paid this on 30th May, 1983. Both cheques were presented by the Department. Realising what had happened, Mr R. wrote on 22nd June, 1984 asking for a refund; however, no acknowledgement or reply was received. On the 23rd May, 1984 a further P.I.N. was incurred by the daughter. As the fine was $25 and the Department still owed them $35 from the previous matter, the daughter wrote asking that the outstanding refund be applied to this fine and the balance refunded. Again no reply was received.

On 2nd October, 1984 a summons was issued. On 18th October, 1984 Mr R. wrote to the Superintendent of Traffic explaining all but still no reply was received. On 13th November, 1984 Mrs R. personally attended the Police Headquarters at College Street and left copies of previous correspondence, and was apparently promised a reply within three weeks. On 14th January, 1985, as no reply had been received, she contacted various officers in the Traffic Branch and was apparently advised that there was no need to attend court. In February Mrs R. received a notice from the court advising that she was now liable for the fine plus costs. On 25th February, 1985 the Traffic Branch wrote saying that enquiries were being undertaken.

Mrs R. ended up paying $35 (still held by the Traffic Branch two years later) plus $43 (fine plus court costs) for a $25 P.I.N.

A search of the Traffic Branch records failed to locate the correspondence of Mrs R.; however, Mr R.'s letter of 5th November 1984 was located. The Department admitted that it was at fault and nominated a clerical oversight and work volumes as the reasons for the matter not being adjourned or the penalty notice withheld.

A refund of $10 was arranged, the balance applied to the P.I.N. and a request for remission of the $43 penalty made to the Under Secretary of Justice by the Department. As at 3rd September Mrs R. was still awaiting refund of the $43 from the Department of the Attorney General.

Mrs R.'s complaint about delay or the failure of the Department to reply to correspondence was not an isolated instance. One grateful complainant who had been dealing with the Police Department by S.T.D. calls and correspondence, wrote:

"I am annoyed that a Department can take so long to reply to a letter and can only be thankful that this lack of efficiency did not extend to your Department."

Unfortunately, delay by the Department in replying has caused disadvantage and needless worry to some complainants.

In the case of Mr P, he had been involved with correspondence with the Department over a P.I.N. He had sent a cheque but it had been received seven days after the extended payment period and was returned by the Department on 4th June, over a month later, as out of time. On 12 June he received a summons and on 18th June he again wrote to the Department, enclosing a cheque and requesting leniency, as he had held a licence for 63 years and had an unblemished driving record. He advised in this letter the fact that the hearing was set down for 6th September, 1984. On 13th September, seven days after the hearing, the Department wrote back and suggested that he plead his case in court. It was of course too late.

This Office has also had to contend with delays in receiving replies to correspondence. Mr R., mentioned in last year's annual report (Page 133), proved to be such a case. His complaint was raised with the Commissioner on 24th May, 1984. As no reply had been received, a follow up telephone conversation took place on 17th July, 1984. This action resulted in the advice that a final reply could be expected within one week. As no reply had been received on 28th August, 1984, a reminder letter was sent. Similarly, on 3rd October, 1984 and on 28th November, this complaint was included on a schedule of fourteen matters which were in excess of six weeks overdue. The possibility of Section 19 action by the Ombudsman if replies were not received soon was brought to the attention of the Commissioner and the Secretary. On 5th December, 1984, telephone advice that the Department could not locate Mr R's papers was received and a further copy was provided on that date. On 13th December, 1984 an interim reply was received in this Office, advising that the papers could not be located. On 15th February, 1985 a further reminder was sent to the Secretary. A reply dated 28th March was finally received on 10th April, advising that the documents were irretrievably lost. Despite having provided the Department with copies of the R.'s correspondence, no attempt was made by the Department to deal with the specific issues raised.

It is pleasing to note that the Secretary in the last year has become more punctual with his replies both to complainants and to this Office. In this regard it is also apparent from information available that the Secretary is taking the many problems experienced by the Traffic Branch seriously. The following quote from a Department file speaks for itself:

"The Secretary is most alarmed at the considerable inconvenience and concern caused to Mr M by the inexplicable disregard of policy concerning the acceptance of late payments and by the inexcusable correspondence omissions. Mr Vineburg has been placed in the embarrassing position of attempting to explain the circumstances and has been forced to apologise to the Ombudsman, the Member of Parliament and to Mr M.

Mr. Vineburg views the incident as an obvious instance of incompetence and it is probable that the Ombudsman will instigate a formal investigation. An application for compensation of over $2,000 is also expected.

Whilst Mr Vineburg acknowledges recent initiatives and dedicated effort at this Branch, he has indicated that a repetition of the events surrounding Mr M. will not be tolerated and that a duplication will result in disciplinary action against the Officers involved."

(N.B. In this case, despite payment having been received on three occasions in the Traffic Branch, the matter was allowed to proceed as unpaid and was finalised in court. As well, there was a five month delay in replying to one of Mr M.'s letters and the Member of Parliament received no reply at all. A formal investigation has been instigated by this Office in respect of this complaint.)

In another matter the Secretary advised this Office:

"I apologise for the delay in replying but your correspondence was negligently misfiled and not acted upon until one of your officers made inquiries. Suitable remedial disciplinary action has been taken. However, this negligence will also delay the response from the Commissioner."

Such frankness is most refreshing!

4. *Lost Correspondence — where does it go to?*

In Mr R.'s case (see above) he had written numerous letters. However, the one addressed to the Commissioner marked "Personal Private and Confidential" was the only one replied to. The response from the Department advised that no record of previous correspondence could be located and requested that he forward copies of previous correspondence, which he did. This correspondence apparently also went astray.

Instances of D.X. mail, registered mail, hand delivered correspondence, courier delivered correspondence and posted letters going astray have all come to the notice of this Office. Australia Post can only be blamed for so much missing correspondence and it is not known where such correspondence disappears to. However, the decision by the Review Section to file matters alphabetically as distinct from in reference number order will surely assist and reduce the incidence of lost files as a file that has been mis-sorted numerically has little or no chance of being found. It is not clear what measures are being taken to reduce other instances of "lost" correspondence.

5. *Inequitable Policies and Penalisation of Complainants through Traffic Branch Delays and Error*

In the case of Mr F. he made representations to the Department on 18th April 1984. A reply was sent some nine and a half weeks later, advising him that his representations were unsuccessful and allowing a 16 days extension of time for payment of the fine. Unfortunately, Mr F. had by that time gone overseas and did not return until 19th August, 1984. On 22nd August, 1984 he wrote explaining what had happened and enclosed a cheque. On 28th August a summons was issued. He again wrote on 12th September. As at 13th November he had not received a reply. Mr F. resolved the matter by attending court and explaining to an understanding magistrate what had happened.

At issue was delay by the Department in replying to correspondence and its policy of returning money received outside of the prescribed period which was implemented mechanically without regard to the circumstances or merit of the case (see example of Mr P. above). This policy of not accepting late payments was vigorously implemented and in one instance a payment due on 12th June but received on 18th June was returned on 21st August as unacceptable. It is noted though that whilst the Department was pursuing this policy it had apparently no qualms about retaining these cheques for months before returning them to the sender.

In regard to the self enforcing Infringement Notice Scheme introduced in July 1984, written advice of the Department's policy was received in this Office in March 1985. Under this new scheme if the infringement notice is still on line when payment is received, payment will be accepted. This policy should result in a saving of time, effort, cost and frustration for both members of the public and the Traffic Branch. Other more realistic policies have also been introduced.

Despite the fact that in the majority of complaints received, the Department has been in the wrong, this was not always the case. In one instance, for example, Mr B.'s girlfriend complained that Mr B. was receiving unwarranted enforcement orders and warrants and requested that the matter be investigated. Investigation by the Department revealed that Mr B. had a number of aliases of which his girlfriend was apparently not aware and had in fact incurred 22 infringement notices. These notices he had put aside and overlooked paying. In the circumstances there was no cause for complaint to this Office about the actions of the Department.

Present Position

In March, three officers of the Ombudsman visited the Traffic Branch in its new premises at Parramatta. Following extensive discussion and examination of the procedures formulated, it was evident that steps had been taken and were now operating to deal with the arrears problems which had been the subject of complaint both to and by this Office for in excess of twelve months. Whilst recognising the large volume of correspondence and payments received by the Traffic Branch it cannot be overlooked that an authority has an obligation to develop satisfactory methods of dealing with such volumes, particularly where this is the reason for its existence.

A noticeable spirit of cooperation is now evident from the Traffic Branch. Following a number of complaints to this Office during the extensive mail delays created by Australia Post in early 1985 both courtesy letters and payment were being delayed and were often out of time when received. As a result the Department agreed to extend the payment period on courtesy letters from 21 to 28 days and advised that additional monitoring in respect of the posting of courtesy letters would take place to ensure that there was no further disruption as a result of excessive postal delays.

Turnaround in the Review Section, according to information received from the Secretary on 2nd September, 1985, is now down to 21 days with some matters being dealt with on a daily basis. Whilst some of the credit for this achievement can go to the implementation of numerous management initiatives and the use of more effective and efficient technology and procedures, some credit is also due, I believe, to this Office for its role in diligently pursuing matters and in drawing complaints to the Department's attention.

As far as this Office is concerned a marked improvement has been noted in the standard of replies received from the Secretary and, as well, in his punctuality. Most replies are now being received close to the 28 day time limit set by this Office. The contact officers in the Traffic Branch, namely Warren Hill and Ian Rea, have also proved helpful and this fact warrants recognition. In this regard I feel it is important to also recognise the contribution of the former Director of the Police Traffic Branch, Mr. Colin Brown, who was instrumental in developing and implementing the reforms within the Branch which would now appear to be achieving the desirable results.

Post Script

One noted side effect of the past administrative deficiencies of the Traffic Branch is the number of matters now being referred to the Under Secretary of Justice for annulment or remission of penalties. Enquiries made reveal that there are inordinate delays in this area and, subject to the resolution of an alleged jurisdictional restriction, this may require an investigation being conducted into the administrative procedures utilised by the Department of the Attorney General in processing these requests.

118. Tow Trucks — Some Action, but Slowly

Tow trucks and alleged inaction by police have regularly been a topic in recent Ombudsman Annual Reports. From the information now available, it would appear that something is finally being done about enforcing the provisions of the Tow Truck Act and Regulations. It is noted that legislative changes are still proposed.

In February 1985 the Minister for Police advised the Ombudsman that a Circular had been issued to all police reminding them of their responsibilities in relation to the enforcement of the Regulations under the Tow Truck Act and that, in January, a Minute was sent to all District Superintendents throughout the State, again emphasising the need for vigilance in this area. The Minister also advised that monitoring of offences by tow truck operators under the Tow Truck Act and the Motor Traffic Act was reintroduced on 1st January, 1985.

On 24th Sepbember, 1985 the Assistant Commissioner (Traffic) provided details of the statistical data regarding these offences to this Office. Fifty-five offences under the Tow Truck Act had been recorded and two hundred and sixty-nine offences by tow trucks recorded under the Motor Traffic Act. It is expected that this monitoring will now be continued so that some record of enforcement action is available.

In April 1985, the Assistant Commissioner (Internal Affairs) advised the Ombudsman:

> "... this Department is currently, in conjunction with other relevant authorities, considering suggested possible amendments to the Tow Truck Act and its attendant Regulations, the updating and improvement of the system presently in operation and consequent amendment to Police procedures and instructions. It is to be hoped that such instructions will assist in lessening the number of complaints received of this nature."

The tow truck arena is a traditional one in which corruption or allegations of corruption (sometimes involving police) abound.

It is to be hoped that the N.S.W. Police (including its Internal Affairs Branch and Internal Security Unit) well and truly have this area targeted. Efforts over recent years seem grossly inadequate.

119. Notifying Next-of-Kin of Inquests — New Developments

In last year's Annual Report the procedures for notifying next-of-kin of inquests was discussed. At that time this Office had received a number of complaints concerning alleged failure by police to notify next-of-kin of the date and place of Coroners' Inquests.

It was found that in June 1984, the police instruction which required police to advise next-of-kin, and all witnesses, of the time and date of the hearing of an inquest and any subsequent adjournments, had been amended so that police were not required to warn interested parties or next-of-kin to attend, unless directed to do so by the Coroner.

While coordination between the Coroner and police in these matters was desirable, it was the Ombudsman's view that any procedures for notifying next-of-kin should be completely effective. A report was prepared for the Minister, outlining the reasons why the Police Department, with its extensive network of police stations, appeared to be better able to notify persons than the Coroner, who would normally have to send notifications by post.

The Police Department then reviewed the role of police in notifying next-of-kin and other interested parties of the particulars of inquests or inquiries. It is not mandatory for the Coroner to advise next-of-kin and witnesses, and so it was decided that police would accept this responsibility.

The Minister for Police and Emergency Services advised the Ombudsman in January 1985 that the relevant Police Instruction would be amended to re-introduce the original provisions.

120. Calibre of Internal Affairs Branch Investigations

During the first 15 months of the operation of the system allowing him to re-investigate police complaints, the Ombudsman has obtained disquieting evidence of the inferior investigative techniques adopted by many of the New South Wales Police Internal Affairs Branch and other New South Wales police involved in the investigation of police complaints, particularly when compared with the standards of the Australian Federal Police and the Victoria Police. A lecture given by Commander Stanfield of the Victoria Police to seconded police officers and other Ombudsman's Office staff at a training seminar in 1984 indicated a whole-hearted determination to thoroughly investigate allegations of corruption. Comparison by the Ombudsman of a New South Wales Internal Affairs Branch investigation with an Australian Federal Police Internal Investigation Division investigation into the respective involvements of New South Wales and Federal Police in a complaint allegation covering substantially the same facts, demonstrated the marked inferiority of the New South Wales investigation.

The principal inadequacies identified by the Ombudsman are:

1. Opportunities for collaboration — examples of Internal Affairs Branch investigators allowing police under investigation to discuss matters before preparing a memorandum responding to the allegations are numerous. On one occasion, it appears that police were left to discuss the matter while the investigator went to lunch. A particularly disturbing example of this occurred when a senior Internal Affairs Branch investigator, enquiring into a bribery allegation, showed a police officer a photograph of the complainant taken shortly before the alleged solicitation of the bribe. The significance of this was that there was dispute between the complainant and the officer who had allegedly solicited the bribe about what the complainant was wearing and, in particular, whether he was wearing a tweed coat, into the pocket of which, it is alleged, the police officer placed his business card at the time of the alleged solicitation of the bribe. A police witness to part of the relevant sequence of events described in his memorandum in response to the allegation, in meticulous detail, what the complainant was wearing in the identification photograph taken when he was charged, which photograph did not show the tweed jacket. There was no indication that he had been shown the photograph before reporting on the allegation, and his apparently perfect recall of the complainant's dress, months after the event, was part of the evidence brought by the police investigator to discredit the complainant.

   It is hoped that the new anti-collaboration measures developed by the former Commissioner of Police, Mr Abbott, and the Assistant Commissioner (Internal Affairs), Mr Shepherd, discussed elsewhere in this report, will reduce this problem. The Ombudsman will be closely monitoring this aspect of police investigations.

2. Denigration of complainants — the Ombudsman and his staff are disturbed by the frequency with which investigating police denigrate complainants or witnesses who support complainants' allegations in reports on investigations, without giving the person denigrated an opportunity to meet the allegations, and then use this material to support a conclusion that the complaint is baseless. A recent example was:

   > "I am not in a position to state why Mr A [a solicitor with an Aboriginal legal service] made the allegations outlined in his complaint. However, it is well known that his standard defence to any charge brought against an Aboriginal is to enter a plea of 'Not Guilty', and, after numerous adjournments, make allegations of assault or some other impropriety by Police.

Another type of denigration of the complainant is particularly disturbing in its implications. In one case a police officer who was considering complaining to the Ombudsman said that, on his bringing some very serious matters to the attention of senior police in the Internal Affairs Branch he was directed to undergo psychiatric assessment. In another case, a senior officer wrote of a complainant:

> "I am aware that about 4 years ago he was involved in a serious motor vehicle accident in Canberra in which his wife was fatally injured and he suffered severe head injuries, which may also have involved brain damage... Various persons have previously expressed opinions that he is suffering from mental illness."

The complainant says there was an accident in which his wife was killed and he was injured, but it was ten years ago, in another country. He did not suffer head injuries and certainly not brain damage. There is no reason to believe that his faculties are impaired.

This complainant was understandably disturbed to read the police report, since he spent some years in a concentration camp run by a regime which made a practice of calling dissidents "insane".

Frequently, where the complaint is investigated by an officer not from the Internal Affairs Branch, such allegations are coupled with assertions about the good character of the police officer the subject of complaint, based on the investigating officer's knowledge of the officer under investigation, whose conduct he is often responsible for.

It is the Ombudsman's view that both of these practices have no place in investigations. He is firmly of the view that the incidence of both of these problems would be reduced if, as in Victoria, internal investigations not conducted by the Internal Affairs Branch were conducted by an officer in a neighbouring district, to whom the officer under investigation did not report in the chain of command. So far, the New South Wales Police Department has refused to make this approach obligatory.

3. Failure to try — the methods adopted in New South Wales police internal investigations often give the impression that the investigators are not really trying. Without exception, the Ombudsman's re-investigations have obtained vastly more information than initial police investigations. The most obvious example of this problem is the practice of directing police to submit memoranda in response to allegations of misconduct, rather than interviewing the police involved. In his re-investigation of the complaint against New South Wales police, in connection with which there had been an investigation into the conduct of Federal police, the Ombudsman found the comparison between the techniques adopted was plain to observe. The Federal investigator asked searching and difficult questions of the officers under investigation; the New South Wales Internal Affairs investigator served documents on the police, requiring them to reply by way of memoranda. He absented himself (on one occasion, to go to lunch), and gave the police involved free rein to collaborate.

   Another example of this attitude was revealed in the police investigation of an allegation of the assault by a police officer on an Aboriginal woman on the night of the "Redfern riots". A civilian witness was able to give a detailed description of the alleged assailant. There were a large number of police at the scene, and the Police Internal Affairs Branch investigator served memoranda on them directing them to answer the following questions:

   a) How did you arrive at the scene? (type of vehicle and call sign)

   b) Were you accompanied by other Police? (give name, rank and station)

   c) Following your arrival at the scene did you recognise any of the other Police who were there? (if so give name, rank and station)

   d) Did you participate in or witness the event described in the statement of [the witness]?

   e) Did you participate in or witness any similar circumstances as those described by [the witness]?

   f) Did you see any Police Officer present who may have fitted the description given by [the witness]?

   Not surprisingly, the identification procedure proved fruitless.

   The Ombudsman's investigation, with assistance from civilians and despite obstruction or non-cooperation from the investigating police and other police, has been able to identify the alleged assailant.

4. Letting the trail go cold — a recent example of this aspect of Internal Affairs Branch investigations of police complaints arose out of the investigation of allegations of assault and abuse following upon a motorist being random breath tested late at night. Within a few hours, in the early hours of the next morning, an Internal Affairs investigator was present at the police station where the complainant had been taken from the random breath test station. The police complained of had also returned to that station.

   While the Internal Affairs Branch investigator took a statement from the complainant on the spot, the police were not required to report for several weeks. There seems to be no reasonable justification for failing to interview the police complained of "on the spot".

   Two current lengthy investigations by the Ombudsman, firstly, that into the complaint against two members of the Special Task Force 2 and their counter allegations involving other police and secondly, that into the Azzopardi complaint about the alleged failure to investigate his allegations about former Sergeant Jones and the Parramatta Police Boys Club, raise a number of serious questions about the operations and, indeed, security of the Internal Affairs Branch, at least as it was constituted at the time of the events in question. At this stage, it is thought premature to discuss the results of those enquiries here.

   As noted in last year's Annual Report, the new head of the Internal Affairs Branch is Assistant Commissioner R. (Bob) C. Shepherd. The Ombudsman recently readily agreed to a request by Assistant Commissioner Shepherd that Mervyn Schloeffel, the senior police officer seconded to the Office of the Ombudsman, should address members of the Internal Affairs Branch on the deficiencies in the Branch's investigations as seen from the perspective of the Ombudsman's Office. That, at least, is one healthy sign of change. It is the Ombudsman's view, and that of police seconded to his Office, that the techniques adopted for internal investigations in the New South Wales police force are in sore need of overhaul.

121. New Anti-Collaboration Rules Introduced by Internal Affairs Branch

In the last Annual Report the Ombudsman expressed his concern about the frequent opportunities offered police under investigation to collaborate in the preparation of versions of incidents complained about. He also reported that, since his report to Parliament for the year ending 30th June, 1983, in which he had drawn attention to this problem, negotiations between him, the former Commissioner of Police, Mr C. Abbott and the newly appointed Assistant Commissioner (Internal Affairs), Mr R. C. Shepherd, had resulted in partial agreement as to new procedures to be adopted by the Police Department in an attempt to avoid such collaboration. At that stage, however, the Police Department was resisting an additional provision suggested by the Ombudsman and which, in his view, was necessary to ensure that the Departmental guidelines dealt comprehensively with the problem.

Since then, agreement has been reached on a set of guidelines to be adopted by the Police Department in the investigation of complaints against police in order to avoid collaboration. Those are:

a) When arranging an appointment with a member, the Police Investigating Officer should not reveal the name of the complainant (as provided by Section 19(2) of the Act) or the nature of the complaint. Similarly, 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 Investigating Officer should advise the member concerned against discussion with other police on the fact that such an appointment has been made or on any belief that may be held on the name of the complainant or nature of the complaint. It should be explained that this is for the member's own protection as any such discussions can lead to later suggestion of collusion or collaboration between the police involved.

b) The directive memorandum 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.

c) Where there are a number of police officers involved, as far as practicable in the circumstances, the service of such directives should be contemporary and the police officers so served shall be kept separate until each has completed his report and been interviewed on any matters relevant to the complaint.

d) 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.

e) A member of the Service or other witness may be questioned about any relevant aspect contained in a statement or report obtained from another person in connection with an investigation. However, such documents should not as a matter of course be shown to the person being questioned.

At the same time, if the need arises for the purpose of the investigation, a statement or report, or part thereof, may be shown to or brought to the attention of another witness after a full account of the particular matter has been obtained. In such a case, this action should be recorded in the appropriate Record of Interview.

The Commissioner for Police, Mr Avery, issued a circular to all police on 21st March, 1985, setting out these guidelines.

The Ombudsman is closely monitoring the progress of this attempt to eliminate or reduce collaboration between police under investigation.

122. Mr Azzopardi's Complaint Against Internal Affairs: Investigation of Parramatta Police Citizens Boys Club: Update

The slow progress of the investigation by police into the above complaint made by Mr E. J. Azzopardi to this Office was reported on in the last Annual Report. As noted there, the Ombudsman decided upon a re-investigation. Among other things, Mr Azzopardi's complaint raises public interest questions about the methods and procedures of the Internal Affairs Branch, particularly where an influential or plausible police officer is the subject of complaint to that Branch by a person who could be denigrated as a trouble-maker or persistent complainant.

During the course of the year, the Ombudsman has taken evidence from 12 witnesses, including the most senior Internal Affairs Branch officers of the time. The Ombudsman's investigation has been in part inhibited by the Section 26(1) order which the Police Commissioner placed on the material, information and reports he supplied to the Ombudsman including the reports of the investigation by (the now) Assistant Commissioner Bunt. The existence of this order has precluded the Ombudsman supplying a copy of Assistant Commissioner Bunt's report to Mr Azzopardi and discussing some aspects of that report with Mr Azzopardi. During the course of the year, the former police officer initially cleared by Internal Affairs Branch, ex Sergeant Christopher Jones, has been convicted of offences connected with Parramatta Police Boys Club. He appealed to the New South Wales Court of Criminal Appeal but, while successful in part, a finding of guilty on several counts was confirmed and a prison term of four years was substituted by the Court of Criminal Appeal. It was thought inappropriate for the Ombudsman to question Sergeant Jones while the trial and appellate court processes were being undertaken. A further reason for delay has been the provision in the 1983 amending Police Complaints legislation which has had the effect that neither the Deputy Ombudsman nor the Assistant Ombudsman may be concerned in the re-investigation of police complaints (see elsewhere in this report). This, of course, has limited the speed with which the Office of the Ombudsman can undertake and complete enquiries.

Final witnesses have been scheduled to give evidence in the very near future and, in accordance with practice and procedures, a statement of provisional findings and recommendations should be sent to the complainant, the Commissioner of Police and affected police officers (and ex police officers) certainly by the end of the year.

123. Criteria for Arrest

In the last Annual Report the Ombudsman expressed concern about the unreasonable use of the power of arrest, and referred to the four criteria for arrest proposed by the Australian Law Reform Commission, namely:

the need to ensure the appearance of the offender before a court;

preventing the continuation of an offence;

the need to preserve evidence of, or relating to, an offence;

the concept of "protective custody" of an offender under mental health, child welfare and similar legislation.

Police Rule 56(b) states:

> "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."

Paragraph 14 of Police Instruction 31 states:

> "Arrests for breaches of the Motor Traffic Act, the Metropolitan Traffic Act, the Transport 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, the driver refuses to give his name and address, or gives a false name and address."

The Ombudsman considered that any conflict between Rule 56(b) and Instruction 31 should be corrected by amendment and that the four criteria of arrest proposed by the Australian Law Reform Commission should be inserted in the Police Rules. This was recommended in a draft report to the Minister for Police in September 1984.

On 17th December, 1984 the Minister consulted with the Ombudsman and said that the relevant practice was being reviewed by the Police Department. The Minister believed that there was a need for change, but he was concerned at a finding in the draft report about the conduct of a constable. The Ombudsman then amended the finding to show that the constable acted in accordance with an established practice, but that the practice was unreasonable. The report was amended to include a reference to the review by the Police Department.

The Commissioner of Police later informed the Ombudsman:

> "Following careful examination of the matters raised in your report it is advised that recommendation 7(2) i.e. a proposed amendment to Rule 56(b), under the Police Regulation Act, 1899 is not supported.
>
> It is my firm view that the nature of an offence is not, by itself, an overriding consideration in Police taking a decision to arrest or to proceed by summons."

Recommendation 7(2) proposed the insertion of the following paragraph in Rule 56(b):

> "An offence may be regarded as minor notwithstanding that it carries as a maximum penalty a sentence of imprisonment."

The Commissioner recommended to the Minister the amendment of Rule 56(b) by insertion of the following paragraph:

> "However, arrest may be made if an office is likely to continue or there are other extenuating circumstances to justify the extreme action of arrest."

He also recommended the amendment of paragraph 14 of Police Instruction 31 by adding:

> "It is to be clearly understood that in those cases where Police effect an arrest for a minor offence on the premise that there are extenuating circumstances to justify the extreme action of arrest (Rule 56) they must do so with the utmost care. It should also be understood that *any* abuse of this discretionary power will be dealt with by firm disciplinary action."

The Ombudsman believes that the amendments to Rule 56(b) and paragraph 14 of Instruction 31 proposed by the Commissioner do not materially alter the present practices. Police have a discretion to arrest, but the criteria proposed by the Australian Law Reform Commission do not fetter this discretion.

In this regard, the Ombudsman has noted a paper entitled *The Role of the Police Prosecutor in the Magistrates' Court System*, delivered by Superintendent P. Sweeny, Officer in Charge of the Police Prosecuting Branch, in November 1984 to a seminar on Prosecutorial Discretion conducted by the Australian Institute of Criminology. In that paper, Superintendent Sweeny said:

> "Police arrest discretion quite likely represents one of the most critical and difficult exercises of police power. But the seemingly commonplace nature of police work does much to obscure the dimensions of the complex problems that face the police decision-maker. Police, ideally, are required to draw a balance in relation to the exercise of individual rights and the apprehension of offenders, and may accordingly be required to exercise their discretionary powers in determining whether or not to invoke an arrest. More often than not, the officer

will have insufficient time for long reflection on the course of action to be taken and may be required to operate on the basis of *vague and imprecise notions as to the extent of his discretionary power, especially when there are few guidelines within the common law, statute, and formal police policies.* (4) The development of Australian law has recognised, up to a few years ago, that police officers needed greater powers than those of the ordinary man. A very strong influence is being brought to bear upon those involved in 'law making' to restrict the police officer's discretion and they believe the ideal situation would be for the swearing of a complaint before a justice or other judicial officer who may then issue his process.

The Ombudsman still believes that the criteria proposed by the Australian Law Reform Commission will give greater assistance than the present guidelines to police officers in exercising the discretion to arrest. The Minister for Police regards this as an important community issue and it is to be hoped he will act to ensure the adoption of the substance of the Australian Law Reform Commission recommendations in New South Wales without in any way weakening the powers of police to fight serious crime.

124. Public mischief prosecutions: promised abolition for Ombudsman complaints

In the last three Annual Reports the Ombudsman expressed concern that police had prosecuted complainants to the Ombudsman's Office for "public mischief". Last year's Annual Report gave details of the Ombudsman's approach to the Premier on this subject.

On 19th June, 1985 the Premier advised the Ombudsman that he had "instructed that a proposal be prepared to amend the Ombudsman Act" in relation to prosecutions for giving false information during investigation of complaints. The Ombudsman is pleased with this outcome and has asked to see the proposed amendments. It is to be hoped that the proposed amendments will soon be available.

125. Disclosure to complainants: over-use of Section 26(1)

Section 26(1) of the Police Regulation (Allegations of Misconduct) Act provides that, where the Commissioner of Police believes that material given to the Ombudsman should not be published, he must inform the Ombudsman, giving reasons. The Ombudsman cannot then publish that material. Section 26(1) is frequently invoked for statements or documents provided to the Ombudsman in progress reports.

Section 26(1) is often invoked where there is a possibility of criminal proceedings against the complainant or the police officers the subject of complaint, and to protect the names and addresses of police informants or potential witnesses.

The Ombudsman's policy is to supply all information to the complainant, unless there is a specific prohibition under section 26(1), or the public interest suggests that particular information should be withheld from a complainant and deleted from documents provided to the complainant. In accordance with the above policy, the Ombudsman has directed his officers that the following should be deleted from the material sent to the complainant:

(i) any information to which a section 26(1) order relates;

(ii) witnesses' names and addresses in serious cases where it may be dangerous to give such information to the complainant;

(iii) names and addresses of other complainants in circumstances where one police report has been prepared on the basis of several separate complaints and it is considered undesirable for the names of complainants to be furnished to all parties;

(iv) information which discloses confidential police methods of operation (for example, under-cover operations or names of or information about informers);

(v) potentially embarrassing or private medical opinions expressed in confidence to the investigating police officer by the complainant's medical practitioner;

(vi) voluminous court transcripts where the complainant was involved in the court proceedings and had the opportunity to hear what occurred;

(vii) police officers' registered numbers.

In practice, some senior police have attempted to invoke section 26(1) for matters where no proceedings are pending, or where the possibility of proceedings is remote.

When material subject to a section 26(1) prohibition contains statements of fact or opinion about the complainant, the Ombudsman cannot obtain the complainant's comments on these statements and must delay his determination of the complaint.

In the absence of comments by a complainant it may very difficult for him to decide whether the complaint should be re-investigated under the Ombudsman Act.

Letters invoking section 26(1) are often in the following form:

> Dear Mr Masterman
>
> Re: Complaint by _____
>
> I refer to previous correspondence in this matter and attach a photostat copy of a progress report submitted by the investigating officer of the Police Internal Affairs Branch.
>
> The provisions of Section 26(1) of the Police Regulation (Allegations of Misconduct) Act are invoked in relation to the attached papers as I do not consider that it would be in the public interest for their contents to be revealed at this stage.
>
> Yours faithfully,
>
> Assistant Commissioner
> (Internal Affairs)

This does not comply with the requirements of section 26(1). It does not give reasons why revealing the contents of the papers is not in the public interest. This Office then has to write to the Commissioner, asking for those reasons. This invariably delays the investigation even further.

Particular problems encountered with section 26(1) orders are:

1. An order may be invoked in the middle of an investigation if police think that there is a chance of serious charges being laid against the complainant or police the subject of complaint. This is understandable. However, often there is a blanket section 26(1) order on the whole police report, which may include documents that would not be prejudicial to the investigation or affect possible legal proceedings. In other words, the terms of section 26(1) envisage the Commissioner (no doubt with the advice of his officers) giving consideration to particular documents. Indiscriminate blanket orders go beyond the terms of the section and risk being totally invalid.

2. A section 26(1) order is sometimes invoked for documents attached to a report, but not to the report itself, even though the report refers to those documents, often in detail. This Office then has to read all of these papers for any reference to the information to be withheld from the complainant. Sometimes the material must be returned to the Commissioner for confirmation that the information has been correctly deleted by this Office.

   Section 26 gives the Commissioner for Police discretionary powers to be exercised in accordance with the limits set out in the section. From time to time there have been disagreements between the Ombudsman and the Commissioner's delegate as to whether a particular purported application of the section is valid. To date these disagreements have been resolved without resort to litigation. This is highly desirable between public agencies. If, however, an impasse is reached in the future on a matter of substance and the Ombudsman receives the advice of independent counsel that a purported application of section 26 by the Commissioner is invalid, the Ombudsman believes that the issue of principle is one that should be decided by the courts.

126. Poker machine investigation: complaints against Special Task Force

This matter was mentioned in last year's Annual Report. A number of complaints had been made against two particular members of the Police Task Force 2 about their investigations into the activities of Mr. Leonard Ainsworth, Australia's largest poker machine manufacturer, and Mr Edward Vibert who, at the time, was the Executive Director of the Australian Club Development Association.

Following the completion of the Police Internal Affairs Branch investigations into the complaints, the Ombudsman determined that a number of those complaints should be the subject of re-investigation by him. Because of the number of complaints, it was possible to readily divide them into definite sets of events. It was decided that the initial re-investigation would be in relation to the complaint alleging that the police officers, the subject of complaint:

Had supplied false information to the former Commissioner of Police, Mr C. Abbott, and the then Leader of the National Party, Mr L. Punch, concerning an alleged association between Mr L. Ainsworth and Assistant Commissioners Pyne and Day and, in particular, an alleged luncheon attended by Mr G. Aldridge during 1982, and events associated therewith.

Pursuant to section 19 of the Ombudsman Act, an enquiry into the complaint commenced in April, 1985. Over 50 witnesses gave evidence, some on more than one occasion, and in the course of the enquiry it was necessary for the Ombudsman to hear evidence in Sydney, Melbourne and Brisbane.

The first stage of the enquiry has been concluded and in accordance with the Ombudsman's practice a Statement of Provisional Findings and Recommendations has been sent to the complainants, the two police officers the subject of complaint, and the Commissioner of Police. Parts of the Statement have been sent to witnesses and persons provisionally the subject of adverse comment. In view of the extreme sensitivity of the matters covered in the document, counsel's advice was obtained and followed in relation to the distribution of different parts of the report to different persons.

Comment, submissions and any further evidence will be received and considered in the near future. Despite the pressures on the Ombudsman's time he believes this matter should be, and has been, given priority. Apart from the public interest of the issues the subject of investigation, not least of the reasons for concluding the matter as soon as possible is the position of the two police officers whose names have been mentioned in Parliament and who have been subject of considerable media attention and inevitable stress.

127. Delays in police investigations: need for legislative amendment

The frequent and extensive delay by police in completing the initial investigation of complaints has been referred to in this and previous Annual Reports. It is not at all unusual, even in relatively simple matters, for more than twelve months to pass between the making of a complaint and the receipt by the Ombudsman's Office of the police report.

In the case of the Miles and McKinnon complaints it was six weeks after the complaint was made before the complainant was interviewed; it was three months before any substantive investigation was commenced; and, at the time of writing, more than ten months after the complaints were made, it appears that no report of investigations has yet been compiled by the investigating detective. The Minister for Police is known to be disturbed at this delay.

Such extensive delay is not only upsetting the complainants, it also compromises the investigation; evidence is lost, memories fade, witnesses disappear; and it dilutes the effectiveness of the Ombudsman's powers of re-investigation. It thereby strikes at the heart of the legislation.

Under the present system the Ombudsman has no power to require the completion of police investigation within a reasonable time.

To give the Ombudsman an effective power to require reasonably expedient completion of investigation, and to protect evidence in matters of particular significance, provision should be made in the legislation that, after the expiration of a specified period, the Ombudsman can, if he wishes, himself investigate the complaint, even though the police investigation has not been completed. Such a provision is not uncommon in similar legislation elsewhere.

Accordingly, the Ombudsman recommends to the Parliament an amendment to the Police Regulation (Allegations of Misconduct) Act to the following effect:

"25B Where the Commissioner has not concluded an investigation within:

(a) a period of 90 days from the date of notification by the Ombudsman pursuant to section 18(2); or

(b) such longer period as is agreed to by the Commissioner of Police and the Ombudsman,

the Ombudsman may make the conduct to which the complaint relates the subject of an investigation under the Ombudsman Act 1974."

128. Progress Reports that offer no progress

The Police Internal Affairs Branch sends progress reports to this Office about complaints under investigation. These are usually copies of memoranda from investigating police to the Internal Affairs Branch. Progress reports often show no progress in the investigation. Indeed, a number of reports have merely given the same information month after month. For example, the following are progress reports on an investigation:

1. Progress Report, 21st February, 1985

   On 11th January, 1985 X was interviewed in relation to this complaint. Since that date one civilian witness and one doctor have now been interviewed. A further two doctors, one civilian witness and at least four uniformed police officers are to be interviewed. It is anticipated that this enquiry will be completed within twenty-eight (28) days depending on the availability of the witnesses and the police officers.

2. Progress Report, 1st April, 1985

   On 11th January, 1985 X was interviewed in relation to this complaint. Since that date one civilian witness and one doctor have been interviewed. Also, three police officers have been interviewed. A further four civilian witnesses, two doctors and two uniformd police officers are to be interviewed. It is anticipated that this enquiry will be completed within twenty-eight (28) days depending on the current workload of this Branch and availability of the witnesses and police officers concerned.

3. Progress Report, 10th May, 1985

   On 11th January, 1985 X was interviewed in relation to this complaint. Since that date one civilian witness and two doctors have been interviewed. Also, three police officers have been interviewed. A further four civilian witnesses, one doctor and two uniformed police officers are to be interviewed. It is anticipated that this enquiry will be completed within twenty-eight (28) days depending on the current workload of this Branch and availability of the witnesses and police officers concerned.

In the course of the three months very little "progress" was made. Indeed, between 1st April and 10th May, 1985, only one interview was conducted, even though all these reports predicted that the enquiry might be completed within twenty-eight days.

This Office cannot investigate complaints in the first instance, and cannot control the pace of the police investigations. However, the Ombudsman attempts to give complainants reliable progress reports. Reports from the police of the kind quoted above are of little use to this Office or to complainants.

129. Gross Delays in Providing Court Transcripts

Complaints against police officers often have some connection with legal action taken by the police against a complainant. Evidence in court can be relevant to the investigation of the actions of police. For example, a complainant might allege assault on the part of the arresting police. In such circumstances, the Police Department's investigation requires an examination of the court transcript. This, in turn, under the existing legislation, delays any re-investigation that the Ombudsman might decide to pursue.

There have been long delays — up to six months — in obtaining copies of transcripts from courts. In March 1985 the Ombudsman asked the Attorney-General whether his Department could provide transcripts more quickly. Five examples were later given where transcripts had not been available within a reasonable time.

The Attorney-General replied:

> "Because of the high demand for transcripts and the limited resources available to my Department, delays do occur in producing transcripts, and a priority order has been introduced to process applications... It would be of assistance to my Department if the police could follow up their applications if no reply has been received within, say, three weeks of the application."

A copy of the Attorney-General's letter was sent to the Commissioner of Police. This Office will monitor any delays in providing transcripts. If delays of the length so far experienced in a number of cases should continue, consideration will be given to making a report to Parliament on the issue.

130. Need to take Statements from all Witnesses before Deferring Investigation

Complaints against police often involve allegations likely to be brought before a court. Progress reports from the police investigation officers not infrequently show that, before court proceedings begin, they frequently interview the complainant and his or her witnesses, but not the police witnesses, or the police the subject of complaint. The police then sometimes seek the Ombudsman's consent to defer the investigation until the end of proceedings; usually when the only remaining interviews involve police and their witnesses.

The Ombudsman agrees that it is generally sound investigative procedure to obtain statements from most witnesses before police the subject of complaint are interviewed. However, interviewing only the complainant and his or her witnesses creates a number of problems. The Ombudsman believes that statements should be taken from *all* witnesses prior to court proceedings, not least because proceedings often take a long time to complete, and memories can fade.

Police investigating complaints against police have a different role from those seeking to aid police prosecutors to obtain convictions. The Ombudsman outlined his concern to the Commissioner of Police and Assistant Commissioner Shepherd replied:

> "To utilise statements by police investigators in the manner you have suggested would be contrary not only to the spirit but also the express provisions of the Police Regulation (Allegations of Misconduct) Act and I would certainly take a serious view of any such incident brought to my attention. To date no such incident has come to my notice."

The Ombudsman then sent to the Commissioner and Minister details of three cases where complainants alleged that their statements to investigating police had been used by the prosecution in court. The Minister and Commissioner replied that the three cases would be investigated; the results of this investigation are not yet available. However, in September, 1985 a police circular apparently accepted points made by the Ombudsman. The circular read:

> "Court proceedings often take long periods before they are finalised and it is felt that it is in the interest of Police generally to be able to report on incidents the subject of complaint whilst events are still fresh in memory. Accordingly, unless there are particular circumstances which would warrant otherwise, all known parties in a complaint matter, including Police directly involved, are to be interviewed and appropriate reports, statements or records of interview obtained *before* application is made to defer investigation pending completion of Court proceedings."

131. Legal Representation for Police in Proceedings before the Ombudsman

Police the subject of complaint are entitled to legal representation during the course of enquiries conducted by the Ombudsman pursuant to Section 19 of the Ombudsman Act. The question of who should bear the cost of that legal representation has been a matter of contention since the Ombudsman commenced such enquiries in 1984. In almost every enquiry the police officer(s) the subject of complaint has been represented.

Initially police officers were represented by the solicitor for the Police Association, Mr G. Liddy of Messrs W. C. Taylor & Scott (or in a few cases by solicitors privately engaged by the police officers). As the number of complaints against police rose, with a corresponding increase in the number of Section 19 enquiries, the legal representation for its members became a financial burden. The Police Association argued that as complaints were levelled against police officers, not as individuals but as members of the Police Force carrying out their duties, some form of legal aid should be available for those officers. On this basis the Association sought the assistance of the Government in funding legal assistance or providing Government employed legal practitioners specifically to represent police officers the subject of complaint. This application was refused. The Premier explained that it was a matter for each individual to decide if they wanted legal representation and therefore they would have to make individual arrangements.

The Police Association requested that the Ombudsman adjourn all further Section 19 enquiries pending the resolution of the problem. As no decision was imminent, this was not seen by the Ombudsman as a viable solution, and Section 19 enquiries continued.

A further application to the Government in this regard was also largely unsuccessful, although the Premier circulated a revised policy on legal assistance for Section 19 enquiries applicable to all Crown Employees, including members of the Police Force. The revised policy is as follows:

> "Persons appearing before such enquiries may elect to be legally represented.
>
> The Government is under no obligation to meet the cost of representation or to make legal representation available. The cost of representation will not be met and, in general, legal representation will not be provided.
>
> However, where in the discretion of the Department Head special circumstances exist which warrant the provision of legal representation through the Department, appropriate representation may be made available. Such representation should be by Departmental legal officers or, where necessary, officers of the Crown Solicitor's Office."

The Ombudsman has always supported the desirability of having individual police officers represented by solicitors, and, if appropriate, counsel, who hold practising certificates and who by virtue of their office owe a duty both to their client and to any tribunal before which they are appearing. However, as a temporary compromise the Ombudsman was prepared to permit staff of the Police Association who were legally qualified to represent and act as advisers to members of Section 19 enquiries. This was accepted on a trial basis only.

Initially, police officers the subject of enquiry were represented by members of the Police Prosecuting Branch, in particular, Sergeants Haines and Gallagher. This situation proved a temporary compromise with Sergeants Haines and Gallagher vigorously representing their clients' interests while at the same time being of considerable assistance in the enquiries. Their integrity and solid preparatory work has been keenly appreciated.

However, there were several potential problems with the system. In particular:

1. legal advisers, who are employees of the Police Department, are subject to directions by senior officers and, in theory at least, such directions could pose a conflict of interest that an independent solicitor (or counsel) would not encounter;

2. the highly undesirable practice (precluded by New South Wales Bar Association ethics) of one legal adviser representing more than one police officer the subject of investigation participating in joint conferences. Where the legal adviser is not strictly bound by the Bar Association rules and code of ethics (that is, as an employee of the Police Department) there may be a danger that information obtained at an early stage of an enquiry may be improperly divulged to those officers who at that stage may not have been subjected to questioning.

The Ombudsman has canvassed these issues with the Commissioner during the past year. In May 1985 it was proposed by the Commissioner, as an alternative compromise, that a unit separate from the Police Prosecuting Branch be set up specifically to represent police in Section 19 enquiries. This alternative was accepted by the Ombudsman, again, on a trial basis. The new unit was set up under the Legal Advisings and Appeals Section. Sergeant G. N. Whitehead (a qualified barrister, formerly attached to the Police Prosecuting Branch) was appointed as the head of the new unit. Sergeant Whitehead is directly responsible to the Assistant Commissioner (General).

The Ombudsman has accepted this temporary solution but considers that the two problems (set out above) associated with representation by employed police officers still remain. The Ombudsman continues to believe that the best solution is the provision of independent legal representation for all police the subject of complaint irrespective of who funds that representation.

Legal representation for police officers called *as witnesses* in a Section 19 enquiry, but who are not subject of complaint, is a matter for the Ombudsman's discretion. It is not seen as generally desirable; however, in special circumstances such officers may make application for representation.

132. Inadequacy of Monetary Penalties Following Disciplinary Proceedings

This Office is concerned that monetary penalties imposed on police officers for wrong conduct do not always reflect the seriousness of offences; indeed, it appears that a double standard exists. Fines range from $10 to $50 for such serious offences as "Neglect of Duty" or "Disobedience". It was suggested to the Commissioner of Police that a citizen would regard a fine of $50 as being on a par with a minor traffic infringement.

The following are examples of fines that have been imposed on police officers:

1. A constable arrived at an accident and took conflicting statements from the two drivers. He refused to take a statement from a witness who came forward at the scene, or from two juveniles who were present. In the subsequent court case, it emerged that the constable changed the original sketch plan of the collision and could not identify all the elements he had drawn. He had also formed a liaison with one of the drivers after coming to visit her to enquire about her injured neck. However, his report had shown that no-one was injured in the accident. The complaint was found to be sustained on three counts, namely:

   — the constable failed to record the statement of a witness;

   — he failed to establish the point of impact of the vehicles;

   — he failed to obtain statements from the juvenile witnesses.

   He was also criticised for taking sides in the case. The constable was charged with "Neglect of Duty" and fined $50.

2. A senior constable at a police station received a report of an accident but did not visit the site, although he noted the particulars on a Traffic Accident Form at the time. The complaint was that the senior constable should have charged one of the parties with an offence. The allegation was found to be not sustained, but the Police Department charged the senior constable with "Neglect of Duty" because he did not record the statements of the drivers and witnesses. He was fined $50 and the charge was placed on his Record Sheet.

3. Another example concerned a complaint about police involvement in tow truck operations. Charges of "Disobedience" and "Neglect of Duty" were preferred against an officer and he was fined $30 on each of the three matters involved. In a letter of advice to this Office, the Deputy Commissioner also noted that the officer was to be paraded before his District Superintendent and the three matters were to be placed on his Service Register and Record Sheet, provided that he did not appeal against the decision.

4. An officer was fined $50 after a charge of "Misconduct" was served on him for conveying confidential information to a third party.

5. Finally, an officer was fined $50 for "Misconduct" in approaching a Commonwealth police officer and seeking to influence an investigation the latter was carrying out into an alleged immigration racket.

In the circumstances, this Office has recommended to the Commissioner of Police that the imposition of monetary penalties be reviewed as it is considered that the quantum of such penalties should reflect the degree of seriousness of charges invovled.

It is appreciated that notations placed on an officer's Service Register (where charges of wrong conduct have been proven) are a record which will remain with the officer for the rest of his or her career in the Police Department. On the other hand, monetary penalties of the size indicated are derisory and out of line with community standards.

As mentioned above, the issue was raised with the Commissioner of Police who in reply expressed the view to this Office that it is his prerogative to decide what penalty should be imposed. Further, that the monetary nature of the penalty alone did not indicate the long term effect on an officer's career of the preferment of a charge. A charge could be entered on the officer's Service Register and this could be a factor considered in relation to any applications made by that officer for promotion within the force.

It is not disputed that it is the Commissioner's prerogative to decide what penalty should be imposed where wrong conduct is proved. However, pursuant to Section 30A of the Police Regulation (Allegations of Misconduct) Act, the Ombudsman is charged with the responsibility to determine whether, in the circumstances of each case (where a wrong conduct report has been made under Section 28 of the Act), the action taken by the Commissioner was appropriate.

On this basis, the Ombudsman will continue to review the quantum of penalties imposed by the Commissioner and, if necessary, will take the matter further under the Act.

133. Attorney-General and Solicitor-General Opinions: No Need for Secrecy with Ombudsman

A difficulty has arisen where a Department under investigation seeks the opinion, often at the Ombudsman's suggestion, of officers such as the Crown Solicitor, Crown Counsel, or the Solicitor-General, on questions such as whether sufficient evidence exists to prefer criminal charges, or instigate disciplinary proceedings, against a governmental employee or other person.

Two recent cases in which the Ombudsman has been hampered by the refusal of the relevant authorities to provide him with more than a brief decision on such questions are set out below:

1. In January 1982 the Ombudsman issued a report under Section 28 of the Police Regulation (Allegations of Misconduct) Act recommending that two police officers be departmentally charged with misconduct, after an investigation conducted by the Police Department into a complaint that they had solicited a bribe in exchange for making efforts to see that the complainant was granted bail. A significant portion of one of the incriminating conversations was tape-recorded by the complainant. Both the Assistant Ombudsman and the Commissioner of Police decided that the complaint was sustained. Before one of those officers could be charged with misconduct, he resigned from the Police Force and, on the same day the complainant failed to appear in court, his whereabouts being unknown. On this basis, the Police Commissioner advised that he proposed to hold in abeyance preferment of a departmental charge against the other police officer involved.

   In November 1982 the Police Commissioner advised the Ombudsman that, as there had been no developments, he had directed that no further action be taken to prefer the departmental charge of misconduct against the remaining police officer. On 2nd June, 1983, that officer submitted his resignation from the Police Force and three weeks later the complainant was again arrested. The Ombudsman advised the Police Commissioner that as the complainant had been apprehended and was then available to give evidence, he was of the view that it was for the Crown Law authorities to determine whether criminal proceedings should be instituted against the two former police officers.

   The Ombudsman wrote to the Attorney-General advising that he believed the question of whether criminal proceedings should be instituted was a matter for consideration by the Attorney-General and his officers. In the final paragraph of that letter, the Ombudsman stated that he would appreciate learning of the Attorney-General's decision in due course. The Attorney-General replied to the effect that:

   > "The papers supplied with your request have been the subject of several advisings by the Crown Solicitor, Crown counsel and the Solicitor-General, and further information has been supplied to the Crown Solicitor by the Commissioner of Police at the request of the former Attorney-General.
   >
   > Following consideration of all the available information, the Crown Solicitor, Crown Counsel and Solicitor-General have advised that in view of the circumstances the institution of criminal proceedings is not justified."

   No reason for this decision was given. On 11th February, 1985 the Ombudsman wrote to the Attorney-General saying:

   > "In view of the importance of the matter, I believe I should refer to it either in a special report to Parliament or in the Annual Report. (In any such report, the former police officers will, of course, not be named.)
   >
   > It would be more informative to Members of Parliament and to the public if I were able to indicated the relevant matters which led the various Crown officers to their conclusions.
   >
   > In the circumstances, I would appreciate your giving consideration to providing me with copies of the several advisings that you have received. Alternatively, and less satisfactorily, one of your officers may be prepared to provide us with a written summary of the factors leading to the decision."

   On 11th March, 1985 the Attorney-General wrote to the Ombudsman, indicating that "The matters raised in your request are being considered and I will write to you again as soon as I am in a position to do so".

   On 12th April, 1985 he wrote again to the Ombudsman saying:

   > "The matters raised in your representations have been considered and your request was referred to the Solicitor-General for comment.
   >
   > In this instance I have accepted the Solicitor-General's recommendation that copies of the advisings not be made available, but that you be informed that any prosecution would need to rely substantially on the evidence of [the complainant]. [The complainant] has indicated his unwillingness to give evidence. Although he is a compellable witness, in the circumstances of this case the leading of evidence from him, including the identification of voices on tape, would require [the complainant's] active co-operation, and not merely his availability as a witness. It was considered that without [the complainant's] co-operation, it was impossible to have any confidence that a conviction could be secured.

I also agree with the Solicitor-General that you be informed that this information is supplied on a confidential basis, and recommend that any report concerning the basis of the decision not disclose the identity of [the complainant]."

On 26th April, 1985, the Ombudsman wrote to the Attorney-General, inter alia, as follows:

"The actual and perceived role of the Ombudsman is to be the public watchdog. It becomes difficult, if not impossible, for me to carry out such a task if I am not provided with relevant information.

As to the information contained in the third paragraph of your letter, I would appreciate information as to the date, circumstances, and persons to whom [the complainant] indicated he was not prepared to give evidence.

Finally, I do not understand your reference to the information in your letter being supplied 'on a confidential basis'. The express purpose of my letter was to seek further information so that I can explain to the public in a report to Parliament why no proceedings ever eventuated. So far as naming [the complainant] is concerned, he originally complained to this Office, and it is a settled practice not to refer to complainants in reports to Parliament unless we have consent to do so. However, if [the complainant] were to indicate to us he had no objection, I would not feel any inhibition in including his name.

I would appreciate your reconsideration of the provision to me of copies of the advisings, and also the information sought in this letter in relation to the circumstances of [the complainant's] indication of his unwillingness to give evidence."

On 9th May, 1985 the Attorney-General wrote to the Ombudsman in these terms:

"The terms of your letter of 26th April, 1985 have been noted, and in the circumstances I wish to have the benefit of further advice from the Solicitor-General.

As you are aware, the Solicitor-General is presently on leave. I shall write to you again as soon as possible after the Solicitor-General returns from leave on 20th May, 1985."

This first case later became taken up in correspondence about both cases.

2. The second case also concerned a complaint about the alleged solicitation of a bribe by detectives. In this case the Ombudsman commenced a re-investigation of the complaint. The Ombudsman took evidence from a number of persons, and then decided to discontinue his re-investigation of the complaint on the following bases:

(a) that there were clearly conflicting accounts as to the serious central allegations of soliciting a bribe which were better determined in a court or the Police Tribunal rather than in proceedings before the Ombudsman;

(b) as the complainant did not wish the complaint to be further investigated by the Ombudsman, there seemed on balance no utility in proceedings to require the complainant to attend for questioning pursuant to the Royal Commission powers in the Ombudsman Act; and

(c) a decision had been made to refer the matter to the Minister and the Commissioner of Police under Section 33 of the Police Regulation (Allegations of Misconduct) Act.

The Ombudsman made a report under Section 33, which section provides that, where the Ombudsman is of the opinion that a member of the Police Force is or may be guilty of such misconduct as may warrant dismissal, removal or punishment, he shall report his opinion to the Police Minister and to the Commissioner of Police, giving his reasons. This report was made on 17th August, 1984.

On 13th November, 1984 the Police Minister wrote to the Ombudsman acknowledging receipt of the report and saying that the matter was presently receiving attention by the Police Internal Affairs Branch. On 17th December, 1984 the Minister wrote to the Ombudsman again, saying:

"The Assistant Commissioner Internal Affairs has advised me that the Department's papers, including the transcript of your hearing on this matter, have been referred to the Under-Secretary of Justice for independent assessment of whether sufficient evidence is available to support the preferment of criminal charges against any person."

The Commissioner wrote to the Ombudsman in similar terms on 28th December, 1984.

On 7th February, 1985 the Ombudsman sought from the Minister and the Commissioner an outline of the present position and on 22nd February, 1985 a member of staff of the Minister's Office telephoned the Ombudsman's Office and advised that the Commissioner's Office had informed the Minister that they had just received a Crown Law advising and would be providing the Minister with a report shortly. On 26th February, 1985 the Ombudsman wrote to the Commissioner, asking to be provided with a copy of the opinion. On 7th March, 1985 the Assistant Commissioner, Internal Affairs, wrote to the Ombudsman saying that he had received advice from the Under-Secretary of Justice on the question of whether evidence was available to support the preferment of criminal charges against any person involved in the matter, and attached a copy of that advice "for your information, indicating that both the Crown Solicitor and Solicitor-General recommend against the institution of criminal proceedings on the basis that there is very little or no reasonable prospect of conviction". That "advice" was in these terms:

> "Following the approval of the previous Attorney-General, your papers were referred to the Crown Solicitor and to the Solicitor-General for consideration and advice.
>
> Both the Crown Solicitor and the Solicitor General have advised that on the basis of the information contained in your papers there is very little or no reasonable prospect of conviction and accordingly they have each recommended against the institution of criminal proceedings.
>
> Your papers are returned herewith."

On 12th March, 1985 the Ombudsman wrote to the Secretary of the Attorney-General's Department saying:

> "As in due course I will need to report to Parliament on this and other matters, I would appreciate your considering whether you are prepared to provide me with copies of the advice of the Crown Solicitor and the Solicitor-General on which you state your reply. If you are not prepared to provide me with copies, I would appreciate some further amplification of your reasons."

On 25 the March, 1985 the Ombudsman received a letter from the Department of the Attorney-General saying that the matters raised by him were being considered and that a further reply would be forwarded to him as soon as possible. Follow-up calls were made by a member of the Ombudsman's staff to an officer of the Department of the Attorney-General. The Solicitor-General's absence on leave was advanced as the reason for delays in responding to the Ombudsman's letter. Indeed, on 24th April, 1985 the Acting Secretary of th Attorney-General's Department wrote to the Ombudsman saying that:

> "The Attorney-General wishes to have the benefit of the views of the Solicitor General on your request for access to the advice given in the above matter.
>
> Unfortunately, the Solicitor-General is presently unavailable due to absence on leave until 20th May, 1985. Further advice will be forwarded to you as soon as possible after that date."

A further telephone follow-up by a member of the Ombudsman's Office to a member of staff of the Attorney-General elicited the information that the matter had not been attended to by the Solicitor-General since she returned from leave because of pressure of work.

On 26th June, 1985 the Ombudsman wrote to the Secretary of the Attorney-General's Department saying:

> "We are now about to commence preparation of the Annual Report and I would appreciate the information sought in my letter of 12th March so that I can decide whether to discuss the matter in the Annual Report.
>
> I would appreciate your reply as soon as possible."

The Ombudsman, on 23rd July, 1985, wrote again to the Attorney-General on both of these matters. The letter was, inter alia, in these terms:

> "I note that in the first of the above-mentioned matters you wrote to me on 9th May, 1985 to the effect, inter alia, that you wished to have the benefit of further advice from the Solicitor-General on the question of my request for reconsideration of your earlier decision not to make available copies of advisings by Senior Crown Law Officers in relation to [the first] complaint.

In the second above-mentioned matter, Mr W. J. Robinson, the Acting Secretary of your Department, wrote to me on 22nd April, 1985 noting that you wished to have the benefit of the views of the Solicitor-General on my request for access to advices given by the Crown Solicitor and Solicitor-General which advices recommended against the institution of criminal proceedings against police officers 'on the basis that there is very little or no reasonable prospect of conviction'.

In both letters, the absence on leave of the Solicitor-General was given as the reason for delay in response to my requests. The Solicitor-General, I gather, returned from leave on 20th May, 1985. Indeed, in relation to the second complaint, Miss Pether of this Office has had conversations with Mr Miller of your Department about the delay, and on 26th June, 1985, I wrote to Mr Haines, the Secretary of your Department, noting that, as I was about to commence preparation of my Annual Report to Parliament, I would appreciate the information sought in my letter of 12th March in order that I might decide whether to discuss the matter in the Annual Report.

I would not wish, of course, were there good reasons (with which I have not as yet been acquainted) for your stance on this issue not to be able to consider these reasons and, if appropriate, modify my reference in the Annual Report to this matter.

Your present stance on this issue and the present delays are making it difficult, if not impossible, for me to carry out my role. I would be grateful for your urgent attention to this matter in order that I may settle my reference to this matter in the Annual Report."

On 13th August, 1985 the Ombudsman received a reply from the Attorney-General. He indicated that:

"I regret the delay in replying to you but it has only been recently that the Solicitor-General has been able to provide me with her further advice on the issue of advisings being made available to your Office. Having had the opportunity to review the matter, I remain in agreement with the Solicitor-General that copies of advisings should not be provided in these cases.

The present arrangement is that in respect of certain matters the subject of investigations by your Office, advice is obtained from the Crown Solicitor and the Solicitor-General as to whether prosecutions might be initiated. That advice is tendered to me in my capacity as First Law Officer of the State, charged with responsibility for the administration of justice, and it seems to me that the same procedures should obtain as obtain in respect of other matters involving a decision to prosecute.

In all other similar matters, I communicate my decision without disclosing the contents of the advice on which the decision has been taken. This practice is given recognition by the Standing Orders of both the Legislative Assembly and the Legislative Council. By those Standing Orders, papers relating to the administration of justice are asked for only by Address to the Governor.

Confidentiality is always maintained in respect of such matters by my Department. One reason for this confidentiality is that advisings frequently involve the frank canvassing of the credibility of witnesses and possible motives of complainants and those against whom the commission of offences is alleged. Advisings frequently also go to the issues of the method of proof of facts relevant to the offence, and it would be undesirable if that information was released when charges are to be laid.

I, as Attorney-General, and in my absence the Solicitor-General, bear responsibility for the presentation of indictments and for the carriage of prosecutions on indictment, including the general fairness of the conduct of those prosecutions. It is not possible for the Office of the Solicitor-General to be involved in such matters, save on the basis of advising me as to matters affecting the administration of justice, in respect of which confidentiality has always been maintained.

In the result, I agree with the Solicitor-General that if you are to be provided with detailed advice as to possible prosecutions, some alternate procedure will have to be devised to resolve disputes in these areas between your Office and the Commissioner of Police."

These are not, in the Ombudsman's view, matters in which any dispute exists between him and the Commissioner. The Ombudsman hopes to have early discussions with the Attorney-General in an endeavour to see whether some alternative procedure can be devised as foreshadowed in the last paragraph of his letter.

134. Superintendent Ernie Shepard

On 30th August, 1985 Detective Superintendent Ernie Shepard, until then head of the Police Internal Security Unit (I.S.U.), was informed that he had been replaced by Detective Chief Superintendent Snape. A decision had previously been taken by the Police Board and the Minister for Police to upgrade the rank of the top position in the I.S.U. from Detective Superintendent to Detective Chief Superintendent, and to advertise the position.

In the time Detective Superintendent Shepard held the position, public confidence in the I.S.U. rose sharply. Detective Superintendent Shepard had received absolutely no criticism about the manner in which he conducted his role and his move from head of the Unit resulted in extensive media comment.

Ernie Shepard joined the Police Force in 1950 and was stationed at Chatswood until 1957, when he decided to become a detective. Between 1957 and 1970, he was stationed at Redfern, Darlinghurst and Chatswood, and in 1970 moved to the Special Crime Squad (now known as the Homicide Squad) where he remained until 1974. For two and a half of those latter years he worked with the Abortion Squad.

In May 1974 he was promoted to the rank of Detective Sergeant at Manly and later to Divisional Detective Sergeant at Mona Vale. In 1978 he was transferred to Central Police Station to head the detectives there. He moved to the Police Internal Affairs Branch in 1979, where he stayed for two years, before becoming Detective Sergeant First Class in charge of the Vice Squad in 1981. Although promoted to the rank of Inspector in 1982, Shepard remained with the Vice Squad until September 1984 when the position of head of the I.S.U. was advertised.

The position of head of the I.S.U., requiring the rank of Detective Superintendent, was advertised in July 1984. Shepard was interviewed by Commissioner Avery, Assistant Commissioners Perrin and Ross and Assistant Commissioner (Internal Affairs), Bob Shepherd.

When he came to the I.S.U., the Unit had a staff complement of 10, which has since been increased to 30, although not all positions are currently filled. Shepard continued in the role as head of the I.S.U. until being replaced in August of this year. Shepard now occupies the number two position in the Unit. The Ombudsman, and his seconded police officers, have considerable respect for the way in which Ernie Shepard carried out his job.

PART III

STATISTICAL SUMMARY OF COMPLAINTS UNDER OMBUDSMAN ACT

1st July, 1984 to 30th June, 1985

KEY TO STATISTICAL CATEGORIES

No Jurisdiction

"Not Public Authority" — private companies, individuals, etc.

"Conduct is of a class described in The Schedule" — Section 12 (1) (a) — specifically excluded from jurisdiction in Schedule attached to Ombudsman Act.

"Conduct or complaint out of time" — Section 12 (1) (b) (c) (d) — action complained of occurred before commencement of Ombudsman Act, etc.

Declined

General discretion — Section 13 (4) (a).

(i) No prima facie evidence of wrong conduct

(ii) Premature complaint

(iii) Other reason.

Insufficient interest of complainant; vexatious or frivolous complaint; trivial subject matter; trading or commercial function; alternative means of redress, etc. — Section 13 (4) (b).

Local government authority where complainant has right of appeal or review — Section 13 (5).

Discontinued

(1) Resolved to satisfaction of complainant

(2) Resolved partially

(3) Withdrawn by complainant

(4) No prima facie evidence of wrong conduct after preliminary enquiries

(5) Other reason.

No Wrong Conduct

"No wrong conduct" as defined by Ombudsman Act.

Wrong Conduct

"Wrong conduct" as defined by Ombudsman Act.

Further Explanation

A. Wrong Conduct Reports

(i) Illawarra County Council — whilst two findings of wrong conduct were made, only one report was written. The report covered both cases.

(ii) North West County Council — whilst three findings of wrong conduct were made, only two reports were written as one report covered two cases.

(iii) Corrective Services Department — whilst thirty-five findings of wrong conduct were made, only fifteen reports were written. (Four of those reports written covered more than one case.)

B. Complaints Discontinued after Formal Investigation Commenced

(i)	Councils	12
(ii)	Departments	25

A total of thirty-seven complaints were discontinued, i.e. categories (1) (2) (3) (5) after formal notices of investigation were issued.

C. Police Department Complaints Investigated under the Ombudsman Act

Since July, 1984, the Office has received a vast number of complaints about traffic infringement matters. The majority of these complaints are handled under the Ombudsman Act.

It should also be noted that, of the fifty-four matters still under investigation, eight are being investigated jointly under the Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act.

DEPARTMENTS	No Jurisdiction			Declined					Fully Investigated		Discontinued					Under investigation as at 30th June, 1985	TOTAL
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Adult Education Board																1	1
Adult Migrant Education Service		1															1
Agriculture Department	1			5	2	2			1	1			1	3		5	21
Albury Wodonga Development Corporation														1		1	2
Anti-Discrimination Board		2												1			4
Apprenticeship Directorate		1												1			2
Art Gallery of New South Wales				1													1
Attorney General's Department		4		1					1		1	1		4		6	18
Auditor General's Department	1																1
Australian Gas Light Company				4			2				1	1		1		2	11
Australian Museum				1													1
Board of Fire Commissioners														1			1
Board of Senior School Studies							1							2			3
Board of Tick Control		1												2			3
Builders Licensing Board	1	2		6	1	3	7		4		3	4		12	3	18	64
Bursary Endowment Board				2													2
Chiropractic Registration Board				1													1
Clerk of the Peace				1													1
Coal and Oil Shale Mine Workers		2														1	3
Superannuation Tribunal and Long Service Leave Branch																	
Conservatorium of Music				2													2
Consumer Affairs Department		1		4	2	2	1		1	2	2		2	9	1	5	32
Consumer Claims Tribunal		4					1									1	6
Co-operative Societies Department														2			2
Corporate Affairs Commission		1		5	1	2			1	1	6	2	3	7	1	10	39
Corrective Services Department	5	16		70	21	26	11		1	35	35	19	12	185	42	149	627

DEPARTMENTS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)	Under investigation as at 30th June, 1985	TOTAL
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Council of Auctioneers and Agents				1							1			1		2	5
Crown Lands Office									1		1			2		1	5
Crown Solicitors Office		1														1	2
Cumberland College of Health Sciences							1										1
Dairy Corporation of New South Wales				6	1	2				1		1		2	1	2	16
Dental Board of New South Wales							1							1			2
Dust Diseases Board		1															1
Education Commission		1															1
Education Department		6		9	5	3	1		1	1	4	2	3	16	5	29	85
Egg Corporation					1	2				2						5	10
Electricity Commission				3		1	2		1		2			2		3	14
Energy Authority					1									1		2	4
Environment and Planning Department				6	1		1			2	1			1	2	8	22
Finance Department				1		1			1							1	4
Forestry Commission				2										1		9	12
Goulburn Gas Company											1						1
Government Insurance Office	2	7		9		8	11		1	2	7	9	1	2	1	6	66
Government Stores Department							1										1
Grain Handling Authority														2		2	4
Gunderimba Shire "C" Riding Drainage																	
Union																1	1
Health Department		5	1	3	12	7	4		3	2	2	2	2	3		21	67
Health Department (Prison Medical Service)				11	2	2					5	1	2	20	4	18	65
Height of Buildings Advisory Committee										1							1
Heritage Council		1								1				1	1		4
Housing Commission		4		20	7	7	4		1		10	1		18		22	94
Hunter District Water Board		1		1	1	1	1				1			2		3	11

DEPARTMENTS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)	Under investigation as at 30th June, 1985	TOTAL
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Industrial Development and Decentralisation														1			1
Industrial Relations Department	1	3		2	2					3	1		3	6		9	30
Investigating Committee																1	1
Ku-ring-gai College of Advanced Education														1			1
Land Board Office		1		1										1		1	4
Land Commission					1	1					1		2	2		2	9
Lands Department				3	3				1		3			3	1	5	19
Land Tax Office				8		2	8				1		1	3		4	27
Land Titles Office		1		3			1				1		1	2		1	10
Legal Aid Commission	2	1		6	1	1	4							2			17
Licences Reduction Board																1	1
Liquor Administration Board				1								1				1	3
Local Government Department											1			1		2	4
Local Government Boundaries Commission										1							1
Local Government Examination Committee														2			2
Long Service Payments Corporation				3			1				4			4	1	4	17
Lord Howe Island Board																1	1
Macquarie University		2					1			1						3	7
Management Committee, Joint Task Force into Drug Trafficking																1	1
Main Roads Department				13	1	3	1			2	6			17		4	47
Maritime Services Board		1		3	2	2				3	1		2	8		9	31
Meat Authority																2	2
Medical Board																1	1
Mental Health Review Tribunal														1			1
Metropolitan Waste Disposal Authority				1										1			2
Metropolitan Water Sewerage and Drainage Board	1			16	12	7	1			2	9	4		16	2	17	87
Mine Subsidence Board							1										1

DEPARTMENTS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)	Under investigation as at 30th June, 1985	TOTAL
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Mineral Resources Department		1		2										2		3	8
Ministry for Aboriginal Affairs					1												1
Mitchell College of Advanced Education				1													1
Motor Transport Department		2		8	6	2					5	2	2	11	1	20	59
Motor Vehicle Repair Industry Council		2		3			2									1	8
Murray Valley (NSW) Citrus Marketing Board														1			1
Music Examination Advisory Board		1															1
National Parks and Wildlife Service				4		2			2	1				7	3	7	26
Newcastle College of Advanced Education														1		1	2
Newcastle Gas Company												1					1
North Sydney Police Boys Club														1			1
Parole Board		15		1			3							3	3		25
Pastures Protection Board		1		3			2		2	2				1		2	13
Payroll Tax Office																1	1
Plumbers, Gas Fitters and Drainers Board					1												1
Police Department	1	1		18	10	12	2			1	35	11	1	27	8	54	181
Premiers Department												1				1	2
Privacy Committee		1															1
Protective Office						1								1			2
Public Accountants Registration Board		1								1				1			3
Public Authorities Superannuation Board		1		2	2	1				1	1		1	1		3	13
Public Prosecutions Office		2												1			3
Public Service Board		3														1	4
Public Solicitors Office		1			1	1								1		1	5
Public Trust Office				4			1			1	2					3	11
Public Works Department					2		1			2	3			5		6	19
Railway Service Superannuation Board						1	1										2

DEPARTMENTS	No Jurisdiction			Declined					Fully Investigated		Discontinued						TOTAL
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)	Under investigation as of 30th June, 1985	
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Real Estate Valuers Registration Board																2	2
Registry of Births, Deaths and Marriages	1			4		1	1					2		5	2	12	28
Release on Licence Board	1	2															3
Rental Bond Board						2					1	2		1	1	2	9
Riverina-Murray Institute of Higher Education					1												1
Rural Assistance Board														1		1	2
R.S.P.C.A.															1		1
Secondary Schools Board												1	1	1	1		4
Soil Conservation Service	1															1	2
Solicitors Admission Board		1															1
Southern District Racing Association														1			1
Sport and Recreation Department				1			1										2
Sporting Injuries Committee							1							1			2
Stamp Duties Office				2	5		1			1	1		1	3		13	27
State Bank	1			2		1	1					1		1		2	9
State Brickworks						1											1
State Contracts Control Board				1			1									2	4
State Electoral Office	1			2						1							4
State Lotteries Office				2	2		1						1	2		2	10
State Pollution Control Commission	1	1			1		2				1			9		5	20
State Rail Authority		4		12	13	4	5			1	8		2	10	4	24	87
State Superannuation Board			1	3	2	2						1		3		3	15
Strata Titles Office		2		1			1			1				1		1	7
Sydney College of Advanced Education				1												1	2
Sydney Cove Redevelopment Authority																1	1
Sydney Cricket and Sports Ground Trust		1			1												2
Sydney Entertainment Centre					1												1

DEPARTMENTS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
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	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Sydney Farm Produce Market Authority														1			1
Teacher Housing Authority											1					1	2
Technical and Further Education Department	1	2		2	3	2	2						2	4		3	21
Tick Control Board																1	1
Totalizator Agency Board				1	1						1					1	4
Traffic Authority		1			2												3
Travel Agents Registration Board		2		1											1		4
Treasury				1	1												2
Universities and Colleges Admission Centre					1												1
University of New England				1		1				1						1	4
University of NSW					1									1		6	8
University of Sydney				1	1											1	3
Urban Transit Authority				3	2		1			1	1	1		2		7	18
Valuer Generals Department	1				3		6			1	1	1	1		2	2	18
Water Resources Commission		2												2	1	5	10
Western Lands Commission										1				1			2
Youth and Community Services Department		2		15	17	6	3	\		3	3	1		14	9	44	117
Zoological Parks Board																1	1
Total	23	123	2	337	161	125	107		22	83	175	73	47	506	102	653	2539

DEPARTMENTS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)	Under investigation as at 30th June, 1985	TOTAL
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Unscheduled Bodies (Outside Jurisdiction)																	
i. Australian Government Departments	96																96
ii. Electricity — Policy	7																7
iii. Employer/Employee	92																92
iv. Private Organisations/Individuals	325																325
	543	123	2	337	161	125	107	0	22	83	175	73	47	506	102	653	3059
Local Government Authorities	24	14	2	212	59	57	63	35	14	47	47	30	13	268	44	411	1340
Total from all sources	567	137	4	549	220	182	170	35	36	130	222	103	60	774	146	1064	4399
Less under Investigation as at 30/6/84																	-773
Total received for year ended 30/6/85																	3626

COUNCILS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)	Under investigation as at 30th June, 1985	TOTAL
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Albury City Council		1			1					1		1		1	1	1	7
Armidale City Council				1												2	3
Ashfield Municipal Council				1										2			3
Auburn Municipal Council																1	1
Ballina Shire Council				1			1	2		1			1	2		1	9
Bankstown City Council				2	1				1					6	1	4	15
Barraba Shire Council															1		1
Bathurst City Council				1										1	1	3	6
Baulkham Hills Shire Council				2			3	2						6	1	5	19
Bega Valley Shire Council				4	1									1	1	5	12
Bellingen Shire Council				3	1								1			1	6
Bingara Shire Council				1													1
Blacktown City Council	1			1	2	1	2	1		3				4	1	8	24
Bland Shire Council					1												1
Blue Mountains City Council				3			2	2						3		8	18
Botany Municipal Council				1												5	6
Broken Hill City Council				1	2		1			1	1	1		1		2	10
Burwood Municipal Council														4		2	6
Byron Shire Council						4	1	2	1	2		8		5		6	29
Camden Municipal Council															1		1
Campbelltown City Council				2				1			1		1	2		1	8
Canterbury Municipal Council				1										3		2	6
Carrathool Shire Council																3	3
Casino Municipal Council							1							2			3
Central Tablelands County Council				1													1
Central West County Council	1						2			1						2	6
Coffs Harbour Shire Council				5			1		1		2			2		11	22

COUNCILS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
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	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Concord Municipal Council	1				1			2			1			1		1	6
Coonabarabran Shire Council											1					3	5
Cowra Shire Council				1							1			1		3	6
Crookwell Shire Council														1			1
Culcairn Shire Council				1													1
Deniliquin Municipal Council		1		1			4										6
Drummonyne Municipal Council				1			1			1					1		4
Dubbo City Council														1		1	2
Dumaresq Shire Council														1		1	2
Dungog Shire Council	1			1							1					2	5
Eurobodalla Shire Council		2		8			2							7		5	24
Evans Shire Council						1										1	2
Fairfield City Council	1			2		1	1				2		1	3		2	13
Far North Coast County Council				1												4	5
Forbes Shire Council																1	1
Gilgandra Shire Council																1	1
Glen Innes Municipal Council						1										1	4
Gosford City Council	1			3		1	3				1			7	1	15	31
Grafton City Council				1	1					2						2	6
Greater Cessnock City Council						1	1					1		4	1	2	10
Greater Lithgow City Council				1		1		1						2	1	2	8
Greater Taree City Council												1		3		5	9
Great Lakes Shire Council					2					1	1			5		5	14
Gundagai Shire Council																3	3
Gunnedah Shire Council				1												1	2
Gunning Shire Council				1				1									2
Guyra Shire Council								1									1

COUNCILS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)	Under investigation as at 30th June, 1983	TOTAL
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Harden Shire Council						1						1		1			3
Hastings Municipal Council		1		5	1	1		1						9		4	22
Hawkesbury Shire Council				2						2	2			2		2	10
Holbrook Shire Council					1											1	2
Holroyd Municipal Council														1	1		2
Hornsby Shire Council				2	2				1			1	1	5		6	18
Hume Shire Council														1			1
Hunters Hill Municipal Council														1		1	2
Hurstville Municipal Council				2	2					2	1			3		2	12
Illawarra County Council				4			1			2		1		1	1	1	11
Inverell Shire Council														1			1
Junee Shire Council											1	1		1			3
Kempsey Shire Council					1	2								2	1		6
Kiama Municipal Council				2		3								1		4	10
Kogarah Municipal Council				1	1		2			1				2		3	10
Ku-ring-gai Municipal Council				3	2	1	1		1					2		5	15
Kyogle Shire Council					1			1							1		3
Lachlan Shire Council																1	1
Lake Macquarie City Council				3	3	1	1		1		4			10		12	35
Lane Cove Municipal Council					1			1		1	1			1		4	9
Leichhardt Municipal Council				3		1	2			1	1	2		4	2	8	23
Lismore City Council	1			2			1			1				1		1	7
Liverpool City Council				2									1	5		4	12
Maclean Shire Council						1				1				1		1	4
Macquarie County Council											1						1
Maitland City Council	1							1		2						2	6
Manly Municipal Council				1		1		1								5	8

COUNCILS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)	Under investigation as at 30th June, 1985	TOTAL
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Marrickville Municipal Council				3		1	2							3		1	10
Merriwa Shire Council				1												3	4
Moree Plains Shire Council				2										1	1		4
Mosman Municipal Council					1	1								1		1	4
Mudgee Shire Council				1			1	1		2			1			2	8
Mulwaree Shire Council							1		1							1	2
Murray Shire Council															1	3	4
Muswellbrook Shire Council				2						2				3		3	10
Nambucca Shire Council										1				1		1	3
Namoi Valley County Council				1												10	11
Narrabri Shire Council																1	1
Narrandera Shire Council				4	2	2	1	1						3		1	7
Newcastle City Council	1													1		7	20
North Sydney Municipal Council										3							9
North West County Council	2			1	2	3								2	1	2	3
Northern Rivers County Council				1													13
Nymboida Shire Council				1													1
Ophir County Council				1													1
Orange City Council				1													1
Oxley County Council				2	1		1									3	7
Parkes Shire Council				1										1			2
Parramatta City Council				4				1			3	1		8		4	21
Parry Shire Council								1								1	2
Peel Cunningham County Council						1											1
Penrith City Council					2	1			1				1	2	2	5	13
Port Stephens Shire Council	1			4		6				1				8	3	5	29
Prospect County Council				3		1	2			1				3	1	1	12

COUNCILS	No Jurisdiction			Declined					Fully Investigated		Discontinued					Under investigation as at 30th June, 1985	TOTAL
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)		
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Queanbeyan City Council										1						1	2
Quirindi Shire Council				1													1
Randwick Municipal Council	7			7		2	1	2		2		1		3	2	4	31
Richmond River Shire Council				1												1	2
Rockdale Municipal Council	1			3	1	1	1							2		2	11
Ryde Municipal Council				3	2			1			1			1		2	10
Rylstone Shire Council														1		1	2
Scone Shire Council		1		3						1							5
Severn Shire Council					1												1
Shellharbour Municipal Council		1		2												7	10
Shoalhaven City Council	1			8	1	3					2			4		9	28
Shortland County Council						1						1		1	1		4
South West Slopes County Council				1													1
Southern Mitchell County Council				1											1	1	3
Southern Tablelands County Council												1		2	2		5
Strathfield Municipal Council				2							1			2			5
Sutherland Shire Council		3	1	4	1	2	3				3	1	1	10	4	10	43
Sydney City Council	1	1		7	3	1		4		3	3	1		14	1	18	56
Sydney County Council				11	3	1	4				3	1		5		5	33
Tallaganda Shire Council				1												1	2
Tamworth City Council								1						3		5	9
Tumbarumba Shire Council				1													1
Tumut River County Council														1			1
Tumut Shire Council				1												3	4
Tweed Shire Council		1	1	4							1			4		9	20
Ulan County Council																1	1
Ulmarra Shire Council								1									1

COUNCILS	No Jurisdiction			Declined					Fully Investigated		Discontinued						
	Sec. 12	Sec. 12 (1) (a)	Sec. 12 (1) (b) (c) (d)	Sec. 13 (4) (a) (i)	Sec. 13 (4) (a) (ii)	Sec. 13 (4) (a) (iii)	Sec. 13 (4) (b)	Sec. 13 (5)			(1)	(2)	(3)	(4)	(5)	Under investigation as at 30th June, 1985	TOTAL
	Not a public authority	Conduct is a class described in Schedule 1	Conduct or complaint out of time	No prima facie evidence of wrong conduct	Premature complaint	Other (specify)	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 to satisfaction of complainant	Resolved partially	Withdrawn by complainant	No prima facie evidence of wrong conduct after preliminary enquiries	Other (specify)		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Uralla Shire Council							1									4	5
Wagga Wagga City Council				1												1	2
Walcha Shire Council				1			1										2
Walgett Shire Council													1	1			2
Warren Shire Council							1										1
Warringah Shire Council				5	5	4	2	1	4	1	2	2		11	1	15	53
Waverley Municipal Council				3	2							1		4	1	14	25
Wellington Shire Council														1			1
Wentworth Shire Council	1																1
Willoughby Municipal Council				8	2						1		2	3		4	20
Wingecarribee Shire Council		1		1		1	1			1		1		1	2	2	11
Wollondilly Shire Council				2							2			1		1	6
Wollongong City Council		1		1		1	1			1		1		5	1	3	15
Woollahra Municipal Council				4	1		3	1	2	2	1			9	3	3	26
Wyong Shire Council	1			7	1	2	2						1	5	1	21	41
Yarrowlumla Shire Council														1			1
Yass Shire Council											1						1
	24	14	2	212	59	57	63	35	14	47	47	30	13	268	44	411	1340
Under Investigation as at 30/6/84																	-241
Received																	1099

(c) POLICE COMPLAINTS

Public Authority				NOT SUSTAINED				SUSTAINED		TOTAL
	Declined	Conciliated	Discontinued	Not sustained finding without reinvestigation	Deemed not sustained — no request for reinvestigation (Section 25M(2))	Deemed not sustained by Ombudsman — Ombudsman decided reinvestigation not warranted despite request	Not sustained finding following reinvestigation	Sustained finding without reinvestigation	Sustained finding following reinvestigation by Ombudsman	
	(2)	(3)	(4)	(5)	(6)	(7)		(8)		
Members of NSW Police Force	498	250	308	48	235	25	9	11	13	1397

NOTES TO TABLE

(1) The numbers given in each column are based on the number of letters of complaint received and if any one complaint in a letter is sustained, the complaint is treated as sustained.

(2) Declined includes complaints which are outside jurisdiction, considered not of sufficient moment to be investigated, or following preliminary enquiries under Section 51 are declined because no prima facie evidence of any wrong conduct.

(3) As a result of discussions between police and complaint. Ombudsman sends photocopy papers to complainant to seek to verify genuine conciliation.

(4) Discontinued matters include where the complainant seeks discontinuance after formal investigation commenced, where complainant unreasonably in the opinion of the Ombudsman refuses to be interviewed or where before Ombudsman investigation, a court has given a decision one way or the other on the substance of the complaint.

(5) That is, on the undisputed facts there is no misconduct.

(6) This substantial category covers cases where the evidence is conflicting but where on being sent the reports of the initial police investigation, the complainant does not seek reinvestigation by the Ombudsman. (The reasons for this are no doubt various — loss of interest, satisfaction with police enquiry, disquiet at pursuing complaint against police.)

(7) This category represents cases where although there is conflicting evidence *and* the complainant requests re-investigation, the Ombudsman believes re-investigation is not warranted.

(8) That is, on the undisputed facts there has been misconduct.

PART IV

SUMMARY OF THE ANNUAL REPORT FOR 1984-85

OMBUDSMAN OF NEW SOUTH WALES

Role of the Ombudsman

The Ombudsman is an independent statutory officer, responsible ultimately to Parliament, who investigates complaints about New South Wales government departments, authorities, local councils and members of the police force. Findings of wrong conduct are reported to the Minister concerned and, in more serious matters or where recommendations have been ignored, reports are also made to Parliament. The status of the Ombudsman as an avenue of final resort for aggrieved citizens is recognised in the Ombudsman Act.

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 the year ended 30th June, 1985 the following written complaints were received:

OMBUDSMAN ACT	
Departments and authorities (other than Corrective Services)	1,559
Local Councils	1,099
Department of Corrective Services	448
POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT	1,798
Outside jurisdiction	520
	5,424

In addition, Interviewing Officers receive up to forty general telephone enquiries and conduct approximately eight interviews each day.

Reports to Ministers

A total of 130 reports of wrong conduct were made to Ministers during 1984-85. Of these, 83 related to complaints against government departments and 47 to complaints against local councils. Section 25 of the Act provides for consultation with Ministers about Reports made by the Office.

Reports to Parliament

Thirteen reports to Parliament were made during the year, including reports on:

- The need to amend the secrecy provisions of the New South Wales Ombudsman Act
- Action by Sydney City Council concerning land at Circular Quay known as the Gateway site
- Problems with the Government Insurance Office
- Administrative procedures in the Traffic Branch of the Police Department.

Responses of Public Authorities to Ombudsman Investigations

The Ombudsman has jurisdiction to investigate complaints about the conduct of over 300 departments, authorities and councils. Some authorities are very helpful and co-operate fully with enquiries and investigations, while others are defensive or evasive and critical of Investigation Officers. The Annual Report cites examples in each category.

"Own Motion" Investigations

The Ombudsman can investigate a matter of public interest on his own initiative without waiting for a complaint to be received. Public interest matters that are reported in the media from time to time become the subject of own motion investigations. The past year has seen the greatest number so far of own motion enquiries by this Office. This accords with practice in other countries, particularly Sweden from where the original Ombudsman concept comes.

Secrecy

Despite two reports to Parliament this year, in addition to comments made in previous years, the restrictive secrecy provisions of the Act continue to pose huge difficulties in providing information to the public and the media about the activities of the Office. These difficulties have included an inability to meet a request from the Attorney-General for information about allegations against police and the inability to assist journalists by correcting or confirming media reports prior to publication. The Ombudsman will persist in seeking amendments to the Act, along the lines already adopted in the Commonwealth and Western Australia.

Royal Commission Inquiries

Section 19 of the Ombudsman Act confers the powers of a Royal Commissioner on the Ombudsman when making or holding inquiries. Forty-one inquiries were held during the year, one of which heard evidence from more than 50 witnesses, involving serious questions of alleged police corruption. Two others involved 45 and 29 witnesses respectively.

Sydney City Council — Brothels in Kings Cross and Darlinghurst

This issue has been closely followed by the Office since 1982. The failure of Council to carry out recommendations made by the Ombudsman in a prior investigation has been reported to Parliament. The Annual Report monitors the progress of the Council in finally putting some of the Ombudsman's recommendations into effect.

Building Overshadowing Hyde Park — Final Developments

The Annual Report notes that, had an investigation not been conducted into this matter, it is almost certain that the proposed tall building would have been constructed pursuant to a void approval. The Ombudsman's recommendations led to the issues being decided by a Court.

Forensic Laboratories

Solicitors for Mr Michael and Mrs Lindy Chamberlain complained about the procedures of the Division of Forensic Medicine of the New South Wales Department of Health. The investigation found that the failure of the Department to retain test plates or slides of the blood stain tests carried out by the New South Wales Forensic Laboratory in respect of the Chamberlain case was unreasonable and that the failure of the laboratory to retain the test slides or make photographs of them prejudiced the defence and made it more difficult for the Court to ascertain the relevant facts relating to the blood samples. Recommendations made by the Ombudsman have been adopted by the Department.

Misleading Advertising by Government Authorities

As a result of an investigation into Landcom, the Minister for Consumer Affairs advised that he would be seeking Cabinet approval in late 1984 to a Fair Trading Act which would provide citizens with similar legal protection against government authorities that exists against private corporations. The Annual Report notes this has not yet been introduced: the Ombudsman will continue to monitor progress.

Adoption of Overseas Children

A number of single women wishing to adopt children from overseas have complained to the Ombudsman about alleged delays by the Department of Youth and Community Services in making a decision on their applications. One woman who applied in 1982 is still waiting for the Department to inform her of the outcome of her application. Other complaints about delays include one from a married couple facing a wait of up to two years before intitial assessment is commenced. Investigations are continuing.

The Registry of Births, Deaths and Marriages

A spate of complaints from people within and outside New South Wales has led to an investigation concerning the alleged failure of the Registry to establish and maintain effective procedures for the tracing of documents in the system and alleged delays in the provision of certificates. Delays of up to 12 weeks have been experienced. The investigation is continuing.

Sydney Rocks Area: High Buildings

A complaint was received about the adverse affect of the Grosvenor Place development in Sydney which, if construction continues as planned, will be the largest office building in the southern hemisphere. The building was approved by the Sydney Cove Redevelopment Authority. Advice given by counsel during an investigation concluded that because the Authority had not obtained an Environmental Impact Statement nor otherwise complied with the provisions of Section 112 of the Environmental Planning and Assessment Act, Grosvenor Place is proceeding in breach of the Act. The issue has even more significance for other sites in the Rocks area. The real issue is whether the public and the Department of Environment and Planning should have a say in the development of this historic area.

Disconnection of Electricity as a Means of Debt Recovery

The Annual Report cites three examples of the threatened or actual disconnection of electricity to put pressure on people to pay for other kinds of services, such as maintenance. County Councils are obliged to use disconnection fairly, and not as a means of coercion of intimidation.

Councils and the Dog Act

Local councils have the primary responsibility for enforcement of the provisions of the Dog Act. The Office is considering a complaint about the extent to which a local council is obliged to enforce these provisions.

Drugs in Gaols

The 1984 Annual Report described the investigation of drug distribution in a major Sydney metropolitan gaol. Following this investigation, the Minister for Corrective Services wrote to the Ombudsman in April this year annoucing approval for the formation of the Internal Investigation Unit, whose primary function is to investigate and report on drug-related matters.

Protecting Prisoners Who Have Given Information

Where a prisoner is on strict protection because of giving information to the authorities, his or her transfer from one gaol to another raises a number of problems. As a result of an investigation regarding the transfer of a particularly "sensitive" prisoner, new procedures have been implemented throughout the prison system which provide greater security and proper consultation before a decision to transfer is taken.

Death of a Drug Detection Dog

The Annual Report describes the death by poisoning at Long Bay Gaol of Jupiter, a drug detection dog, and the subsequent failure of the police to investigate the incident.

Bogdan Ostaszewski Case

Mr Ostaszewski, a Polish migrant from Wollongong, has been in a coma for seventeen months following an incident when he was evicted from his lodgings and conveyed by police to the cells at Wollongong Police Station where he was found to be unconcious eleven hours later. On his admission to hospital various injuries were observed. The Ombudsman received complaints about the conduct of police and, in investigating the matter, he engaged the services of an independent expert, neurological surgeon Mr Michael Fearnside. The Ombudsman's investigation is almost complete.

Summaries of Some Case Notes from the 1984-85 Annual Report

- Twenty-seven colour transparencies loaned to the Australian Museum were lost in the post. The owner complained about the loss and the Museum's failure to reply to correspondence enquiring after them. When the Museum could find no proof that the transparencies had been posted, it paid compensation of $2,700.

- A private bus service operator in Parkes complained about the manner in which the Department of Education dealt with his tender for a school bus service. The tender was initially accepted in writing by the Department. However, the Department later accepted another tender. Upon the Ombudsman's recommendation, the complainant was paid $10,000 in compensation.

- The Maritime Services Board took six years to deal with a complaint from a tenant in the Rocks area of Sydney about dampness and cracks in the walls of a house. Some minor plastering work was done, but the complainant did not consider the repairs to be satisfactory. The investigation uncovered inordinate delay, failure to make decisions and carry them out, and failure to properly inform the complainant of the situation.

- A PhD Student at the University of New England complained that his thesis had remained untouched for five months in the cupboard of the person responsible for arranging to have it marked. New procedures for the submission and examination of PhD theses were recommended.

- Randwick Municipal Council was asked by a resident to stop noise from a car wash owned and operated by an alderman on the Council. Council inspections had shown that the car wash did not comply with set conditions, but Council neither enforced the conditions nor penalised the proprietor. Council eventually took proceedings against the owner, who was fined by the Court.

- A complainant sought assistance from the Ombudsman when, through no fault of his own, his $70 traffic ticket grew into a $268 fine. As a result of an investigation, the Secretary of the Police Department agreed to accept payment of $70 and to apply to the Attorney-General for annulment of the Court penalty.

- Two police officers, apparently carrying coats under their arms, were seen late at night walking from a nearby lane to a police car. The property was placed in the police car and they drove off. A witness complained about the incident and eventually the constables, who admitted the theft, were charged, fined and dismissed from the Police Force.

REPORT

OF THE

OMBUDSMAN OF NEW SOUTH WALES

FOR THE

YEAR ENDED 30 JUNE, 1985

VOLUME II — CASE NOTES

CASE NOTES

Table of Contents

(a) Public Authorities and Departments (see next Table for issues raised in cases)

Issues raised in Case Notes

(b) Local Councils (see next Table for issues raised in Cases)

Issues raised in Case Notes

(c) Prisons — Department of Corrective Services

(d) Complaints against Police

Case No. 1

AUSTRALIAN MUSEUM

Lost colour transparencies

Mr P. submitted twenty-seven colour transparencies of Australian insects to the Australian Museum for publication in the magazine *Australian Natural History*. After examination by the editor of the magazine, the photographs were apparently posted by certified mail back to Mr P. They were never received; it appears that they were lost in the post. Mr P. complained to this Office about the loss of the transparencies and the Museum's failure to reply to correspondence enquiring after them.

The Museum could find no proof that the transparencies had been posted, and so the Board of Trustees, on the recommendation of the Deputy Director of the Museum, approved a payment of $2,700 to Mr P. to compensate him for the loss.

Case No. 2

DEPARTMENT OF EDUCATION

Incorrect advice about donation of books

Mr F. complained that he had been treated unfairly by the Department of Education when he had tried to donate some books.

Mr F. had followed the instructions given to him by one of the Department's officers, and had sixty-one copies of the book delivered to the prescribed address. Some months passed without an acknowledgement from the Department of receipt of the books. Mr F. contacted the Department to make sure that the books had been received.

Several weeks later, Mr F. received a letter from the Director of Education for the region to which he had donated the books explaining that Mr F. had not followed the "normal practice in regard to donations". The books were to be returned to Mr F., who would have to make a personal approach to the principals of sixty-one secondary schools in the region.

An exchange of correspondence resulted, but the Department held to the view that the books would have to be returned to Mr F. for him to distribute them personally.

On receipt of Mr F.'s complaint, this Office commenced preliminary enquiries with the Department. Mr Swan, the then Director-General of Education, replied:

> "Thank you very much for drawing this matter to my attention. Whilst appreciating the reasons for my officers' actions, it is very clear that Mr F. was misinformed as to the Department's requirements and that acting on that advice he incurred expenditure which, from his correspondence, he could perhaps ill afford.
>
> Under the circumstances, I would be pleased to reimburse Mr F. for the expenditure incurred by him subject to presentation of some evidence of payment for the books. Please extend to Mr F. my apologies and ask him to contact the Secretary of the Department, Mr V. Delaney, to make the necessary arrangements."

It had previously been brought to Mr Swan's attention that the Ombudsman considered it inappropriate for the Department to ask this Office to convey its apologies. This view was reiterated in this case.

The Department contacted Mr F. and asked him to meet the Department's Assistant Secretary, Administration. At that meeting, a formal apology was conveyed and arrangements were made for Mr F. to be reimbursed for the costs he incurred in making his donation.

CASE NO. 3

Tendering procedures for a school bus route

Mr H operates a private bus service in Parkes. He complained to the Ombudsman about the manner in which the Department of Education had dealt with his tender for a school bus service.

The Department of Education had decided that a second bus service should be established on the Eugowra to Forbes school bus route. The Department of Motor Transport took the view that, where there was an extension of school services, tenders should first be called from existing authorised bus operators in the area. If a satisfactory agreement could not be reached with these operators, the Department of Education sought the Department of Motor Transport's permission to advertise a public tender. There were two authorised operators in the area, the complainant and one other (who will be referred to as Mr & Mrs A).

Previous temporary arrangements and discussions showed that the son of Mr & Mrs A would act on their behalf in the tendering for and running of the bus service. Both the complainant and Mr A. (junior) submitted tenders. The complainant's tender was the lower and written approval was given for its acceptance.

Mrs A (senior) telephoned the Regional Office and learned that the complainant's tender had been accepted. She then said that the tender submitted by her son did not reflect the wishes of her husband or herself, the authorised operators for the area. The Department decided that Mr & Mrs A. should be allowed to submit a tender. At this time the complainant telephoned the Department and was informed of the latter decision. He objected, and asked to submit a fresh tender. His request was refused.

Mr & Mrs A. submitted a tender lower than the complainant's, and theirs was accepted.

The complainant then went to his member of Parliament. As a result, the contract was cancelled and fresh tenders were called. The A.s' tender was again the lowest and was again accepted.

It was found that Mrs A.'s assertion that her son's tender did not reflect the wishes of her husband or herself was irrelevant to the tendering procedure. To allow tenders to be submitted by the son and then by the parents was effectively to accept two tenders from the same party. In addition, of course, the A.'s were at an advantage, through knowing the value of their son's tender and the fact that it had been unsuccessful.

The Ombudsman took the view that it was not proper or equitable for the Department to accept the tender from Mr & Mrs A. The original acceptance of the complainant's tender was valid, and should have been allowed to stand, despite the approach from Mrs A. The calling of fresh tenders provided insufficient recompense to the complainant.

Had approval to accept the complainant's tender not been rescinded, the resulting contract would have been for an unlimited term. The run would have been saleable, with the consent of the Department, at a significant price. On that basis, the Ombudsman recommended that the complainant should be compensated by an ex gratia payment of $10,000.

The Director-General of Education later advised that $10,000 had been paid to the complainant in settlement of his claims.

CASE NO. 4

ENERGY AUTHORITY OF NEW SOUTH WALES

Tree-Trimming Guidelines

Trees which overhang powerlines can be a safety hazard, and at times have even been the cause of bushfires. A complaint received from a tree-lover in Grafton demonstrated the sensitivity and complexity of the issues involved where safety factors and aesthetic considerations are in conflict.

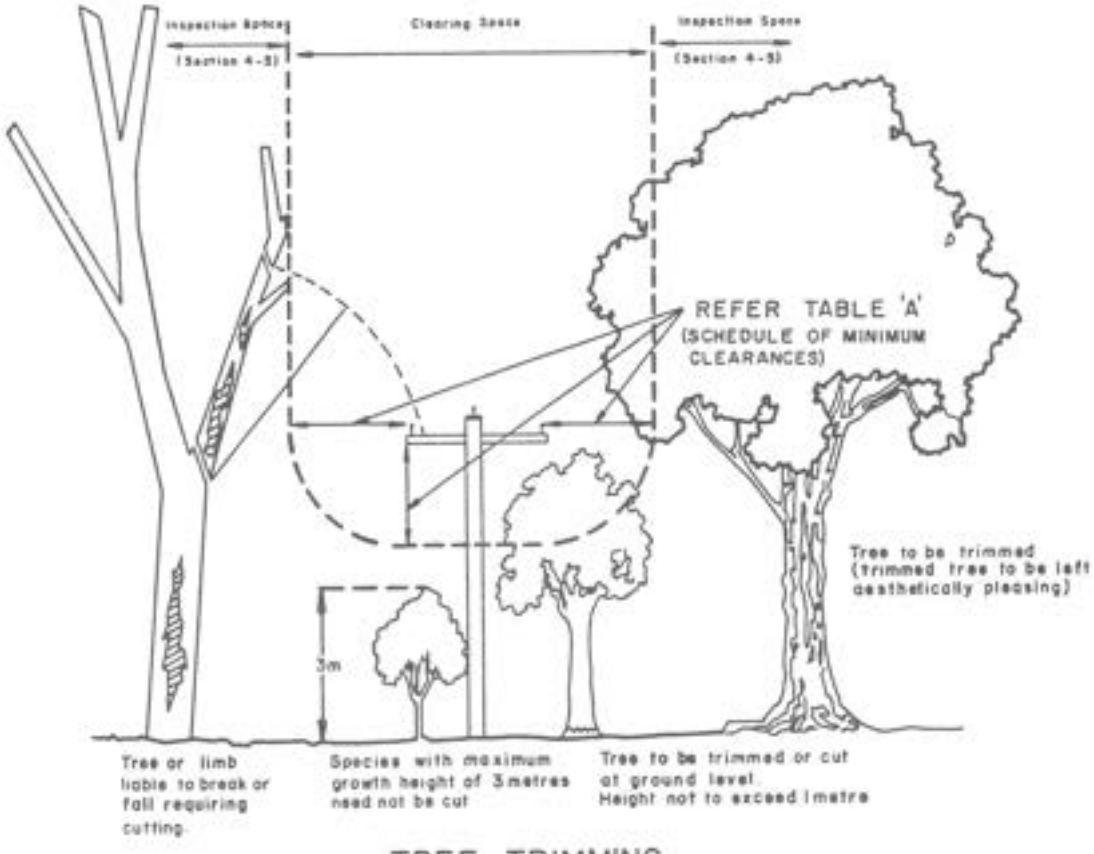
Statewide energy policies are formulated by the Energy Authority of New South Wales. At a local level, the delivery of electricity and the maintenance of powerlines are the responsibility of county councils. Enviromental factors are the concern of the Department of Environment and Planning, and at a local level, municipal and city councils. Areas of historical significance are also subject to scrutiny by the Heritage Council of New South Wales. In addition, groups of citizens and rural newspapers often have strong views about local issues. All these factors were present in a controversy about tree trimming in Grafton.

In October 1983 the Energy Authority issued a booklet entitled *Tree-Trimming and Planting near Power Lines — Guidelines for Electricity Supply and Local Government Authorities.* The guidelines concerned Regulation 38 of the Overhead Line Construction and Maintenance Regulations, under the Electricity Act. The Northern Rivers County Council received the guidelines, and in 1984 decided to arrange tree-trimming in accordance with them.

Grafton is famous for jacaranda trees. Its citizens are proud of the city's trees, and are sensitive to any threat to them. The Northern Rivers County Council, realising the issue was a sensitive one, held a demonstration outside its Office to show what effect a strict interpretation of the guidelines would have on the large and famous Cunningham Fig tree there. The diagram shows the minimum clearance recommended in the Guidelines. The Northern Rivers County Council claimed it always intended to negotiate with local councils about the clearance levels appropriate to historic trees. However, an article which appeared in a local paper gave the impression that the clearance level would be uniformly applied, disfiguring many of Grafton's trees. Enviromentally-conscious citizens, including one who complained to the Ombudsman, were alarmed, as were some members of the Grafton City Council; a photograph showed the Deputy Mayor on her knees before a partly-lopped tree.

By October 1984 a full-blown local controversy was underway. In November 1984, demonstrators interrupted the lopping of trees, and an anti-lopping demonstration was held under the Cunningham Fig tree.

On 20 November 1984 the Minister for Planning and Environment issued an order under Section 136 of the Heritage Act to prevent any lopping in Grafton for 28 days. A notice of a dispute between the Grafton City Council and the Northern Rivers County Council led to the appointment of a mediator by the Minister for Local Government.



TREE TRIMMING

MINIMUM CLEARANCE DIAGRAM

On 27 November the two Councils reached an agreement as a result of the conference arranged by the Minister for Local Government. In essence, they agreed that, once the Heritage Order was lifted, some trimming could proceed, but that alternatives could be considered in the case of significant trees. The City Council would refrain from planting trees under powerlines. The Heritage Order could be lifted on 7 December 1984. Given the strength of feeling in Grafton, and the different viewpoints of the two councils, this agreement was a satisfactory one.

As to the policy issues involved, the Energy Authority of New South Wales told the Office of the Ombudsman that the guidelines are under review. One option being considered is the adoption of two different standards of trimming, one for high-risk bushfire areas, and another for low-risk urban areas such as Grafton.

CASE NO. 5

GOSFORD DISTRICT HOSPITAL

The qualifications of Dr S.

Dr S., and ear, nose and throat specialist, complained that the Board of Directors of Gosford District Hospital had failed to consider various applications by him for appointment as a Visiting Medical Practitioner in a fair and unbiased manner. Such an appointment would have given Dr S. the right to treat his own patients in Gosford Hospital.

Over a period of five years, the complainant made three applications for appointment as a Visiting Medical Pracititioner at the Hospital and sought reconsideration of those applications on two occasions. Each application was refused.

While the complainant practised in Gosford, he was outspoken about certain practices adopted by local doctors, notably that pensioners were allegedly being coerced into joining private medical funds; this placed him in conflict with many of his local colleagues. The complainant alleged that his applications for visiting rights to the hospital were refused on the basis of that conflict, rather than on proper criteria.

In the course of investigating this complaint, the circumstances surrounding each of the complainant's applications were closely examined. The course of events following the complainant's application in November 1980 was of particular concern. Of the eight references supporting the complainant's application of November 1980, seven were excellent and one mediocre. The mediocre reference was not from an ENT surgeon and did not cast doubt on clinical competence. The complainant had been told that if he could show that he had fostered the confidence of a body of referring doctors, he would have a better chance. (The complainant had been previously advised that lack of such confidence was one of the reasons for an earlier refusal to appoint.) As a result, 26 letters of support for the complainant were received from local practitioners. It was clear that by this stage he had complied with all requests made of him, and had acquired impressive references.

The Medical Superintendent took it upon himself to seek comment from specialist anaesthetists. The comments were adverse to the complainant's application. The complainant was not made aware of these adverse reports prior to the decision, nor given the opportunity to answer the criticism.

When the names of referees are given to support an application, an applicant is clearly indicating that he agrees that such people may be contacted, and that he must suffer the consequences of any of their comments. However, when a Committee member goes beyond these referees and seeks comment from others, and such comment is derogatory, the Ombudsman believes that such derogatory statements (suitably made anonymous) should be made known to the applicant, and the applicant given the opportunity to rebut them. This applied especially to the complainant's case: it was obvious that there was considerable ill-feeling against the complainant among some members of the local profession, for reasons totally divorced from the applications in question.

The then Secretary of the Department of Health made the following comment on the complainant's case:

> "The position is that the Hospital made decisions on the facts and rejected all three applications. There is no direct evidence of unfairness by the Hospital Board in its assessment of his application. However, given the benefit of hindsight and the likely inferences to be drawn from the facts and circumstances, I tend to the view that the Hospital did make an error of judgement in relying as it did repeatedly on the advice given to it by the Medical Advisory Board which did not provide for an independent assessment of Dr S.'s clinical compentency by an ENT specialist ..."

A further factor which should have prompted the Board to seek an independent assessment of the complainant was the illogical conflict of evidence as to clinical competency. Seven referees (five being ENT Surgeons) had commented in glowing terms about the complainant's competence. This is what one would expect from a surgeon possessing such qualifications. On the other hand, four local anaesthetists had contended that the complainant was incompetent. These two sets of views cannot be logically reconciled. One possible view that the Board should have been alert to was that the opinion of local anaesthetists may have been coloured by local, extraneous issues.

The Deputy Ombudsman found the conduct of the Hospital Board to be wrong in terms of the Ombudsman Act, in that it repeatedly relied upon the advice of the recommending committee concerning the complainant's applications for appointment, in circumstances where it was unreasonable to do so. The Board should have sought an independent assessment of the complainant's clinical competence.

It was recommended that, should the complainant apply for appointment to another hospital, the Department of Health request the Board of Directors of the hospital concerned to seek an independent assessment of the complainant's clinical competence. Subsequent to the investigation of this matter, the complainant was appointed as a Visiting Medical Practitioner to Port Macquarie Hospital.

Sections 33G to 33P of the Public Hospitals Act provide for a right of appeal to the Minister for Health where an application for re-appointment as a Visiting Medical Practitioner is declined or made subject of conditions, or an existing appointment is suspended or terminated. The appeal can be determined by the Minister, or he may decide to appoint a Committee of Review to determine the appeal. There is not right of appeal in respect of initial applications for appointment.

The Deputy Ombudsman recommended that the Public Hospitals Act be amended to provide for a statutory right of appeal in the cases of refusal to approve initial applications for appointment as Visiting Medical Practitioners. Such right should be similar to that provided in sections 33G to 33P of the Public Hospitals Act.

As a result of this recommendation, the Minister for Health asked the Department of Health to review this question and to consult with the Ombudsman and the Australian Medical Association on the issues involved and the practicality of introducing some changes to the existing principles. The Department has referred the matter to the AMA and is awaiting the Association's response.

Case No. 6

DEPARTMENT OF HEALTH

Alleged Harassment

Mrs J., a dispensary assistant employed by the Prison Medical Service, first complained to this Office in December 1983 about the dispensing of drugs within the Prison Medical Service by unauthorised persons. Mrs J. was concerned that nurses employed by the Service were being allowed to dispense pharmaceuticals without proper supervision by a pharmacist. In particular, Mrs J. suggested that this practice occurred during strikes by custodial officers, when the responsibility for dispensing drugs was left entirely to nursing staff; this included the dispensing of medication for prisoners held in the cells at the then Central Court of Petty Sessions.

In response to preliminary enquiries from this Office, the Secretary of the Department of Health outlined numerous practical difficulties facing nursing staff of the Prison Medical Service; for example, since prisoners were locked in their cells during strikes by custodial officers, nurses had to take medication to the prisoners, rather than have prisoners come to the clinic. In no case was medication dispensed without the authority of a medical practitioner. In the light of this information, the Ombudsman discontinued enquiries, on the basis that there was no prima facie evidence of wrong conduct.

In July 1984 Mrs J. again wrote to this Office, after receiving a letter from the Prison Medical Service in the following terms:

> "Due to the change of your industrial classification from 40 hours per week to 35 hours per week an overpayment of $1148.35 has occurred.
>
> I regret that this situation has occurred and the details of the situation was discussed with you and the Administrative Officer on 4th June 1984.
>
> What basically occurred is that when your classification was changed to a 35 hour week the Health Department Industrial Division arranged for the computer service to change its base data and the hours did not change in your employee computer file.
>
> Therefore the overpayment occurred over 13 pay periods.
>
> It is necessary under audit requirements that all overpayments must be recovered.
>
> I would therefore like you to indicate an agreeable method to repay the debt."

Such a matter appeared to involve the conduct of a public authority relating to matters affecting a person as an officer or employee. Such complaints are outside the jurisdiction of the Ombudsman by reason of Clause 12(b) of the Schedule 1 to the Ombudsman Act. Mrs J. went on to complain that she believed she was being victimised because of her previous complaint to this Office. She maintained that staff employed at the Parramatta Gaol pharmacy under the same classification as her own were continuing to work and be paid for a 40 hour week.

This aspect of the complaint was within the jurisdictionof the Ombudsman, who regards complaints of victimisation, harassment or intimidation of complainants most seriously. Accordingly, preliminary enquiries were commenced with the Department of Health. The enquiries revealed the following information:

> "1. In late 1983 the Industrial Relation Division of the Department of Health updated the computer payroll system. In the course of this task it was discovered that dispensary assistants were required to work a 35 hour week rather than a 40 hour week.
>
> 2. In December 1983 the computer payroll data were adjusted to reflect the fact that a full-time employee was required to work only 35 hours per week. The salaries personnel of the Prison Medical Service failed to make this adjustment in the case of Mrs J.
>
> 3. Mrs J. continued to be paid for a 40 hour week until May 1984, until the mistake was discovered resulting in the overpayment referred to.
>
> 4. An inspection of attendance books by inspectors of the Southern Metropolitan Regional Office on 6 September 1984 confirmed that Mrs J. had in fact worked a 35 hour week.
>
> 5. No dispensary assistants were employed at Parramatta Goal pharmacy, contrary to the belief of Mrs J. At Cumberland Hospital (formerly Parramatta Psychiatric Centre) the situation was the same; that is, employees were working 35 hours per week, but their salaries were paid on the basis of a 40 hour week until December 1983, when the computer payroll data were amended."

The preliminary enquiries failed to reveal any evidence of victimisation or discriminatory treatment of Mrs J. by her employer as a result of her previous complaint. Accordingly, enquiries were discontinued.

CASE NO. 7

HOUSING COMMISSION OF NSW

Failure to rectify seepage problem

A complaint was made by Mrs L., a tenant of a house in the northern metropolitan area, that for four years the occupants had had a continuous problem with water seeping up through the floor in two places on the ground level. Mrs L. said that water seeped in every time it rained, and that, shortly before writing to the Ombudsman, she had had to cancel the family's holiday because, in her words, "It was necessary for someone to be here to continually mop up the water". The complainant had approached the Housing Commission on several occasions, and Commission staff had dug up the yard and laid pipes in an attempt to rectify the problem, but without success. Commission officers had returned when Mrs L. notified them that water seepage was continuing; in fact, she had been told to ring the Commission every time it rained, "to remind them". In her letter of complaint to the Ombudsman Mrs L. wrote, "All I want is the seepage stopped and the inconvenience to me in mopping, having to stay home (from work), and lifting the new carpet out of the way of the wet towels and water".

The Housing Commission reported to this Office that water penetration had been a problem in some units in the group of town houses, of which Mrs L.'s was one, since soon after they were completed, because the units were located on a rocky elevated site, making effective drainage difficult; extensive efforts by Commission technical officers had failed to prevent seepage from rocks behind the dwellings entering some of the houses.

The Housing Commission said that the advice given to Mrs L. to contact the Commission when moisture was coming in was not, as she claimed, to remind them; rather, with a problem of this kind, it was only possible during and immediately after periods of rain to establish the source of seepage, or to check whether previous efforts to rectify the situation had been effective.

The Commission's report went on to say:

> "Since receipt of your enquiry, arrangements for further investigation have been made, and whatever remedial action is considered appropriate will be taken. In the meantime, I can only apologise for the inconvenience Mrs L. is suffering and for the unavoidable delay in finding a permanent solution to the problem."

This information was sent to Mrs L., who wrote to say that she was optimistic that the problem would be rectified. However, two days after she wrote that letter, the most torrential rains in thirty years hit the Sydney area. Mrs L. rang the Ombudsman's investigation officer handling her complaint to say the house was flooding again. The officer immediately requested a report on the current position from the Housing Commission. The Commission later said that internal seepage under the house had been rectified, that external work was progressing, and that drains and concrete paving would be completed shortly.

Soon after that report, Mrs L. wrote:

> I can happily state that all work has been completed, all we now need is rain to see if it will work. I thank you most sincerely for your assistance.

Again, two days after Mrs L. wrote this letter, an exceedingly heavy downpour hit the metropolitan area. The Ombudsman's investigation officer, being about to finalise the file, rang the complainant to see how the works had stood up to the rain. Mrs L. reported that everything was absolutely satisfactory, and that there had been no more flooding. In this instance the Housing Commission responded positively to initial enquiries, and did all it could to rectify the problem which prompted the complaint. The complaint was therefore considered to be resolved.

CASE NO. 8

DEPARTMENT OF INDUSTRIAL RELATIONS

Delay in processing Theatrical Agent's Licence

Mr H. complained about delay in processing his application for a Theatrical Agent's Licence. Mr H. lodged his application with the Department of Industrial Relations and paid the required $40 fee on 18th April, 1983. He received no acknowledgement from the Department until six months later, when an inspection of his residence was carried out by an officer from the Department.

Preliminary enquiries were made by this Office with the Under Secretary of the Department. He claimed that the main reason for the delay was a shortage of staff at the Lismore District Inspectorate. Mr H.'s application had been referred to that office for investigation.

A formal investigation was then begun, and showed that the Department did not notify Mr H. at any time as to:

1. The receipt of his application by the Department, and the procedures normally followed in its processing;

2. The possible delay in the processing of his application as a result of staffing problems at the Department's Lismore Office; and

3. The delay that did in fact result because of the staffing problems at Lismore.

The following practices of the Department were found to be wrong and unreasonable:

a The failure of the Department to acknowledge receipt of applications;

b The failure of the Department to inform Mr H. of the delay in its processing of his application; and,

c The failure of the Department to provide reasons for such delay.

The Deputy Ombudsman recommended that the Department institute an administrative procedure whereby applicants for such licences were notified by the Department of its receipt of their applications. He further recommended that, where there was a delay in the processing of an application, the applicant be notified of the delay and the reasons for it.

Following the Deputy Ombudsman's report and recommendations, the Department implemented a new procedure. Applicants are notified of receipt of their applications by way of a letter, which also gives details of the procedures to be followed by the Department in determining their suitability to hold such a licence, and the time for reaching a decision. The letter also gives a telephone number for enquiries about the progress of applications.

CASE NO. 9

MARITIME SERVICES BOARD

Delay in carrying out repairs to a house

Mrs M. was a long-term tenant of a house in Kent Street, Miller's Point. This was one of several properties for which the Maritime Services Board was responsible until October, 1982, when a number of buildings in the Observatory Hill Resumed Area were transferred to the Housing Commission. Mrs M. complained to this Office in late 1983 that the Board had failed to carry out repairs to her house. She alleged that since 1976 she had been complaining about a damp problem in the house and about cracks in a number of walls. In July, 1976 she wrote to the Board to say that the walls in one of the upstairs bedrooms were cracking and in need of repair.

Investigation revealed that the Board's file on this matter had been shuttled back and forth between seven of the Board's officers from the time Mrs M. wrote to them in July, 1976 until December, 1978. The Board did not write to Mrs M. about the cracked walls during this two and a half year period, and no action was taken to repair the cracks until the middle of 1979. After an inspection in December, 1978, the Board's Building Inspector submitted a report on work to be done to the property. The report stated that the northern side wall of the property showed cracks in the first floor bedroom and that a gap in the wall adjacent to the stairs indicated that the foundations may be resettling. The Inspector's report went on to say that "no further maintenance was required at this stage" and included a notation that his report should be "attached to the maintenance and repair file and returned to the Sub-Branch". A request was made on the file that papers be resubmitted "for further information report" in June, 1979 — six months later.

In July, 1979 a "job sheet" was issued for repairs to be done to the cracks in the bedroom wall. The Board's repairmen made an attempt to repair the cracks in the upstairs bedroom by plastering over the existing cracks. This was the first action taken since Mrs M. had complained exactly three years earlier. Mrs M. was convinced that the plastering work done was not adequate, as the cracks were still visible. She did not agree to having the Board's painters paint over this work until the cracks had been repaired satisfactorily. Three months later, in September, 1979, another building survey report was made by the Board's Building Inspector. This stated in part:

> "Major repairs will be required in the near future. The north side wall to the structure has dropped considerably, causing cracks in the external brick work and the internal plaster walls. It would appear that the foundation supporting this wall is subsiding and the tenant reports that the cracks are slowly becoming worse. Continued subsidence has caused cracks to reappear. Please attach papers to survey file and return to this Sub-Branch."

In December, 1979 the Board's Architect reported on the north wall subsidence of the house. In February, 1980 a report on behalf of the Design Engineer recommended that the walls be propped to control movement. Mrs M. received no further information from the Board about the cracking in the walls, and in November, 1981 she wrote a letter directly to the Secretary of the Board. At this juncture the Secretary requested on urgent report from his staff, and on 5th January, 1982 Mrs M. received a letter stating:

> "It is advised that the Board proposes carrying out work involving the shoring of external wall, the internal plastering and painting early in 1982."

Nothing happened. In the middle of September, 1982 Mrs M. wrote again to the Board, asking why no work had been done and stating that she would contact the Health Department. A few days later, the Board's workmen came to the property and carried out external shoring of the northern wall to prevent further cracking of internal walls. This involved placing a large timber construction between that house and the adjacent house. Repair of internal cracks and painting of the wall was not done. It was just over six years from the time of the initial complaint about cracks that this work was done. Some minor plastering work had been performed in the interim, but Mrs M. did not consider the repairs to be satisfactory.

Concurrently with the complaint about cracked walls first made in 1976, Mrs M. had complained about dampness problems. Inspectors from the Board had come to inspect the dampness problem in the bathroom, the backyard and the lounge room. They had found that the ground was very damp. The joists under the floor in the lounge room were inspected and were found to be in sound condition. In February, 1980 the drains and sump in the property were cleared in an attempt to prevent flooding of the bathroom floor and to end dampness under the house. This action has taken four years after Mrs M.'s initial complaint about that problem.

This Office's investigation of Mrs M.'s complaint uncovered inordinate delay, failure to make decisions and carry them out, and failure to properly inform the complainant of the sitiuation.

One comment on the Board's file stated:

> "Residentials in the Rocks were very old and poorly designed. Poor drainage, underfloor ventilation, damp prevention and old style materials all created buildings requiring expensive care. These buildings needed major renovations to bring them to a comfortable standard. Maintenance of the O.H.R.A. buildings (which were handed over to the Housing Commission in October 1982) had always been funded from Consolidated Revenue, and the annual allocations had been only sufficient for running repairs and not for major renovations."

No explanation of this was put to Mrs M. She retained the impression that the Board simply did not have any interest in the situation which she had brought to its attention. The then President of the Board stated that the repairs required were of comparatively low priority; that the structural problems did not constitute a danger, but where of an aesthetic nature; that the dwelling was quite comfortable and habitable; and that, in any event, the house was low cost accommodation. In the view of this Office, these considerations did not justify the administrative inefficiencies in the Board's handling of the matter.

A report of wrong administrative conduct was made about the Board's actions, on the grounds that it failed to communicate with the complainant; that it failed to carry out repairs within a reasonable time, when it considered the repairs necessary and had indicated that they would be done; and that it failed to investigate the delay in carrying out the repairs. This Office takes the view that, when a public authority is acting as landlord, the same basic responsiblities and obligations should apply to that authority in its dealings with properties and tenants as apply to landlords in the free market. It should not allow a maintenance matter to drag on, unresolved, for years.

The recommendations made in the report of the investigation included no specific recommendations about Mrs M.'s property, as the responsibility for it had by then passed to the Housing Commission. However, it was recommended that repair requests be acknowledged in writing within thirty days; that an indication be given of when an inspection might take place; that within thirty days after the inspection a letter be written to the person to inform them of the results and, if work were scheduled, to indicate approximately when it might be carried out; that, when repairs or maintenance work had been scheduled and the tenant notified, the work be done at the time stipulated; that the Board implement procedures to monitor any delay in inspection and subsequent repair work to properties, to enable it to notify tenants; and that the Board write to Mrs M., to apologise for its failure to satisfactorily carry out the repairs to her premises and to advise her of the reasons for the delay. The Board immediately wrote to Mrs M. in those terms. The Board also instituted full procedures for recording and monitoring the progress of repair requests, and for keeping the tenant informed of the situation.

CASE NO. 10

PUBLIC ACCOUNTANTS REGISTRATION BOARD

Removal of accountant's name from the register

Mr M. was registered as a public accountant from 1973 until the beginning of 1983. He made a complaint to this Office when he found that his name had been removed from the register after his application form and cheque were not received by the Public Accountants Registration Board. Every public accountant has to pay a roll fee before 1st January each year. Mr M. maintained that he had posted his application form and cheque at the beginning of December and had expected his reregistration to go ahead as a matter of course, although he had not requested a receipt from the Board. After his name was removed from the register, he was obliged to return his registration certificate within fourteen days. This Office took the view that the Board should have sent a reminder notice or made a telephone check before cancelling the professional accreditation certificate of an accountant who had been practising for a decade.

The report of wrong conduct found that it was unfair and unreasonable that the Certificate of Registration later issued to Mr M. gave his date of registration as 27th May, 1983, even though that was in accordance with the law, as it stood. The report recommended that urgent steps be taken to introduce a series of amendments to the Act; these had already been proposed by the Board to the Attorney General.

Mr M.'s certificate was later noted, "First registered 14th May, 1973". Following further recommendations in the report, the Board telephoned registered public accountants whose fees had not been received by the prescribed date, to find out whether the public accountant had intended not to re-register.

CASE NO. 11

PUBLIC TRUST OFFICE

Unreasonable delay in distributing estate

The complaint was the Public Trustee had been slow to distribute an estate and had not given accurate information about the proposed time of distribution to the beneficiaries.

Probate was granted to the Public Trustee in September, 1982. The beneficiaries had not given instructions about the sale of the property in the estate, and in February, 1983 the Public Trustee wrote to the beneficiaries asking their wishes. In June, 1983 the property was auctioned, in August contracts were exchanged, and on 30th August the Public Trustee informed the complainant of this. By 5th October, 1983 the transaction was complete.

In January, 1984 the complainant wrote to this Office, saying that she had not been informed of the distribution since August 1983, when the Public Trust Office informed her of the exchange of contracts on the property. Between November, 1983 and January, 1984 the complainant had rung the Public Trust Office on four occasions, asking for further information. She believed that her telephone calls had yielded only inaccurate and misleading information.

The Public Trustee, in responding to the investigation by this Office, commented on matters that were specific to the estate under consideration and on other things that concerned the system of operation of the Public Trustee Office. Part of the delay was explained by the fact that the beneficiaries had not given clear instructions about the sale of the property. As to the further delay between the transfer of title to the purchaser in October, 1983 and the distribution of the proceeds of the estate to the beneficiaries in February, 1984, the Public Trustee suggested that this was caused by a clerical mix-up and the fact that the Branch Manager had been in hospital.

The Public Trustee relied on enquiries by the beneficiaries to monitor files, rather than on regular reviews. This Office made a number of recommendations in its final report, the major ones being:

1. That the Public Trust Office ensure that reasonable and reliable information is made available to interested parties concerning the time needed to distribute an estate.

2. That the Public Trust Office ensure that all enquiries, and any advice given, be noted on the file.

3. That the Public Trust Office monitor the processing of estates so that no undue delays occur.

These recommendations were implemented by the Public Trust Office. Staff were instructed to review estate files every two months after Grants of Administration had been obtained, and to monitor the progress of files if they had been in the Accounts Section for longer than 14 days.

CASE NO. 12

DEPARTMENT OF PUBLIC WORKS

Failure to properly handle construction of effluent main through oyster lease

Mr H. complained to the Ombudsman about the conduct of both the Department of Public Works (Public Works) and the Fisheries Division, Department of Agriculture (Fisheries) in relation to an oyster lease owned by his wife.

In order to construct the Woy Woy effluent main, it was necessary for Public Works to construct a pipeline diagonally across Mrs H.'s oyster lease. An on-site meeting was held, attended by Mr H. and representatives from Public Works and Fisheries. The only record kept of the meeting was a minute prepared by one of the Public Works officers. During the course of the investigation, there was conflicting evidence as to precisely what took place at the meeting. However, the Deputy Ombudsman was satisfied that the complainant had been told by a Public Works representative that Public Works would take over the lease while the pipeline was built, and that the complainant could not cultivate the lease during that time.

The complainant alleged that he submitted a claim for $45,000 compensation to Fisheries in 1980. The original compensation claim could not be found on any of the files inspected, and the Fisheries officer involved denied that he received the claim. However, it was established that Public Works knew of the existence of a claim in 1980.

Construction of the pipeline commenced soon after March, 1981. The complainant noticed the dredge leaving the area on 27th November, 1981. He assumed that most of the work was completed, but that there was still some work to do on the bank. He allowed the lease to stand uncultivated for 12 months (1982) to allow any sedimentation to settle; he contends that this was recommended to him at the on-site meeting on 20th May, 1980.

The complainant had heard nothing by the end of 1982, and had his solicitor write to the Department of Public Works on 22nd February, 1983. A copy of the compensation claim dated 18th August, 1980 was attached. The letter set out the facts, and advised that the complainant had allowed the period of 12 months to elapse. When no reply to this letter had been received by April, 1983, the solicitor wrote to the Fisheries Inspectors at Woy Woy on 19th April, 1983. It was again stated that Mr H. had allowed the 12 months to elapse. On 26th July, 1983, the solicitor wrote again to Fisheries. It had by then been suggested orally to the complainant that he could cultivate the lease, and the letter sought early confirmation of that advice.

On 23rd December, 1983 Public Works replied to the solicitor's letter of 22nd February, 1983 as follows:

> "The pipeline through your client's lease area was a public work under the Public Works Act and your client has no entitlement to compensation."

Construction concluded at the end of 1981. Public Works' files suggested that the complainant had been told that he could not cultivate during construction. Public Works was aware that a compensation claim existed, and the Gosford office would have known that no cultivation had taken place during construction. Public Works also knew that the complainant had intended to derive income from the lease. Given all these circumstances, it was found that Public Works had an obligation to advise the complainant when construction was finished, and when cultivation could safely commence. Public Works had taken over the lease for its own purposes, and so it was Public Works which had the responsibility to obtain that information and communicate it to the complainant.

It appears that Public Works is legally able to use land such as the lease area for the purpose of construction of a public work without being liable to pay compensation. However, this legal right carries with it certain moral obligations. In circumstances where it was clear tha the proprietor intended to derive income from the property, one such obligation was to advise the proprietor when construction ended and when the income deriving activity could recommence.

It was found that:

- Fisheries officers should have kept a written record of the original on-site meeting.
- Public Works had failed to deal promptly and adequately with correspondence from the complainant's solicitor.

The Deputy Ombudsman recommended that the complainant should be compensated by an ex gratia payment of $17,000 for loss of potential profit during the period following construction, when Public Works failed to advise that construction had concluded and cultivation could commence.

The Secretary of the Public Works Department later advised that $17,000 had been paid to the complainant.

CASE NO. 13

STATE RAIL AUTHORITY

Overcharging for quarterly tickets

Mrs B. complained to the State Rail Authority about bus quarterly tickets which she had purchased from a railway ticket office. She maintained that she had been sold the wrong quarterly ticket for the journey which she took from home to work each weekday; the one she had been sold was neither the correct nor cheapest ticket for her particular journey.

The State Rail Authority acknowledged her letter of complaint, but when the complainant heard nothing further after three months, she wrote a further letter to the Authority, seeking an explanation. Another month passed without a reply, and Mrs B. approached the Office of the Ombudsman for assistance.

The complaint concerned quarterly tickets sold over a period of approximately three years, during which time a new system of periodic ticketing had been introduced by the Urban Transit Authority. Moreover, the name of the particular ticket purchased by the complainant had been changed once more during that period.

It emerged that the complainant was confused by the old system of periodic ticketing; one reason for the introduction of the new system of ticketing was to overcome the difficulty experienced by some members of the community in understanding the old system.

After extensive investigation by the two Authorities at the instigation of the Ombudsman's Office, and further explanations by the Office to the complainant of the calculation of the correct charges, the complainant received from the Authorities a refund of $266.20.

As the Authorities have a new system of zoning for periodic tickets, and as the Authorities made good the overcharging of Mrs B., the Ombudsman decided that the payment made to the complainant was a satisfactory resolution of the complaint.

CASE NO. 14

UNIVERSITY OF NEW ENGLAND

Marking of a Ph D thesis

Mr B. complained to the Ombudsman that the University of New England had not followed proper procedures for the marking of his Ph D thesis.

The procedure at the University is that Ph D theses are delivered by candidates to the Deputy Academic Secretary (DAS), who is the secretary to the Ph D Committee. An established set of procedures for the submission and examination of theses had existed for some time. It was the responsibility of the DAS's Secretary (the Secretary) to carry out these procedures.

In this case, it was found that the complainant's thesis was submitted to the office of the DAS on 28th July, 1983. Examiners had already been approved by the Ph D Committee on 17th September, 1982. The first step in the marking procedure to be carried out by the Secretary was to send standard letters to the examiners, asking whether they agreed to examine the thesis. If they agreed, a further letter and a copy of the thesis was sent to each examiner. However, on this occasion, the required procedures were not followed. Copies of the complainant's thesis were placed in a locked cupboard by the Secretary, and no letters were sent to the examiners.

Early in December, 1983 the Secretary told the DAS that the copies of the complainant's thesis were in a cupboard in the DAS's office, and that no action had been taken on them. The DAS forthwith sent letters to the examiners, asking them whether they would agree to examine the thesis. The DAS advised the Associate Professor who had supervised the complainant's thesis of the situation. The Associate Professor informed the complainant that there would be a delay in obtaining a result on the thesis, as some examiners had not yet received their copies.

The Deputy Ombudsman concluded that it was unsatisfactory for the complainant's thesis to have remained in the Secretary's cupboard for nearly five months, and that ultimate responsibility for the delay rested with the DAS, because the Secretary worked under his control and supervision. If the DAS found his Secretary to be less than efficient, then he should have increased the level of supervision.

The Deputy Ombudsman recommended that, in the future, procedures for the submission and examination of Ph D theses should be carried out by an officer more senior than the Secretary. He also recommended that the procedures be altered so as to provide for the establishment of a comprehensive register for Ph D theses, in which each significant procedural step would be recorded.

The Vice-Chancellor of the University has advised that the recommendations have been implemented.

CASE NO. 15

WESTERN LANDS COMMISSION

Failure to reply to correspondence

A complaint was made to the Ombudsman in April, 1984 that there had been a long delay by the Western Lands Commission in replying to questions about the Commission's policy on the clearing of mallee scrub in the Western Division of New South Wales.

The complainant said that in November, 1982 he wrote to the Western Lands Commissioner seeking information about applying to clear mallee. The Commission acknowledged the complainant's letter, but did not answer the questions raised in it. Only after an approach from this Office did the Commission respond in any way to the complainant's queries.

In seeking to explain the delay, the Commission referred to lack of staff and a backlog of work. The Commission said that the Joint Parliamentary Select Commission of Enquiry into the Western Lands Commission had placed great demands upon the Commission's staff. It was also expected that the Joint Parliamentary Select Committee might shortly bring down its report; that might contain recommendations that would enable a reply to be made.

Despite the explanations offered by the Commission, the Deputy Ombudsman concluded that standard administrative procedures dictate that it was unreasonable for the complainant not to have received anything other than a standard acknowledgement for 18 months.

In September, 1982 the former Minister for Local Government and Lands had advised this Office that the Management Review Branch of the Department would survey the Western Lands Commission. This review was carried out in 1983, concentrating upon the procedures of the Commission, clerical staff levels and functions and the management structure. Some of these procedures were said to have been implemented before the review team reported, but it appeared that delay was still occurring.

In reply to the Deputy Ombudsman's draft report, the Minister now responsible for the Commission, the Minister for Natural Resources, said that she was aware of the administrative and staffing problems of the Commission; steps were being taken immediately to remedy some of the unsatisfactory aspects of the administration, but such an overhaul would take some time to overcome all the problems. The matter will be reviewed by this Office at an appropriate time.

CASE NO. 16

HAWKESBURY SHIRE COUNCIL

Levying of additional charges by a council

Two complaints concerned the imposition by Hawkesbury Shire Council of $30 fees for initial site inspections prior to the processing of certain building applications. In one of these matters, the Council also retained a portion of a damage deposit (paid by an applicant for approval of a building application) to defray the costs associated with the inspection of kerbing, guttering and footpaving prior to and at the completion of construction works carried out by the complainant.

The issue was whether a council is justified in charging an initial site inspection fee (over and above a building application fee) prior to the processing of building applications, or in retaining a portion of a security deposit.

The levying of additional charges by a council is discouraged by the Department of Local Government. The fees and charges which can be levied for building applications are set out in clause 9.1 of Ordinance 70. Although inspections are required by Ordinance 70 (clause 3.3) upon completion of construction work, and may be necessary when considering a building application and during the erection of a building, no separate fees are specified in Ordinance 70 to cover these inspections.

There is a strong argument that, prior to approving almost any building application, it would generally be essential, if a Council is to fulfil its responsibilities, for the site of proposed works to be inspected by councillors and/or Council servants. In many situations inspections would be an essential prerequisite to determining whether: the site is subject to flooding, subsidence or slip; the erection of the building would adversely affect the drainage of adjoining sites; or whether trees on the site should be preserved.

Most Councils ensure that an inspection is carried out prior to approval being given to a building application. Such inspections include an assessment of the condition of kerbing and guttering and footpaving prior to the commencement of construction works. For example, Council advised this Office that:

> "... it is necessary to inspect sites prior to the assessment of Building Applications in order that Council may properly exercise and perform its duties and powers under the provisions of the Local Government Act ..."

There is no provision in the Local Government Act 1919 for a Council to retain a portion of a security deposit to off-set the costs of inspection of kerbing and guttering and footpaving or to charge a separate fee for this purpose. When a Council has been notified that the construction of a building has been completed, the Council is required to cause an inspection of the building to be carried out to determine whether or not it has been erected in accordance with Ordinance 70 and without material deviation from the approved plans and specifications. It would appear to be unnecessary and inefficient for a second separate inspection to be carried out to assess the condition of kerbing and guttering and footpaving. These inspections are an integral part of Council's consideration of building applications; they cannot be separated from provisions of Ordinance 70. The inspections would therefore, in normal circumstances, be covered by the fees referred to in clause 9 of that Ordinance. As no separate inspections are necessary, there is no need to retain a portion of security deposits to cover the cost of such inspections.

In the report on the first of these complaints, it was recommended:

1. That Council refund the $30 inspections fee paid under protest by Mr M.

2. That the Department of Local Government and Lands determine the matter and issue guidelines as to the practice Councils should follow in regard to the levying of charges in respect of the consideration of building applications.

3. That Council desist from charging site inspection fees except in exceptional circumstances such as those specified by Holland J., until guidelines are issued by the Department of Local Government and Lands.

In response to this report, the then Minister for Local Government and Lands, Mr A. R. L. Gordon, M.P., advised Council that he concurred with the findings contained in the draft report from this Office and recommended that Council:

— refund the inspection fee which was the subject of complaint;

— refrain from charging site inspection fees in future; and

— ensure that its levying of building fees is strictly in accordance with the terms of Ordinance 70 under the Local Government Act.

In response to this advice, the Council resolved to adopt the recommendations of the then Minister for Local Government and Lands.

In the report on the second of these complaints, it was also recommended that the Department of Local Government issue guidelines as to the practice that Councils should follow in regard to security deposits.

In response to this report, the Minister for Local Government agreed that the retention of portion of the security deposit to cover the cost of inspection is ultra vires.

He went on to say:

"It is considered that to issue guidelines to all councils may be premature at this stage as this practice appears to be confined to the particular council in question.

If the council is desirous of increasing income to offset its administration cost associated with building regulatory control a more appropriate action would be for the council concerned to make a submission to my Department outlining reasons for any proposed change to the existing fee schedule. Please also be advised that the existing fee provisions of Ordinance 70 are scheduled to be reviewed this year and any submission which the Council might desire to make would be taken into account in that review."

CASE NO. 17

LANE COVE MUNICIPAL COUNCIL

Hidden Road Sign

It is often the case that, in the course of preliminary investigations, a number of matters which might otherwise be made the subject of a full investigation are resolved.

One such instance, which highlights a slip between decision and implementation, involved Lane Cove Municipal Council.

Over a number of years, certain residents of one area had been agitating for the erection of a traffic sign to warn of a particular traffic hazard known to the locals, but generally unnoticed by visitors. The matter was of sufficient gravity for the N.R.M.A. also to have made representations to Council.

The matter had been the subject of consideration over a number of years by successive Local Traffic Committees. Finally, in February, 1984 the Committee recommended that an appropriate sign be erected. On 20th February Council gave their approval and the sign was duly erected. However, the sign was placed amid roadside shrubs and vegetation, which hid it from the view of motorists. The residents complained to the Ombudsman.

The Town Clerk, when informed of the situation, quickly had the sign repositioned to a suitable and very visible site.

CASE NO. 18

GREATER LITHGOW CITY COUNCIL

Purchase of land at Marrangaroo

Mr N. complained on behalf of the Lithgow Ratepayers' Association about the purchase by the City Council of land for subdivision at Marrangaroo, which is just to the west of the town and south of the Great Western Highway. Mr N. alleged that Council had been extravagant and careless in making this purchase, and that it had allowed the vendor conditions that were much too generous.

The land, 117.4 hectares in area, was bought following a Council resolution on 10 August, 1981 that "the Mayor and Town Clerk immediately commence negotiations to purchase land owned by Mr D. for $600,000 plus eight blocks of the proposed subdivision". Contracts were exchanged in late 1981, and the total purchase price was entered in Council records as $803,733. However, the purchase was effected without the specific approval of Council, the resolution of 10 August, 1981 having referred only to "negotiations".

Section 530A of the Local Government Act provides, among other things, that the purchase of land cannot be delegated; that is, a Council itself must resolve that land be purchased under the conditions set down, rather than entrust that task to its members or servants. The Marrangaroo purchase was thus in breach of the Local Government Act.

However, Council was told of the purchase and no objection was raised. The matter was later reported to the then Local Government Office, and the Director stated that, although there appeared to have been a "technical" breach of the Act, any effect on the contract of sale could only be determined by the Courts, in the event of a challenge. No challenge was made.

At the time of Mr N.'s complaint, in July, 1984, Council still owned the land, had been unable to subdivide it owing to poorer economic conditions, and was facing the prospect of having to pay a further $200,000 cash to the vendor in lieu of the eight blocks of land, which had not been subdivided, and was not likely to be.

The investigation of the complaint involved a visit to Lithgow for discussions with the Mayor and Council officers, examination of files, and discussions in Sydney with staff of the Department of Local Government and the Town Clerk at the time of the purchase.

It was clear from the investigation that the Council had made an economically disastrous decision in agreeing that negotiations to purchase the land should take place, and in acquiescing in the purchase. Nevertheless, there appeared to be little purpose in preparing a formal report of wrong conduct, for reasons which the Deputy Ombudsman set out in his final letter to the complainant:

> As your are already aware from the investigation carried out by the Department of Local Government, the purchase of the Marrangaroo land was not in accordance with the provisions of the Local Government Act. This was termed a "technical" breach of the Act by the Director of Local Government. My enquiries suggest that, although the Council did not give formal assent to the purchase of the land, as required by the Act, it approved negotiations for purchase, and was kept informed of the negotiations and the conditions of purchase. There thus appears to have been no attempt to deceive the Council, nor to act improperly in some other way. It seems to have been for this reason that the Director of Local Government considered this a "technical" breach.

On being made aware of this problem, Council itself sought advice and thereby involved the Department of Local Government (or Local Government Office, as it then was).

Although this breach may have amounted to wrong conduct in terms of the Ombudsman Act, there seems to be little point in continuing an investigation to the point of preparing a formal report, because any such report could make no recommendation that would correct the defect, nor any suggestion that has not, to my knowledge, already been considered by Council.

It appears that any objections to the Marrangaroo land are levelled not so much at the manner in which it was purchased, as at the fact that it was purchased at all. The land was bought at a time when it was expected that there would be dramatic expansion in the steel and coal industries. Several new projects were to begin in the Lithgow area. I understand that Lithgow Council was anxious to attract the workers in the new projects to that city, rather than have many of them live in such areas as the Upper Blue Mountains, as had often been the case in the past.

It also appears that private developers had previously shown little interest in Lithgow, and that most land development had been carried out by Council. There were projections of substantial population growth from new coal mines and associated works, and the proposed Marrangaroo sub-division, among others, was intended to cater for that growth.

As is well known, the economic and population "boom" did not occur, owing to factors far beyond the control of Greater Lithgow City Council. The fact is that, regardless of whether Council had followed the correct procedures in purchasing the Marrangaroo land, Council would still be in possession of that land. Other Councils have found themselves with similar problems. In hindsight, it appears that Council should not have purchased the land. However, its decision to do so would not amount to wrong conduct in terms of the Ombudsman Act, given the circumstances at the time.

Council bought the land for some $800,000, which you consider to be an excessive amount. I have considered the factors involved as follows:

1. There was interest from commercial developers (whether genuine or not) and from the Land Commission in the purchase of land to meet the demands expected to flow from economic expansion, and landowners on the outskirts of Lithgow were aware of that interest.

2. There are very few areas of subdivisible land near Lithgow City, particularly when such factors as access to water and sewerage are considered; Marrangaroo was one of these areas.

3. The land is rough at its higher levels, it contained a quarry, and the land for subdivision was near the Great Western Highway, lower down. Council attempted to buy only the subdivisible land, but the owner wished to sell the whole area.

4. The valuation of the land was on the basis of land value ($75,000) and the value of the operating quarry ($750,000). The quarry has since ceased production, apparently because of the fall in demand for its minerals, which were used in steel production.

The amount paid by Council was in accordance with the valuation. It might be argued, again with the benefit of hindsight, that Council should have been more cautious in its approach. However, the land would probably not have been a net loss to Council had the projected development around Lithgow taken place. Given contemporary conditions, it would be hard to sustain a finding of wrong conduct in terms of the Ombudsman Act.

In summary, the episode of the Marrangaroo land purchase has proved unfortunate for Greater Lithgow City Council, both procedurally and economically. However, there is nothing that the Ombudsman could recommend to redress the situation, and so I have decided to discontinue my enquiries.

Case No. 19

NAMBUCCA SHIRE COUNCIL

Failure to answer correspondence

On 1st July, 1984 the Honorary Secretary of the Three Valleys Branch of the National Parks Association complained that his Association had written to the Nambucca Shire Council on two occasions seeking information as to why Council had cleared some roadside vegetation, but that the Council had declined to provide answers.

On 3rd February, 1984 the Association had written to Council, protesting at "rather drastic clearing" of the roadside vegetation on the Scotts Head Road, and asking some specific questions. Council on 2nd March, 1984 simply replied that "it had decided to receive the letter". On 19th March, 1984 the Association wrote again, seeking answers. On 10th April, 1984 Council replied that it declined to answer the specific questions. After investigation by this Office, it was recommended that the Council should provide civil answers to sensible questions asked in acceptable form by taxpayers and ratepayers (as, in this case, the members of the National Parks Association). On 12th March, 1985 Council advised that at a recent meeting it had resolved to answer reasonable questions posed to it.

CASE NO. 20

PORT STEPHENS SHIRE COUNCIL

Delay in advising sanitary service charges

In December, 1979 the complainants purchased a property in the Shire of Port Stephens comprising an unoccupied main house and a small gatekeeper's cottage, tenanted since 1972 by a single elderly pensioner. Upon purchase, a Notice of Sale was sent by the complainants' solicitors to the Council, which was asked to send all rate notices to the solicitors' office. Normal annual rate notices were received by the solicitors for the years 1980 to 1983 and rates were paid to the Council.

In July, 1983 the complainants' solicitors received a final notice for unpaid rates of $1,842.34, apparently for outstanding sanitary service charges which had accrued since 1980. The solicitors claimed that this was the first they had heard of the charges; in any event, the main house was unoccupied and had had a septic tank installed in 1981. Council stated that the charges were for a service to the caretaker's cottage.

The owners then complained to this Office. They maintained that, had they known the amount Council was charging for the service to the gatekeeper's cottage (in 1983 it was $613.40), they would have installed a septic tank in 1981, when they installed one in the main house; that would have eliminated the charge.

Upon investigation it emerged that a sanitary service had been provided to the caretaker's cottage since 1972. The sanitary contractor was advised by Council in July, 1979 that the service was to be discontinued, but the contractor had failed to act on Council's instructions. In 1983, after conducting a survey, Council discovered that the service was being provided, and issued a final notice to the complainants solicitors. However, it was evident that neither Council nor the owners had requested the service, and were unaware that it was being provided. In fact, the matter was predominantly a dispute between Council and the contractor.

Although Council has the right to levy costs arising out of services provided in previous years, it is reasonable for an owner with a known address to expect annual bills from Council. Annual rate notices could have included sanitary charges, and it was remiss of Council to have overlooked them.

The conduct of Council was found to be unreasonable in that it failed to notify the complainants within a reasonable period of time of outstanding and accelerating sanitary service charges. As a result of the recommendations made, Council accepted payment of $297.75 (an agreed amount) as settlement of the outstanding account, and undertook to ensure that bills are regularly provided to persons affected by the service.

CASE NO. 21

RANDWICK MUNICIPAL COUNCIL

Failure to resolve a noise problem

Mr L. complained in January, 1984 that Randwick Municipal Council had failed to stop noise from a car wash near his home. The car wash was owned and operated by an alderman on Council, Mr D.

On 9th February, 1982 Council approved a development application to erect a two storey building containing an automatic car wash on the ground floor and an automotive workshop on the first floor. Several conditions attached to the consent as to permissible noise levels from the car wash and workshop; no nuisance was to be caused by the emission of noise or other pollution from the premises. No appeal was made by Mr D. on the imposition of these conditions.

On 22nd March, 1983 a final inspection was carried out by Council's Health and Building Inspector. According to Council's files, Mr D. was asked "to submit a report from his acoustical engineer to check the installation and to make recommendations for noise attenuators where necessary".

Between April, 1983 and January, 1984 complaints to Council about the operation of the car wash were made by Mr L., another resident, Mrs I., and Mr Michael Cleary, M.P. (the local State Member of Parliament) on behalf on Mrs I. According to Council's files, inspections by Council officers showed that the operation of the car wash did not comply with the conditions attached to the consent.

As a result of the investigation of the complaint, it was concluded by this Office that, despite the fact that Council officers and Council became aware of the breach of the conditions relating to noise levels, Council failed to make any decision about either the enforcement of the conditions of consent or the penalising of the proprietor for his failure to comply.

On 19th July, 1984 a draft of a report setting out the preliminary findings of the investigation by the Ombudsman's Office and recommendations for action by Council was forwarded to the Council for comment. On 10th August, 1984 the Town Clerk informed this Office that:

> "... the Council has instructed its solicitors to commence prosecution proceedings against the owner of the premises [for] failing to comply with conditions of development consent and building approval."

Until the draft report was sent to Council, all Council had done about non-compliance was twice to pass resolutions calling on the proprietor to submit an acoustic engineer's report to Council, in order to determine the measures needed to reduce the noise to the prescribed level.

In following this course of action Council was taking upon itself the responsibilities of the proprietor. Instead of simply issuing the proprietor with a notice to comply, Council embarked upon the task of finding out how to alter the physical structure of the car wash so that the noise levels set by Council were not exceeded. Consequently, intentionally or not, Council was distracted, and failed to perform its proper function of considering the enforcement of the conditions of consent and, if necessary, the question of prosecuting the proprietor.

It was concluded by this Office that, where the private or commericial interests of an alderman of Council were concerned, Council should ensure that it did not leave itself open to a charge of favourable treatment of that alderman. The fact that the proprietor was an alderman of Council meant that a heavier responsibility was placed on Council to ensure that the proper functions of Council were carried out.

The report made the following recommendations:

> "1. That Council implement procedures to ensure that Council is promptly given notice of instances of non-compliance with conditions of Development Consent where such is brought to the attention of Council officers;
>
> 2. That Council implement procedures to ensure that information, to complainants, about steps taken or intended to be taken by Council is accurate; and
>
> 3. That Council implement procedures to ensure that any difficulties encountered by Council officers in securing compliance, by a third party, with a requirement in a Council resolution, be promptly brought to Council attention."

Before the publication of the final report, the Town Clerk informed this Office that Council had instructed solicitors to institute proceedings against Mr D. Later, a fine and costs were imposed by the court.

Case No. 22

SCONE SHIRE COUNCIL

Unreasonable procedures in deciding on future use of sporting park

An association at Aberdeen which had, for many years conducted rodeos on Jefferson Park, Aberdeen complained that Scone Shire Council had acted unreasonably in deciding which sporting activities would be permitted at Jefferson Park.

Jefferson Park is under the control of the Council, which has vested much of the management of the park in the Aberdeen Sporting Association (ASA). The ASA is a local committee in terms of Section 527 of the Local Government Act. As such, it is a delegate of Council, responsible to Council. The ASA has a Board of Management which, under its constitution, must provide minutes of its regular monthly meetings to the next ordinary meeting of the Council.

The complainant had constructed on the park a number of good quality crush yards, races and holding yards for use in camp drafts. The improvements were made from the complainant's own funds, with the consent of Council. The Board of Management of the ASA passed a resolution that no further rodeos be held at the park and that the existing crush yards be removed by the football club. The complainant was not given notice of the Board's meeting, as it was not represented on the Board. Nor was the complainant advised of the resolution.

Two days later, Council reaffirmed the resolutions of the Board at its ordinary meeting. The complainant was still not aware of the resolution. Immediately following the Council meeting, the Chairman of the Board of Management authorised the football club to commence demolition of the yards used for rodeos. It was only when members of the complainant association heard that this demolition was in progress that they were aware that a decision had been made.

It was concluded that, given the interest that the complainant had in the yards, the Board of Management should have given ample notice of its intention to consider the motion to cease rodeos and demolish the yards. While the president of the complainant association knew of the proposal two days earlier, he did not have the chance to consult with his members before the final decision was made. The notice given to the complainant should have been sufficient to allow its members to consult and consider its official response to the motion.

In addition, it was found that the complainant should have been invited to have representatives present at the Board of Management meeting to allow them to present the complainant's views on the motion. If the complainant was not to be given this opportunity, the Board of Management should have ensured that the complainant was immediately notified of the decision, certainly prior to Council's ratification of it.

Given that Council ratified the Board's decision without making sure that reasonable procedures had been followed, it should have at least made certain that no demolition commenced before the complainant was formally notified of the decision. It was most unsatisfactory that the complainant first learned of the decision when the yards were being demolished by the football club — the club that was to gain the use of the area.

The Deputy Ombudsman recommended that Council's procedures for ratifying local committee decisions be reviewed. It was also recommended that Council make an ex gratia payment of $1,500 to the complainant to compensate for the loss of building materials.

As a consequence of the Deputy Ombudsman's report, Council has reinforced its administrative instructions to secretaries of local committees. Council is currently negotiating with the complainant over the recommended ex gratia payment.

CASE NO. 23

SHOALHAVEN CITY COUNCIL

Fires at Berry Garbage Disposal Depot

Mrs C. complained to the Ombudsman in January, 1985 that Shoalhaven City Council had not controlled fires at Berry Garbage Depot. The letter of complaint detailed unsuccessful requests to Council by residents, and included a request to the Ombudsman for assistance.

The problem was that the garbage was being set alight by unknown people at least three times each week; the burning of tyres, plastics and other items created unhealthy black smoke, which hung over the area. Mrs C. was concerned about the pollution, the fumes and the danger to surrounding homes, as the dump was often burning on windy days when total fire bans were in force. The problem had existed for some time; in 1983 the bush around the depot had caught fire and been extinguished by the Bush Fire Brigade. Mrs C. was concerned that another bush fire could easily break out.

The matter was raised with the Director of the State Pollution Control Commission, who detailed the action taken by the Commission in an effort to resolve the problem; it was apparent that Council had ignored the Commission's requests. The Commission was prepared to pursue the matter through the courts.

The matter was also raised with the Council. The Mayor responded that, from 20th February, 1985, a number of control measures had been introduced. These included restricting the hours the depot was open from 24 hours a day, seven days a week, to 8 a.m. to 4 p.m., and daily supervision of the site during the operating hours. As well, on a trial basis, evening surveillance of the depot by a security firm was arranged, and submissions were invited for the establishment of a recycling business.

Mrs C. wrote to the Ombudsman in May, saying that a few weeks after she had lodged her complaint, the fires had become less frequent and, as of April, almost non-existent. As well, she stated that a recent meeting, chaired by the Mayor and attended by approximately 120 residents, had been told that when the lease on the present depot expired (in about ten months) the Council intended "to do the right thing" and construct a new depot which would be properly fenced, and controlled.

The matter was discontinued on the understanding that residents would let this Office know if Council did not fulfil its promise of a pollution-free tip.

CASE NO. 24

DEPARTMENT OF CORRECTIVE SERVICES

Delay in processing application

A prisoner whose jeans and T-shirt, while held in the prison reception store, had been slashed by a prison officer made application for compensation. His application was dealt with properly and promptly by the prison superintendent who recommended that compensation be paid.

Four months later, having heard nothing about his claim (despite two reminder applications to the prison authorities), the prisoner complained to the Ombudsman. The matter was made the subject of an investigation.

During the investigation, the Department contended that the delay in dealing with the prisoner's claim had been due to:

— the "continued ill health" of an officer since deceased;

— the need to conduct an investigation into how the clothing came to be slashed and whether any other clothing in the reception store had been damaged; and

— a prolonged industrial dispute involving prison officers.

The investigation, however, revealed that:

— the deceased officer had dealt with the matter on the same day it had been referred to him;

— the investigation of the reception store had been completed only one month after the prisoner made his first claim;

— the industrial dispute had not commenced until four months after the prisoner made his claim; and

— the delay was entirely due to failure of the Assistant Director Custodial Services (Central), Mr E. Quarmby, to properly discharge his responsibilities.

The Department, in the meantime, had offered the prisoner compensation of $30. The prisoner had claimed $75 originally, but said he would accept $50. The Department refused to increase its offer.

The Ombudsman decided that the conduct of Mr Quarmby was wrong, and recommended that he be told to take prompt action on prisoners' applications. The Ombudsman recommended that the Department issue a written instruction on this subject to all its officers. He also recommended that the prisoner be offered an ex-gratia payment of $50: $30 for the damaged clothing and $20 compensation for inconvenience and delay.

The Department accepted the first two recommendations but refused to vary its offer of $30. The Minister for Corrective Services later informed the Ombudsman that, after perusing the report, he had requested the Department to pay $50 to the prisoner.

CASE NO. 25

Inadequate toilet facilities for visitors at Mulawa

The mother of a prisoner at Mulawa who visited the goal every week complained that there was only one visitor's rest room, which was used by both men and women. There were no doors to the entrance of the toilet, and the cubicles were in full view of everyone who passed. The complainant was so embarrassed at the thought of having to use the rest room that she cut her visit short, stopping at a nearby service station to go to the toilet there.

The Superintendent confirmed the facts of the complaint, and said she had already written to the Department about the rest room. Acting on her own initiative soon after contact from this Office, she arranged to have another disused rest room converted for visitors' use, and had doors attached to the existing toilet. The new facilities were ready for use within a matter of days.

The Ombudsman discontinued his enquiries into the complaint in view of the Superintendent's actions.

CASE NO. 26

No action by officer during assault on a prisoner

On October, 1983 Mr H., an inmate of Maitland Gaol, was assaulted in his cell by another prisoner while the Officer on duty sat at a desk a short distance away. The assault took place in the cell area of the cook house during the mid-morning break. Mr H. had gone into his cell to lie down and read while eight or nine of the other prisoner kitchen staff were outside in the general recreation area playing table tennis. The TV was on, and there was apparently some noise in the area.

Another prisoner came into Mr H.'s cell, shutting the door behind him. It was claimed that the door was then locked from the outside by another inmate. Mr H. was severely assaulted with an iron bar, slashed with a blade and beaten over the head with his own stool and Breville sandwich maker. After the assailant left his cell, Mr H. came out and spoke to the Officer on duty, Mr D., saying that he had fallen over in his cell and had to get to the hospital quickly.

The police were called in, but Mr H. would not press charges against his assailant. However, he complained to this Office in March, 1984 that neither the Public Service Board nor the Department of Corrective Services had properly investigated his allegation that the officer, Mr D., had allowed the assault to continue unchecked, despite all the noise being made in the cell. The Gaol Superintendent, in his report on the incident stated, in part,

> "I must add that I have failed to see how Officer D. did not hear or see anything that could have helped in the enquiries on this matter."

On 21st November, 1983 the Department of Corrective Services decided that Mr D. should be interviewed, in view of Mr H.'s statement and the comments of the Superintendent. Two officers of the Custodial Services Division interviewed Officer D., but they did not talk to witnesses or to people involved in the matter, including the alleged assailant and the complainant. A line of questioning was suggested at the conclusion of the interview with Officer D., that he had perhaps been "stood over" by the "heavies" in the wing, or had been paid money not to notice the incident. However, the matter was not pursued by the investigators.

This Office investigated the Department's handling of Mr H.'s complaint, and concluded that the Department's investigation was not concerned with determining who assaulted Mr H., nor with any action that might be taken against the assailant. Rather, it was aimed at deciding whether any disciplinary action should have been taken against Prison Officer D. Officer D. was subsequently transferred to work in the Cessnock Corrective Centre, apparently at his own request. No Departmental action was taken against him.

At the time of Mr H.'s complaint it was the practice of the Department not to proceed to a full investigation of a matter if the person involved refused to co-operate with the police. The Chairman of the Corrective Services Commission, in a letter to this Office in May, 1984, agreed with his Investigating Officer's conclusions that there was insufficient evidence to indicate negligence on Officer D.'s part.

Nevertheless, the Ombudsman found that the practice of issuing a direction to the Department's investigatory staff to interview only the officer concerned, rather than to investigate an incident thoroughly, was unreasonable and unjust. The wrong conduct report recommended that the Department instruct senior staff investigating serious allegations to conduct thorough and detailed investigations, including the taking of statements from all officers and prisoner witnesses involved. This recommendation was adopted in September, 1984, when new provisions were set out in Circular 84/22.

CASE NO. 27

Failure to investigate conduct of prison officers and to exercise disciplinary functions

In July 1983 this Office made final a report about a complaint by Mr S. that his son, a prisoner in the custody of the Department of Corrective Services, had been assaulted by a prison officer in the Prince Henry Hospital Annexe and had then been unjustly transferred on segregation to the "Circle" at Parramatta Gaol.

The final report made a number of recommendations about the issuing and termination of segregation orders, and the reviewing of procedures governing the transfer of prisoners so that the physical health of those prisoners was taken into account. In November, 1982 the Department of Corrective Services issued Circular 82/60, and in August 1984 issued a further Circular 84/16 (referred to in the last Annual Report of this Office), about segregation orders; these implemented recommendations in the report. In addition, the Prison Medical Service established procedures to implement relevant aspects of the report.

An earlier draft of the report had also included the following recommendations:

> If Officer B. is found guilty of assault, appropriate Departmental charges should be laid against Officers T., B. and C. in relation to the contents of their statements.
>
> An immediate enquiry should be undertaken by the Corrective Services Commission into the claims by Sister J. and Sister R. that Prison Officer H. endeavoured to suborn their evidence in relation to the alleged assault, with a view to the laying of appropriate charges against H.

Sister J. had alleged that Officer H. had told her, following the assault by Officer B. on S., to "mind my own business and that nothing was seen", or words to that effect.

These recommendations were omitted from the final report, following receipt of a letter from the Chairman of the Corrective Services Commission which enclosed advice from the Deputy Commissioner of Police. In relation to the first of the draft recommendations subsequently omitted, the Deputy Commissioner stated:

> "I understand that in his summing up the Magistrate found there was no evidence of collusion on the part of Prison Officers T., B. and C. and therefore, no criminal charges arise.

In relation to the second of the draft recommendations subsequently omitted, the Deputy Commissioner said:

> "The statements made by Sisters J. and R. do not, in the opinion of the Superintendent in charge, Police Prosecuting Branch, indicate any qualitative evidence to substantiate the preferment of any criminal charge relative to suborning against Prison Officer H. I am in agreement with the Superintendent. Sister J. gave evidence to the Court in similar terms to her statement, Sister R. was not called as her evidence was mainly hearsay, she not being a witness to what occurred between Prison Officer B. and Mr S.

On 28th November, 1983, a report appeared in the Sydney Morning Herald which stated, inter alia:

> The NSW Ombudsman's Office dropped a recommendation earlier this year that three warders face departmental charges after it was wrongly advised that a Magistrate had found there was no evidence to support the charges.

The report went on to note that a close reading of the transcript revealed that the Magistrate made no finding as to whether there had been collusion. A copy of the Magistrate's judgement was obtained by this Office, and confirmed the accuracy of the statement in the newspaper report.

In the light of this information, the Ombudsman considered that a further investigation should be conducted into the apparent failure of the Department of Corrective Services and its responsible officers properly to investigate the conduct of Prison Officers C. and T., and to discharge its disciplinary functions in respect of those officers. As Officer B. had been convicted of an assault on S. and a subsequent appeal had been dismissed for want of prosecution in the Sydney District Court on 27th September, 1983, the question of any Departmental disciplinary action against him was not pursued. It was also considered that, whatever may have been the position about a possible charge of subornation (a criminal offence) against Prison Officer H., this did not affect the question of whether the Department of Corrective Services and its responsible officers had properly investigated the conduct of Officer H. and correctly discharged its disciplinary functions.

Accordingly, on 28th June, 1984, the Ombudsman advised the Chairman of the Corrective Services Commission of his decision, in the exercise of his own motion powers, to investigate the above conduct. Relevant officers were also notified.

The investigation revealed that:

"1. On 15th December, 1982 the Department's Legal Section recommended that Prison Officers C. and T. be interviewed to establish the reasons for their failure to intervene during the assault. This failure could have been regarded as evidence bearing on the question of whether disciplinary charges were warranted, and could also be viewed as suggesting collusion between the officers. The failure to intervene had been noted by Sister J.

2. A direction was issued to relevant officers on 16th December, 1982 to interview Officers C. and T.

3. Officers C. and T. were interviewed on 6th January, 1983 by way of Records of Interview. Despite some minor inconsistencies, it was the view of the Ombudsman that their answers were in accordance with their evidence before the Magistrate.

4. The officer who conducted the interviews reported on 13th January, 1983:

C's first action was to secure the entry door to the ward which had been left open by B. As C. rightly pointed out he could not have entered the ward and left the door open nor could he have entered whilst still in possession of the security keys.

and further:

T., who was armed at the time, removed his firearm and secured it in the metal box provided as soon as he realised that the situation warranted intervention.

"5. The officer who interviewed Officers C. and T. also interviewed Officer H. (though he had apparently not been directed to do so), and obtained a statement from him relating to the alleged failure to intervene. In addition, Officer H. orally denied the allegation made by Sister J.

6. Neither Sister J. nor Sister R., employees of the Health Commission, was interviewed.

7. The officer conducting the investigation recommended no action against Officers C. and T. No recommendation was made about Officer H.

8. The Department's Industrial Relations Officer supported this recommendation on 20th January, 1983, subject to perusal of the transcript of evidence. The Deputy Chairman also agreed.

9. The delay between the date of the assault, 14th May, 1982, and the date on which Officers C. and T. were interviewed could be partly explained by the need firstly to conduct an investigation into the actions of Officer B. In these circumstances the delay did not appear unreasonable.

As a result of the investigation, the Ombudsman concluded that there had been no wrong conduct on the part of the Department of Corrective Services and its responsible officers.

Case No. 28

Safeguarding postal remittances to prisoners

Routine complaints sometimes lead to the investigation of wider issues than those of concern to the complainant.

A prisoner, Mr D., said that his grandmother had sent $50 cash to the Central Industrial Prison for credit to a fellow prisoner's account. The proposed transaction was disallowed, quite properly, by the Superintendent. Mr D's complaint was that, despite his grandmother's efforts, the $50 had not been returned to her. Preliminary enquiries revealed an unsatisfactory situation. There was an unofficial record of the $50 being received at the prison, but no official record existed; nor had a receipt ever been issued. The money could not be found.

The Department agreed to refund $50 to Mr D's grandmother, and did so as an act of grace. However, it was decided to investigate the adequacy of the procedures in force at the Long Bay Complex of Prisons to safeguard remittances received by post for inmates; enquiries had established that, in a little over three months, more than $15,000 was received at the Central Industrial Prison alone.

The investigation revealed that:

i) the procedures in force at the Long Bay Complex of Prisons generally, and at the Central Industrial Prison in particular, did not comply with the requirements set out in Treasury Instructions;

ii) cash was often held at the prison for varying periods and reasons before being properly brought to account and, in general, was dealt with in the same way as non-cash remittances;

iii) the General Office at Long Bay, which services all four prisons in the complex, is physically separate from all of them; this created special accounting problems, and no special procedures had been devised to deal with them;

iv) until this Office raised the matter, the Department had not given prison officers instructions about receiving prisoners' money.

The Department's conduct was found to be wrong in that it:

1. failed to implement at Long Bay adequate procedures to ensure that postal remittances were properly dealt with and brought promptly to account; and

2. failed to instruct its officers about receiving and processing postal remittances.

A report under the Ombudsman Act recommended that the Department:

a) review procedures at Long Bay (and other relevant prisons) and ensure that postal remittances were promptly receipted and accounted for; and

b) following such review, issue appropriate instructions to all prison officers on this matter.

The Department, in response to the recommendations made by the Ombudsman:

i) issued instructions about procedures for postal remittances;

ii) carried out an internal audit of the Central Industrial Prison, which identified several unsatisfactory procedures;

iii) arranged for a subsequent review of procedures by the Accountant, who reported that proper procedures were being observed.

On this basis, the Ombudsman concluded the investigation.

Case No. 29

Prisoners to be told why they are being transferred

On 15th January, 1984 four prisoners were transferred from Parklea Gaol to Goulburn Gaol. In late January, 1984 they complained to this Office that, on their arrival at Goulburn, they were told by the Acting Superintendent that he did not know why they had been transferred and placed in segregation, as the paper work had not been received.

After investigation by this Office, it was concluded that the Department had procedures requiring Superintendents to tell prisoners the reasons for their segregation and transfer. The Superintendent at Parklea had failed to observe procedures. He was responsible for a delay of some 18 days in sending appropriate documentation to Goulburn, and did not inform the complainants of the reasons for their transfer and segregation.

The Ombudsman noted in his final report that on 17th August, 1984 the Department had instructed Superintendents that all paper work relating to the transfer and segregation of prisoners must accompany them, and under no circumstances were prisoners to be moved without the relevant documentation. Consequently, no recommendation was made on that part of the complaint. The Ombudsman recommended, and the Department agreed, that all Superintendents be reminded of the need to explain to prisoners the reasons for their transfer and/or segregation.

COMPLAINTS AGAINST POLICE

CASE NO. 30

Offensive cartoon in court room

The Aboriginal Legal Service Limited complained that a police prosecutor allowed a racist cartoon to remain in a public area of a suburban courtroom. The cartoon cast aspersions on the Aboriginal people and the Aboriginal Legal Service, and was visible to members of the legal profession and to defendants sitting in the dock. The complaint was investigated by a senior officer of the Police Prosecuting Branch, who prepared a report to be sent to the Ombudsman. The Ombudsman found that the complaint was sustained.

The relevant facts were not in dispute, and were as follows: On the morning of 11th October, 1982 the police prosecutor noticed the cartoon attached to a calendar on the monitor's box in a courtroom at the Redfern Court of Petty Sessions. Later that day he walked up to the cartoon and noted that in a "balloon" forming part of the cartoon the original words had been erased and there appeared:

> "THE ALS SAID PLEAD NOT GUILTY AND THEY WOULD GET ME OFF TOO. AND HERE I AM."

The cartoon, which depicted five aboriginals in a cell, is represented here.

The police prosecutor stated that on that day he did not make any inquiries about how the cartoon got onto the calendar on the monitors's box and did not speak to anyone about it. On the next day, the prosecutor entered the courtroom at about 10 a.m. The cartoon was still in position. Following the morning tea adjournment, a solicitor employed by Aboriginal Legal Service brought the cartoon to the attention of the Court. The Magistrate immediately ordered the removal of the cartoon. He did not take any further action, and refused an application that the police prosecutor be denied further leave to appear. The Magistrate stated that the cartoon "... causes me concern and it is a most improper document to have displayed anywhere, not least in a courtroom. I order that it be taken down straight away and removed from the court".

The Ombudsman found that there was no evidence that the police prosecutor was a party to the placing of the cartoon in the courtroom. However, in the Ombudsman's opinion, the prosecutor ought either to have removed the cartoon himself on 11th October or, alternatively, drawn it to the presiding Magistrate's attention. The Ombudsman found the admitted conduct of the police prosecutor in not adopting either of these courses of action to be unreasonalbe and to constitute wrong conduct in terms of Section 28 of the Police Regulation (Allegations of Misconduct) Act. He decided that there was no need for further action to be taken.

Deputy Commissioner Perrin had, at the conclusion of the police investigation of the complaint, expressed the view that the complaint was "not sustained". He proposed taking no action against the police officer concerned. After the receipt by the Commissioner of Police of the final report of the Ombudsman in this matter, Inspector Pry, signing for the Assistant Commissioner (Internal Affairs), wrote to the Ombudsman in these terms:

> Although I share the views previously expressed by Deputy Commissioner Perrin that this complaint has not been sustained, it is advised that I have directed the Superintendent in Charge, Police Prosecuting Branch, to bring the circumstances of this matter to the notice of all members of his staff. In this regard, I have requested the Superintendent to instruct the Police concerned to immediately bring to the notice of the appropriate authority any "offensive" material observed by them to be on display in the Courts where they might be required to perform duty.
>
> The above action has been taken to avoid repetition of [similar] complaints ...

CASE NO. 31

The growing fine

A complainant wrote to the Ombudsman for assistance when, through no fault of his own, his $70 traffic ticket grew into a $268 fine.

The complainant was told that he would be reported for Negligent Driving; he later received a traffic ticket through the post. The NRMA made representations to the Police Department on his behalf. It is not known what happened to these representations, but the complainant later received a court summons for the offence. Further representations were made by NRMA, but the Police Department decided that the matter should remain in the hands of the Court. At Court a penalty of $250 was imposed, with costs of $18.

The complainant felt that, as he had sought relief through the Police Department's own system for review of traffic tickets, no summons should have been issued until that review had been completed. If the Police Department decided that the ticket ought to stand, then the complainant could pay the original fine.

When the Ombudsman asked the Police Department to comment on the complaint, the Secretary of the Department said, "Correspondence volumes and arrears at the time caused the issue of a summons to (the complainant) whilst representations on his behalf were being considered". The Secretary offered to accept payment of the original penalty of $70 and to apply to the Attorney General for annulment of the court penalty.

It was felt that this result should satisfy the complainant. The conduct of the Police Department might have been wrong, but because there is a continuing programme of improving the administrative system within the Department, and because the Department's handling of such matters is constantly under review by the Ombudsman's Office, investigations were taken no further.

CASE NO. 32

Tow truck driver alleges malice

In several respects, the case of Mr F., a tow-truck driver, illustrates the frustrations inherent in investigations of the police. His complaint took more than eighteen months to finalise, and during that time his interest in the matter appeared to wane. Throughout the investigation there was a conflict of evidence between Mr F. and the traffic constables he complained about. When his complaint was at last concluded, it was with the finding of "unable to determine", which under Section 25A of the amended Act means the complaint is deemed not to be sustained. Mr F. did not want his complaint re-investigated under the new procedures, which allow the Ombudsman to hear evidence directly.

Mr F., for whom English is a second language, wrote to the Commissioner for Police on 28th January, 1983. His three-page letter alleged malice on the part of four constables, whose badge numbers he quoted. He said: "These constables I felt somehow they have ill-feelings, malice, resentment towards me. The other constables are fair and deserve their rank and name as Constable". One constable in particular was alleged to have harrassed him by issuing unwarranted traffic notices and by giving preference to other companies when allocating tow jobs.

This excerpt from Mr F.'s letter shows the type of incident he alleged:

"One night I was minding my own business at 1.30 a.m. in the morning. I was on my way home to sleep. I saw this Constable's car followed me. I was not speeding up to any accident. He followed me along Princes Highway, Tempe to Union Street along to Unwing (sic) Bridge, to Richard Crescent, to Carrington Road, to Premier Street, to Thornley Street, then I stopped and asked him why do you follow me around like that? He said I'll book you for speeding and no seat belt and no indicator. He said to his partner the other Constable, have a Rego check and put a Defect sticker on his tow truck. One occasion at Newtown I pulled up at King Street and Holt Street to an accident when the book signed it was time for me to tow the damaged car I turned from left side of road to right to where the car was, the same Constable booked me for turning over a double line. The traffic was very thick at the moment, to the best of my judgement and for the benefit of the public I just have to chuck the U turn to pick the damage vehicle. I must do this immediately otherwise it may cause another accident.

Many accidents I went to this very Constable always told me to leave because the other Company tow truck driver has got the job. Sometimes I arrived at the accident before the other drivers of the Company arrive the same Constable told me to leave as the job is belong to the other tow. Time and time again I saw it with my own eyes to the behaviour of this Constable."

The Ombudsman's Office received information about Mr F.'s complaint by telephone from Internal Affairs Branch, and a copy of his complaint was received on 18th February, 1983. On 24th February the Senior Investigation Officer wrote to him explaining that the first stage of the investigation would be carried out by members of the Police Force, and that it might be several months before he heard from the Ombudsman's Office again.

On 10th June, 1984 the Deputy Commissioner of Police, Mr Perrin, wrote to the Ombudsman. He sent information on preliminary police enquiries, and asked the Ombudsman to agree to Section 20(1) of the Police Regulation (Allegations of Misconduct) Act being invoked. This provision allows for a suspension of investigation until charges have been heard in court. Mr F. faced several traffic infringement charges. The Ombudsman agreed to this delay but asked that the investigation into alleged favouritism in allocating tows go ahead.

Police investigators interviewed Mr F., who stated among other evidence:

"There is a lot of times I go to accidents and this Policeman and his mate are there. They tell me to piss off, the other company has got the job, but we both arrived at the same time and no books have to be signed up or cards given and I wait to give them my card. The constable say, 'You go, or I lock you up'."

In September, 1983, the Deputy Commissioner sent to the Ombudsman his report into the issue of whether the tow roster was being adhered to fairly. Copies of relevant tow rosters were attached to the reports, as were the traffic infringement records of a number of tow truck drivers. All police involved in the matter strongly denied favouring rival firms. The investigating police officer was satisfied the complaint was not sustained.

The tow truck rosters showed that, over a 4 month period, the company Mr F. worked for received fewer tows than five other companies, but more tows than three other companies had received. In other words, there was no conclusive evidence of favouritism.

The investigating sergeant's report included some gratuitous remarks about the complainant, who was described as "a Tongan Islander, very illiterate, [with] a very limited grasp of the English language". A former employer was quoted as having had to sack him because he was too violent.

Mr F. was given a chance to comment on the report, but did not do so. In March, 1984 he defended a number of traffic charges in court. These included charges of speeding, doing an unlawful U-turn and failing to wear a seat-belt. He was convicted of all except "not wearing a seat-belt".

In March, 1984 and again in June, 1984 the Ombudsman's Office asked when the report on the allegations of harassment could be expected.

In June, 1984 the Assistant Commissioner (Internal Affairs) sent a final report on the harrassment issue. Again there were strong denials by all police and a recommendation that the complaint be found not sustained. This report was sent to Mr F. for his comments.

Mr F., who by this time was working for a different company, did not reply. Nor did he respond to two telephone calls. There was thus no indication that he would welcome a re-investigation of his complaint.

The Ombudsman had before him conflicting written statements only: on the one hand allegations by Mr F., which tended to lack names, dates and witnesses; and on the other, denials by police officers, usually corroborated. The court had convicted Mr F. on most of the traffic charges, so his allegations of unfair tickets could not be sustained. On the available evidence, the Ombudsman was unable to determine whether a tow truck racket existed or whether some constables had harassed Mr F. The complaint was found "unable to be determined", and deemed to be not sustained. Mr F. and the police involved were informed of this outcome in August, 1984, a year and a half after the complaint was made.

CASE NO. 33

Police powers in a "dangerous situation"

A complaint was received following an incident at the Central Industrial Prison on 18th August, 1979. A member of the Corrective Services Advisory Council, Mr B., was "escorted" from the prison by a number of police officers armed with batons. Despite his protestations to the police concerned, his contention that he had a statutory right to remain at the prison, and his proferring of identification, the police saw him off the prison grounds. The solicitors acting for the complainant protested at the "rude, officious and indeed unlawful behaviour" of the police involved.

A police investigation into the matter suggested that the incident occurred while a state of emergency existed and, because of a strike by prison officers at the time, circumstances were "verging on a riot situation" The police officer concerned had decided to remove Mr B., in exercising his discretion while "in charge of a dangerous and volatile situation".

Protracted communications ensued with the complainant's solicitors, and with the Department of Corrective Services as to the legal authority of Mr B. to remain in the prison. The police agreed that Mr B. was duly authorised under the Prisons Act to visit and examine any prison at any time he thought fit.

The Ombudsman issued a draft report, finding the complaint sustained and recommending that a suitable communication expressing regret for the police action be sent by the police to Mr B. He also recommended that responsible officers be made aware of the rights and responsibilities of members of the Corrective Services Advisory Council.

The then Commissioner of Police arranged for the next meeting of District Superintendents to note the position of members of the Council, but maintained that "the action that should be taken in the event of a recurrence (of a similar situation) must rest with the authority in charge allowing that authority to assess the situation on its merits". He noted that this firmly held view of his would also be brought to the attention of the District Superintendent's meeting. He also considered that an apology was not warranted.

A later approach to the Assistant Commissioner failed to elicit the recommended apology, because he did not think it appropriate to review the decision of the Commissioner of the day.

CASE NO. 34

Compromise on traffic fines

Mr N. complained about the behaviour of a highway patrol officer, Constable S. Mr N. claimed that he was pushing his motor cycle, with the engine off, when Constable S. made a U-turn and proceeded to abuse him. Mr N. explained that he had been riding in the bush, and for that reason did not have his licence with him. He then received four infringement notices for various offences. He claimed that he proceeded on his way, pushing the motor cycle. When almost home, he had another altercation with Constable S., who gave him four more notices. Mr N. complained to this Office of harassment.

An investigation was carried out and two conflicting versions of events emerged. Constable S. denied being rude and abusive, and claimed that Mr N. had abused him and used rude gestures. There was a possibility that Constable S. had been rude and that Mr N. had provoked him. The first set of infringement notices were issued at 4.58 p.m. and the second set, for identical offences, at 5.22 p.m.; these were issued when the complaint was almost home, and suggested harassment.

In this case a compromise was reached in that the complainant paid the first four fines and the latter four were adjudicated "caution". In view of the action taken to resolve the matter it was decided that little would be gained by re-investigation, and the complaint was discontinued.

CASE NO. 35

Failure to destroy fingerprints

A discretion is vested in the Commissioner of Police as to whether a fingerprint record, once in the possession of police, should be destroyed. The Ombudsman received a complaint about the Commissioner's rejection of a request to destroy the fingerprint record of Ms P., a thirteen year old girl who had shoplifting charges against her found proven in Court but dismissed under Section 83(3) of the Child Welfare Act. Solicitors acting for the girl were particularly concerned at the advice they had received from the police that Government departments were afforded "limited access" to such records for the purpose of assessing employment applications.

In view of the claim that the girl's future employment prospects may be jeopardised, the Ombudsman made some preliminary enquiries into the complaint. The Commissioner advised that, whenever a person dealt with under the provisions of Section 83(3) of the Child Welfare Act appears before the Court on a future date, he or she is required to inform the Court of that fact. This is to assist it in determining sentence and to prevent that person from again being dealt with as a "first offender". However, the Commissioner reviewed the matter, and considered that the fingerprints should be destroyed in the particular circumstances of the case.

The Ombudsman considered that, in view of the outcome of his preliminary enquiries, no further action was necessary.

CASE NO. 36

Fund Raising for the Police Citizens' Boys' Club, Maitland

An anonymous complaint was received from a publican in the Maitland area, alleging that the sergeant in charge of the Police Citizens' Boys' Club was asking publicans in the area to sell "lucky tickets" to raise money for the club. The complainant believed "lucky tickets" to be illegal, and as he had never received a receipt for monies collected, he was worried about misappropriation of the funds.

An investigation was carried out by the Police Internal Affairs Branch. This involved interviews with 19 publicans in the area and an examination of the activities of the sergeant organising the sale of tickets.

The sergeant freely admitted that he organised the sale of "lucky tickets", believing the activity to be legal. He showed the investigating officer a newspaper clipping which indicated that the Premier had stated that "pub raffles were OK". The sergeant also produced receipt books which accounted for the monies collected.

The matter was referred to the State Crown Solicitor's Office, where it was determined that "lucky tickets" is an unlawful game under Section 17 of the Gaming and Betting Act. Under Section 18 of that Act is an offence to organise or conduct, or to assist in the organising or conducting of an unlawful game or to share in the proceeds. Section 19 makes it an offence for a person to give or sell a ticket in an unlawful game. In the circumstances, it appeared that both the sergeant and the publicans were in breach of the Gaming and Betting Act.

The illegality of the game has been drawn to the notice of the superintendent in charge of the Federation of Police Citizens' Boys' Clubs, in order to prevent any similar breaches of the Gaming and Betting Act.

Case No. 37

Bookmaker out of business

Anonymous allegations were made about the operations of an SP bookmaker in a small coastal town. The writer went into some detail as to how people laid their bets, the location of the premises from which the bookmaker operated, and where and how she paid the winners. It was alleged that police from a nearby town and from one of the squads were being paid to allow her to operate.

The police officer responsible for investigating the complaint interviewed:

— the alleged SP bookmaker;
— the owners of a house where she allegedly operated;
— the proprietor of the local store outside of which she was alleged to pay winners each Sunday morning;
— the proprietor of the local TAB; and
— the local publican from whose premises the alleged phone calls were made.

The investigation revealed that, although the person had apparently operated for many years, she had ceased these activities several months prior to the complaint. In fact, she had been arrested on one occasion by the police squad she was alleged to have been paying.

The Ombudsman required that the matter be re-investigated under the Ombudsman Act, and a special officer of the Ombudsman visited the town, observed the TAB and hotel telephone on Saturday, and the alleged debt paying area on Sunday, and spoke to many locals and visitors. As there were no signs of the SP activities outlined in the letter, the complaint was determined to be not sustained.

Case No. 38

Duty to take blood samples

Dr L. complained that on 31st May, 1984 he had been called to a country hospital to see a man alleged to have been involved in a fight with police.

The doctor alleged that, while the man was at the hospital for examination, the police officer in charge requested a blood sample be taken from the man. Earlier that evening the man had been involved in a motor accident and had refused medical attention by ambulancemen. He had also refused a roadside breath test, and had assaulted the attending police and resisted arrest. He was subsequently charged on a number of counts, including refusing an alcotest, refusing breath analysis and driving under the influence of intoxicating liquor. Those charges were preferred prior to his being taken to the hospital for examination.

It was the opinion of the doctor that police were using the widest interpretation of the section of the Motor Traffic Act relating to the taking of blood samples. He sought some clarification of the matter, suggesting that the law as it stood required members of the medical profession to become law enforcers. This Office then sought advice from the Commissioner of Police as to the policies and procedures of the Department in the circumstances outlined by Dr L. Statements were obtained from the police officers and other persons involved in the matter.

There was conflicting evidence from Dr L. and the police officer concerned. Dr L. said that he received a telephone call from the police officer to the effect that the prisoner was to be conveyed to the hospital for examination, in accordance with Police Departmental Instructions, and for a blood alcohol test. The police officer maintained that Dr L. asked whether he should take a blood sample from the prisoner. The officer said that he informed Dr L. of the responsibility placed upon a medical practitioner by the Motor Traffic Act on the taking of blood samples in such situations. The doctor was also alleged to have been told that any such blood sample was totally unnecessary because the prisoner had already been charged. After medical examination the doctor took a blood sample from the prisoner, but only after obtaining written consent.

The doctor's concern arose, it would seem, through a lack of understanding of the requirements of Section 4E(1) of the Motor Traffic Act which provides:

> Where a person of or above the age of 15 years attends at or is admitted into hospital for examination or treatment in consequence of an accident involving a motor vehicle, it is the duty of any medical practitioner by whom the person is attended at the hospital to take, as soon as practicable, from the person a sample of the person's blood, whether or not the person consents to the taking thereof.

The Commissioner of Police agreed that, under the circumstances outlined to Dr L., the taking of the blood sample would not have been in accordance with Section 4E(1).

Section 4F of the Motor Traffic Act provides:

> Where a medical practitioner fails to take a person's blood sample as required by this section he shall be guilty of an offence under this Act.

Section 5 of the Act provides a defence to the section previously quoted in that:

> It is a defence to a prosecution for an offence under sub-section (4) if the medical practitioner satisfies the Court that:-
>
> (c) he did not believe that the person had attended at or been admitted into hospital in consequence of an accident involving a motor vehicle.
>
> (d) without limiting (c), he did not believe that the person was a person from whom he was required by this section to take a sample of blood and it was reasonable for him not to have so believed.
>
> (g) there was reasonable cause for him not to take a sample of blood from the person in accordance with this section.

Dr L. was informed that the matter had been carefully considered, but it had been decided not to have the complaint made the subject of investigation.

Case No. 39

Snake throwing

On 2nd September, 1983 a youth was arrested in Bourke as a result of his being detected smashing a bottle on the roadway. He was charged with "Throw Missile", under the provisions of the Local Government Act.

He complained that he was assaulted and sworn at by police officers on the night of his arrest. Following investigation, the several allegations of assault on the night of 2nd September, 1983 were found "unable to be determined" and therefore, not sustained.

However, a subsequent complaint that a police officer threw a dead snake onto the youth's bed in his cell on the morning of 6th October, 1983 was found to be sustained. The constable involved claimed that he had passed the dead snake through the cell bars for the juvenile to indentify it. However, the complainant and his friend, who were in the "juvenile" cells together, maintained that the constable threw the snake onto the youth's bunk while he was asleep.

A departmental charge of "Misconduct" was preferred against the constable, in that he caused the snake to be handled by a person in custody. A second charge of misconduct was preferred against the constable for making a misleading statement to the investigating officer, concerning what happened to the snake after he had put it into the cell. He was fined $25 on each matter and transferred from the Dubbo Police District as a penalty. A record of the penalties was recorded on his Service Register.

Case No. 40

Conditions under which prisoners are held in police custody

In May and June, 1983 two complaints were received about the conditions under which prisoners were held at Dubbo Police Station. An investigation was carried out by the Chief Inspector, Dubbo, into allegations of dirty cells, filthy blankets, inadequate and haphazard cleaning, insufficient and cold meals, and the denial of a number of other facilities, including lack of provision for adequate shaving and for changes or prisoners' clothes for court appearances.

Several matters raised by the complainants were found "not sustained", because they resulted from police practices which were reasonable in the circumstances. These included denial of mirrors for shaving and denial of personal shaving gear to prisoners. To prevent the possibility of injury, prisoners were supplied with disposable razors. Similarly, supplementary food supplied by visitors was sometimes withheld, on the basis that food containers could be used to block toilet cisterns.

The allegations regarding cold and insufficient meals could not be determined owing to conflicting evidence. The allegation that one complainant was not allowed a change of clothing for a court appearance could not be determined on the evidence available. In this case, police had no record of the particular instance, but claimed that prisoners had generally been allowed to change their clothes before appearing in court.

At the time of the complaint, Police Instructions did not permit changes of clothing, although the officers at the Dubbo Police Station appeared to allow prisoners this facility. Following recommendations by this Office, Police Instructions were redrafted to allow prisoners a change of clothing for court appearances. Police Instructions at the time did not permit prisoners to receive visitors, apart from legal representatives. However, officers at Dubbo allowed visits by relatives when time and staff permitted. A recommendation was made that Police Instructions be amended to allow prisoners to receive visitors, and an appropriate instruction has since been circulated by the Commissioner.

As to the complaints of dirty cells and inadequate cleaning, it was determined that the contract cleaner, who had been doing the job since October, 1981, had never been given a statement of his duties. Consequently there was irregular and inadequate cleaning of the cells, toilet bowls and exercise yards. Blankets were laundered once a month, and this was insufficient, in view of the occupation of cells by intoxicated persons. Mattresses and pillows were generally not provided on the grounds that, if these were set alight, a hazard would be caused by toxic fumes in a confined space. Cells were fitted with coir mats over a bare concrete floor.

As a result of the investigation, the Police Department issued instructions that blankets should be laundered at least once a fortnight, and more frequently where necessary. The cleaner was given a statement of duties requiring the daily cleaning of cells. Instructions have also been issued that non-smokers should be supplied with mattresses where they are suitably segregated from smokers.

The Chief Inspector of the Dubbo area accepted that the cells and exercise yard were not kept as clean as they should have been. As a result of the investigation, he was reminded by the District Superintendent of his responsibilities to ensure that reasonable standards were maintained.

Case No 41

A cursory initial investigation

The complainant said that he saw a police vehicle commence a right-hand turn in George Street, Sydney, into the path of an on-coming car, which had to swerve to avoid a collision. The police then booked the driver of the car for disobeying a red light. The complainant said that this was wrong, and that the police had been making an illegal turn.

The original investigation by police relied heavily on the fact that the driver of the car had paid the penalty for the offence. The then Ombudsman found the complaint not sustained, and reported this to the complainant. The complainant wrote back setting out his dissatisfaction with the investigation, saying that he had been mis-quoted by the police officer who had taken his original statement of complaint.

When the Ombudsman attempted to re-open the investigation, the police involved took the matter to the Supreme Court and subsequently to the Court of Appeal. The Courts decided that the Ombudsman had power to re-open investigations if new evidence came to his attention.

In the subsequent investigation further witnesses to the event were interviewed, and the driver of the car was also interviewed. Enquiries were made of the Department of Motor Transport, but it was not possible to determine the state of the traffic lights at that intersection at the time.

In summing up the investigation, Mr Perrin, the Deputy Commissioner of Police, found that the conflict of evidence prevented him from deciding what the truth was. He said:-

> "In those circumstances I believe I have no alternative but to find that the complaint cannot be sustained. Likewise, because of that dilemma, I feel that the same benefit of the doubt must be extended to Mr T. in respect of the traffic infringement notice which was issued upon him.

The police department refunded the penalty paid and expunged the infringement from the driver's record.

Because of this, and because the events complained of had occurred in 1979, the Ombudsman declined to re-investigate. By virtue of Section 25A of the Police Regulation (Allegations of Misconduct) Act, the complaint was deemed to be not sustained.

It is notable that the police in charge of the first investigation had not interviewed the alleged offender, but had relied on his reported admissions to the officer who booked him. When he was later interviewed he denied making those admissions. He also said (and he is probably not alone in this) that he paid the penalty, not because he was guilty, but because he wanted to avoid "hassles". The first investigation did not seek out an independent witness; that person's evidence came to light as a result of the interview with the alleged offender.

It is now the practice of the Ombudsman to invite complainants to comment on the results of investigations before a decision is made.

Case No. 42

Alleged assault and bribery

Following a minor traffic accident, the two drivers involved pulled to the kerb and alighted from their cars. After heated conversation a fight occurred, during which one of the drivers indentified himself as a policeman. The complainant, Mr D., stopped a taxi for assistance, but the taxi driver left after being shown the police badge. Mr D. wanted to go to a police station, but the constable refused. After discussion about compensation for damages, another fight took place. The constable allegedly snatched fifteen dollars from Mr D., and both drivers left the scene. Mr D. went to the nearest police station and reported the incident, while the constable went home to bed. Constable N. was contacted that night and admitted to a "bit of a scuffle"; he had "had a few beers" and was on his way home when the accident occurred.

The following day Constable N. made a statement about the accident. His description of the events was considerably different from that of Mr D.; he agreed that there was a scuffle, but alleged that it was instigated by Mr D., and that Mr D. had given him some money towards the damage to his car.

In his report to this Office the Deputy Commissioner of Police maintained that the complaint about the alleged assault was not sustained because of the conflicting stories of the two parties. As to the complaint about Mr D. paying Constable N. money under duress, the Deputy Commissioner suggested that money was paid to the constable, but since the circumstances under which it was paid were in dispute this part of the complaint was also not sustained.

The file was referred to the Legal Advisings Section of the Police Internal Affairs Branch. The matter was heard by the Police Tribunal. The Departmental charge was:

> On (a certain date) having witnessed a breach of the Motor Traffic Act and being subjected to a criminal assault you acted in a manner likely to bring discredit upon the Police Force in that having identified yourself as a member of the Police Force you did then accept the sum of $15 from the person alleged to be responsible for such offences and you did not otherwise take action against such person.

The Tribunal found the charge proved but recommended no penalty. Mr Justice Bell was satisfied that, after the two parties alighted from their cars, a fight took place. He found that a second melee took place following a discussion concerning compensation for damage, and fifteen dollars was obtained by Constable N.; the method of obtaining the money was disputed.

Mr Justice Bell found Constable N.'s behaviour to be of no credit to the Police Force. He rejected the Constable's explanation for dismissing the taxi driver and for refusing to report the matter to the police. His Honour found that a police officer, whether off duty or on duty, but particularly when he identified himself as a police officer, should not decline to submit to a reasonable request by a citizen to comply with a procedure, nor should he give the impression that he is extorting money by reliance on his status.

CASE NO. 43

Constables caught red-handed

At about 11.30 p.m. a council worker standing on the corner of a city street saw an unoccupied police car parked, with its lights on, in the vicinity of several clothing stores. He heard an alarm start and then saw two police officers walk out of a nearby lane, apparently carrying coats under their arms. They put the property into the police car and drove off.

The council worker made a complaint. Evidence was gathered by the Internal Affairs Branch from the proprietor of the clothing shop, from the security firm as to the time the alarm sounded, and from tape recordings of police broadcasts. Eventually the constables admitted the theft, and charges were laid.

The constables were found guilty of "break, enter and steal", fined $500, and dismissed from the Police Force.

CASE NO. 44

Police inaction in logging dispute

The immediate complaint arose from the actions of a senior constable, which stemmed in turn from a continuing dispute between the complainants, and the Forestry Commission.

Part of the complainants' property adjoins the Keybarbin State Forest. When they purchased their property the complainants asked an officer at the Casino office of the Commission whether there was any logging in the forest. Accounts differ as to what the complainants were told. In fact, logging had occurred intermittently in the forest for at least seven years before the complainants bought the property. In 1970, in order to obtain legal access to Keybarbin State Forest, a road was surveyed and catalogued by the Department of Lands through part of the complainants' property. This road was never gazetted, since the then owner wanted it relocated a greater distance from the homestead. However, the second route, leading from the Shire road into the forest, did not follow a reserved road, and land for it had not been resumed before the first of the incidents complained about occurred on 14th August, 1981. Although it was not a legal road, the second route became the recognised access for logging contractors and Forestry Commission personnel; indeed, past owners of the property permitted it to be used for this purpose.

On 12th August, 1981 a neighbour told the complainants that a gate to their property had been damaged. They drove to the property and saw that the Forestry Commission was working in the adjoining forest, and that access to the logging sites appeared to be across their land. Mr P. put a chain and lock on the gate leading from the Shire road to his property and telephoned two officers of the local Forestry Commission. Logging operations in the Keybarbin State Forest were suspended and an officer of the Forestry Commission arranged to meet the complainant on the site on the morning of 14th August, 1981. That officer also asked that the local senior constable of police attend at the property while the Forestry Commission officer attempted to resolve the problem of equipment which belonged to three logging contractors and which was locked into the forest as a result of Mr P.'s putting the chain and lock in his gate. In the early hours of 13th August the logging contractors awakened the complainants by blowing their horns and flashing their headlights at the locked gate. Mr P. rang the local senior constable of police, but before he arrived a confrontation occurred between the complainant and the logging contractors. When the senior constable arrived Mr P. made it clear to him, the logging contractors and to the Forestry Commission officer who was then present, that there was no gazetted road through his property and that he would not give permission for logging trucks to go through it.

On 14th August, 1981 two Forestry Commission officers and the complainants' neighbour met Mr P. at his homestead. He refused to unlock the gates so that the logging equipment could be removed from the forest. During this discussion the senior constable remained on the road outside the complainants' property, about 4 km away, where logging contractors had gathered. The logging contractors apparently threatened to force their way into the property, and the police officer warned them not to do so. The logging contractors then said they would cut the chain securing the gate and the police officer indicated that he would not intervene. There is a dispute between Mr P. and the police officer about the conversation that took place between them shortly afterwards, as to what the contractors proposed to do, and what the senior constable proposed to do as a result. In effect, the senior constable said that Mr P. agreed to his standing by and recording the names and addresses of the persons responsible, so that Mr P. could proceed against them civilly. Mr P. denied that he agreed to this course of action; rather, he wished the police officer to stop the contractors. Three logging contractors cut the chain; in order to do so, according to Mr P., they elbowed him out out the way. This was denied by the other persons at the scene. The chain was broken, the logging contractors entered the forest and retrieved their equipment, and the senior constable gave Mr P. the names and addresses of the persons concerned.

On 31st May, 1982 the local Forestry Commission officer telephoned the senior constable and asked that he attend at the complainants' property while a survey was carried out for a proposed road resumption. The Forestry Commission officer claimed that he telephoned Mr P. prior to speaking to the senior constable, and that it was his understanding that Mr P. was going to refuse access on this occasion. Mr P. disputed the account of the conversation, while indicating that it occurred. In any event, he allowed the surveyor on to his property, while the senior constable and a third class sergeant remained in a "caged truck" police vehicle outside the complaints' property. The surveyor and the Forestry Commission officer served a notice under section 30 of the Public Roads Act on Mr P. The police stood by for some time, the length of which is disputed.

The complaint was re-investigated by the Ombudsman under the Ombudsman Act. At the conclusion of the presentation of evidence in the inquiry under Section 19 of the Ombudsman Act, the Ombudsman found that on 14th August, 1981 the senior constable made an error of judgement in not at least giving the logging contractors a warning against cutting the chain and entering private property against the will of the owners. Indeed, he indicated that he personally believed that the senior constable ought to have taken positive steps to preclude the cutting of the chain and that, whatever their apparent mood, he was not persuaded that the logging contractors would not have ignored a firm warning by the senior constable. However, taking into account all the circumstances, including the unusual nature of the problem which confronted the senior constable, the Ombudsman found that his actions fell short of wrong conduct under sub-section 28(1) of the Police Regulation (Allegations of Misconduct) Act. He found that there was no other wrong conduct by the senior constable on this occasion. In relation to the events of 31st May, 1982, he found the conduct of the senior constable to have been proper. The Ombudsman recommended that the role of police officers involved in civil disputes be once again a topic of lectures given by the police to divisional education officers throughout the State. He also recommended that the part of the Police Instructions concerning police involvement in civil disputes be up-dated to give more specific instructions to police officers as to their legal obligations in such matters. The Commissioner of Police accepted these recommendations.

Case No. 45

Unauthorised incursion into private property

There were two aspects of this complaint. The first was an allegation that a police officer in a small country town had, early on New Year's Day 1983, been surprised by the complainant's daughter inside the complainant's house. He was dressed in a t-shirt, jeans and thongs, and when asked why he was in the house, said that he was the local policeman. He asked who owned a motor vehicle parked at the front of the house and, when told by the complainant's daughter that the owner was her brother, had asked that he come to the police station.

The second aspect of the complaint related to the alleged wrongful issue of traffic infringement notices to the complainant's son.

The Ombudsman decided to re-investigate the complaint about the incursion of the casually dressed police officer into the complainant's house, by means of an inquiry under Section 19 of the Ombudsman Act. The police officer declined to give evidence before the Ombudsman. The Ombudsman took evidence from the complainant's daughter and son-in-law, and concluded that on New Year's Day 1983 the police officer was unable to attract the attention of the sleeping couple or the complainant's son. He entered the complaint's house while wearing plain clothes and was surprised by the complainant's daughter near the doorway between the hall and the lounge room. The Ombudsman found that the police officer had entered the premises without a warrant or the consent of the occupants, and that this was contrary to law. The police officer, being dressed in extremely casual clothing while executing his duty, was acting unreasonably and against police rules.

The Ombudsman recommended that the police officer be paraded before his District Superintendent and instructed not to enter private premises unless authorised by law or with the occupants' consent, and counselled as to the rules about wearing uniform. He also recommended that the Police Department formally apologise to the complainant for the incursion.

The Commissioner of Police has accepted these recommendations.

Case No. 46

Police involvement in contractual dispute

Two police officers responded to the complainant's call during a dispute between the complainant and a swimming pool contractor. The complainant alleged that the senior of the two police officers authorised the swimming pool contractor to enter the complainant's property and damage it. The Ombudsman decided to re-investigate the complaint under the Ombudsman Act, and instructed a seconded special officer to interview the parties. The Ombudsman later concluded that the senior of the two police officers involved himself in the dispute, purported to interpret the terms of the contract and, based on his interpretation of that contract, directed the swimming pool contractor to take the swimming pool pump motor and leave. The Ombudsman found that, in so doing, the police officer went against Instruction 125 of the Police Instructions, which provides, "Detectives and permanent Plain Clothes Police should . . . be particularly careful not to become involved in any civil dispute . . . They are not . . . to act on behalf of a creditor who seeks to obtain payment from his debtor. (This applies also to Police in uniform.) Such interference is exceedingly improper and dangerous and any member so offending will be liable to dismissal or severe punishment . . .". In view of the junior officer's passive role in the incident, the Ombudsman made no such finding against him.

The Ombudsman recommended that, because the senior officer's contravention of the instructions was comparatively minor, and as there was no evidence of malice in his ill-fated attempt to interpret an agreement, the sergeant be paraded before his District Superintendent and instructed on this matter. The Ombudsman did not think it appropriate to make a recommendation about compensation. He recommended that the Police Instructions which set out the responsibilities of detectives and plain clothes police, and which also apply to uniformed police, be separated and applied specifically to uniformed police.

Case No. 47

Confusion over blood tests for alcohol

The complaint maintained that two young uniformed police misunderstood recently-amended legislation, and compelled him to have a blood test taken in a public hospital after he had been injured in a motor accident. The police claimed that the complainant appeared to be in pain; they took him to a hospital in an effort to assist him. Once at the hospital, he was required by the Motor Traffic Act to undergo a blood test.

The Ombudsman re-investigated the complaint, conducting a hearing under Section 19 of the Ombudsman Act. The Ombudsman concluded that the police spoke and behaved in a way that led the complainant to believe that he was required, under the Motor Traffic Act, to attend a hospital to have a blood sample taken. The relevant provision is that a driver involved in an accident, who attends a hospital, has to have a blood alcohol test. The complainant, a medical practitioner, had wished to obtain medical treatment from a doctor next to his own practice, which was extremely close to the hospital in question.

The Ombudsman formed the view that the police believed they were required to have the complainant take a blood alcohol test, because he had been injured in a motor vehicle accident. The police conveyed their belief to the complainant. The Ombudsman, in reaching his decision, discounted evidence given by the police that the complainant had expressed his gratitude at some length before parting from them, that he had requested a lift from the Domain Car Park to the Sydney Hospital, and that he knew the staff at Sydney Hospital.

The Ombudsman accepted the complainant's evidence that he had not expressed gratitude, and that he did not know the staff of the Sydney Hospital. The complainant had told the officers that, if it were necessary for him to have a blood sample taken, Sydney Hospital was more convenient than St Vincent's Hospital, as it was much closer to his place of work. The Ombudsman decided that the officers' evidence on this point was inaccurate, and amounted to rationalisation.

The Ombudsman found that, because of the time taken for police to attend the accident, it was not practicable for either driver involved in the accident to be submitted to a breath test (the complainant had said that neither driver had been breath tested). The Ombudsman found that the conduct of the two police officers, in indicating to the complainant that he was required by law to have a blood test, was based wholly on a mistake of law. Both officers appeared, at the time of the Ombudsman's inquiry, to understand Section 4F of the Motor Traffic Act, and so the Ombudsman made no recommendations about them.

Evidence was given by the Director of Casualty and Emergency Services at the Sydney Hospital that confusion existed among police as to the provisions of Section 4F. The Ombudsman therefore recommended that certain educational steps be taken by the Police Department. He further recommended that the Commissioner of Police apologise to the complainant for the inconvenience and embarrassment caused to him, and reimburse him for the cost of the blood test. The only one of these recommendations accepted by the Commissioner of Police was to amend an index heading on the Police Department Circular about the provisions of Section 4F, so that it was not misleading, and did not intimate that blood testing was complusory for persons involved in motor vehicle accidents, irrespective of whether they attended at or were admitted to a hospital. The recommendations for apology and reimbursement, and the other more wide-reaching educational recommendations, were not accepted by the Commissioner of Police. Because one of the police officers had submitted an inaccurate report of the accident, she was counselled on this point, and a fresh traffic accident report, correcting the inaccuracy, was made out.

Case No. 48

Ill-Treatment in indentification

The substance of this complaint was that a probationary constable was rude to the complainant and ill-treated her. The constable was investigating an accident involving a vehicle owned by the complainant, but apparently driven by an old school friend, to whom she had lent her vehicle. The complainant was unable to assist police to locate her friend, who had given the driver of the other vehicle a false name, address and telephone number. The complainant said that her friend had told her she had been in an accident, but not that another car had been involved.

The complainant said that the probationary constable, in a peremptory manner, summoned her to the police station to question her about the accident. On a later occasion, after the complainant and the constable had trouble contacting each other, the constable, according to the complainant, demanded that she attend the local police station to answer questions which "had to be asked in a police station". The constable arranged for the other person involved in the accident to be present at the police station at this time, so that the other driver might say whether the complainant had, in fact, been a party to the accident.

The complainant said that she was left waiting in the police station while the constable went away, allegedly because he had the wrong notebook. She complained of being pushed into an interview room, to be identified by the other party to the accident. The complainant also alleged that the constable, in his speech and manner, was rude and aggresive.

Proceedings brought against the complainant for failing to supply the name and address of the driver of her vehicle at the time of the accident were dismissed on a plea of "not guilty".

The complaint was re-investigated under the provisions of the Ombudsman Act and a seconded special officer of the Ombudsman interviewed the complainant, the police officer the subject of complaint, and the other driver involved in the accident. The Ombudsman determined that the indentification procedure carried out by the probationary constable, and his failure to inform the complainant of this procedure, was contrary to Police Instructions. This was likely to create an atmosphere in which his words or actions could be construed by the complainant as being rude. The Ombudsman also found that the act of subjecting the complainant to this identification procedure constituted ill-treatment. He found that the conduct of the probationary constable was unreasonable within the provisions of Section 28(i) of the Police Regulation (Allegations of Misconduct) Act. He observed that the senior officer responsible for supervising the identification procedure was not mentioned in the original complaint, and so the Ombudsman made no finding as to his conduct. He noted, however, that the officer in charge of the station had certain supervisory responsibilities, if the identification procedures set out in the Police Instructions were to be complied with. The Ombudsman recommended that the probationary constable be counselled as to the appropriate course of action for identifying suspects, and the Police Department agreed with this course of action.

Case No. 49

Disputed police search

The complaint was in these terms:-

a) While attempting to gain entry to the complainant's house on 1st December, 1982, under a search warrant, two officers from the special gaming squad failed to identify themselves as police officers or to produce the warrant to the complainant.

b) Because the officers did not identify themselves, the complainant sought police assistance against two unidentified persons who forced entry into his house, breaking a window in the process.

c) One of the officers used offensive language and harassed the complainant, saying: "You dickhead, you knew we were coppers, why didn't you let us in ..."

"We have treated you very well, we could have surrounded the house with a dozen or so of our blokes, and just smashed our way in."

"... if you continue to telephone the Police when something like this happens, the word will get around that A ..... 's a pest, who is always complaining. One day when you want a copper they just won't come."

"... Regarding that appeal we've got some tapes on that haven't we ... You are going to get a shock when that appeal is heard."

"I don't give a shit if you phone the Prime Minister."

d) One of the officers refused to allow the complainant to photocopy the search warrant and, when asked who had issued it, gave a false name.

e) Drawers and cupboards in the complainant's study and other areas of the house were searched.

f) A uniformed constable, who arrived in response to the complainant's telephone call to police headquarters, was belligerent and offensive, and failed to check the bona fides of the officers from the special gaming squad.

The complainant's solicitors said the complaint was predominantly about harassment by police; that arose because the complainants had appealed against a conviction under the Gaming and Betting Act.

The Ombudsman re-investigated the complaint, mainly through an inquiry under Section 19 of the Ombudsman Act. He concluded that the complainant's behaviour was intended to inconvenience and delay the entry of police to his house. It was a Wednesday afternoon and, in the Ombudsman's view, it was highly likely that starting price bookmaking was being conducted by the complainant and his friend, who (while denying that this was the case) admitted that he had, in the past, assisted the complainant in this activity.

The complainant, by not allowing the police entry, was able to destroy evidence of betting. The police found a large bag of shredded pricing sheets and other shredded paper attached to a shredder in the complainant's office. While executing an earlier warrant at the complainant's house, police had seized a tape recording in which the complainant outlined a stratagem similar to that used on this occasion to delay police entry. The Ombudsman formed the view that both the complainant and his friend were fully aware that the persons attempting to gain entry to the premises were police officers inquiring into starting price bookmaking. The complainant's friend said that he, at least, knew they were police. Later in the inquiry the complainant admitted that he knew that police were attempting to gain entry to his premises. The Ombudsman also found that the complainant had been shown indentity cards and the special search warrant by the officers of the special gaming squad. The Ombudsman was not satisfied that any of the police involved in the execution of the warrant or the subsequent verification of the special gaming squad officers' identities made any of the offensive remarks or behaved in the offensive manner alleged by the complainant.

One of the reasons for the Ombudman's scepticism at the complainant's evidence was the complainant's professed ignorance of the tape recording, which the police intended to introduce at his wife's appeal. It was highly unlikely that the complainant was ignorant of the tape, since his wife, and the police who seized the tape, said that the complainant was present when it was seized and that the tape was referred to in the proceedings against the complainant's wife.

The Ombudsman found the complaint not sustained, and found that the police officers involved in the incident acted properly in executing the special search warrant and in responding to the call to the complainant's house.

Case No. 50

Missing property

Mr T. complained that valuable personal property was taken from him at a police station upon his being arrested, charged and held in custody. Mr T. did not attempt to collect the property for some time, and found that it was missing when he finally came to claim it. The police investigation of this complaint concluded that the property had been taken from the police station without Mr T.'s authority, and that the person responsible for this was most probably a member of the police force. However, owing to the lapse of time, to the inability of the investigating police to identify the author of forged signatures on relevant documents, and to the large number of police who had passed through the police station in the relevant period, they were unable to identify the person responsible for the removal of the property.

The Ombudsman believed that it might be possible to gather sufficient evidence to identify the police allegedly involved, and decided to re-investigate the matter. Certain limited re-investigation was carried out, but there was still insufficient information to identify the persons responsible for the disappearance of the property.

A dispute presently exists between the Office of the Ombudsman and the Police Department as to the amount of compensation to be paid for the lost property. The Police Department is of the opinion that the sum of the lowest values for each individual item of property (taken from three composite quotations) should be paid to the complainant. The Ombudsman is of the view that the middle composite valuation of the three composite valuations obtained should be paid to the complainant. The Ombudsman has further recommended that expenditure incurred or to be incurred by the complainant in replacing house and car locks (his keys had been amongst the missing property) should be re-imbursed to him by the Police Department. The Police Department has requested that receipts and quotations be obtained in relation to these latter expenses before it considers whether to recommend the making of such a compensatory payment.

Case No. 51

Who solicited the bribe?

In May, 1984 the Police Department received an anonymous letter alleging that during Easter, 1984 a police officer had solicited a bribe of $800, and had accepted $300, from Mr M., instead of charging him with driving while above the prescribed alcohol limit. The letter said that a further $500 was to be paid to the officer and that Mr M. had received threatening telephone calls about paying the $500, and had borrowed $500 from his employer to pay the bribe. The complainant also supplied the home and business telephone numbers of Mr M., the name and address of his employer, and the employer's first name.

Investigating police were told by Mr M. that he was stopped by a uniformed police officer in Bondi Junction about 11 a.m. on Easter Sunday, 21st April, 1984, for a traffic offence; he was given a breath test, which proved positive. The officer intimated that he would also fail the test on the "big machine" at the Police Station, and remarked that Mr M. would need his licence for work. The sum of $800 was mentioned. Mr M. had $300 in his possession, and handed that money to the officer.

Mr M. described a Police issue alcometer as the device used for the breath test. He described the officer, and said that he was wearing normal police uniform but no cap, and that he was driving an unmarked Commodore sedan. He also said that there was no mention of paying a further $500 to the officer; nor had he received threatening telephone calls. Mr M. could not assist the investigating officers with the identity of the complainant, and claimed he had told no one of the incident.

Mr M.'s employer told police that on 4th May, 1984 Mr M. had borrowed $800 from him, saying that he had a problem with drinking and driving.

Police inquiries revealed that on 21st April, 1984 the only officers working in the Bondi area, and issued with alcometers, were members of the Highway Patrol. The only unmarked Highway Patrol vehicle in the Bondi area at the relevant time was manned by two officers, neither of whom answered the description supplied by Mr M. There was no further evidence to establish whether or not the "officer" was, in fact, a police officer, or whether his vehicle was an unmarked police car or a private vehicle.

Investigating police were satisfied that Mr M.'s version of the incident could not be refuted and that there was sufficient evidence to sustain the complaint. However, since the officer could not be identified and all avenues of inquiry had been exhausted, consent was granted for the investigation to be discontinued.

Case No. 52

Change in procedures

Mr S. rented some premises in Neutral Bay to two brothers. When Mr S. went to find out why his tenants had not paid their rent, a heated argument broke out. Mr S. alleged that his tenants assaulted him and caused malicious damage to his car.

Mr S. left the premises, drove to the nearest telephone and called the local police station. The police arrived at the Neutral Bay address and interviewed Mr S. and his alleged assailants. The police asked Mr S. and one of the brothers, Mr W., to accompany them to the police station.

Mr W. was charged with "Assault" and "Malicious Injury". Mr S. alleged that he was told, after signing the charges, that "I could leave and nothing more". Mr S. said that "about two and half weeks later I contacted Constable K. by telephone to find out when the matter was being heard and why I had not been contacted and he advised me that it had already been heard and because I had not appeared in the matter it had been dismissed". The police denied the allegation and said that they had told Mr S. where and when to appear in court, and had given him a "scrap of paper" with the details on it.

The police investigation of Mr S.'s complaint found it not sustained. However, the Ombudsman, after examining the police report, decided to re-investigate the complaint. A hearing was held under Section 19 of the Ombudsman Act. The Ombudsman found that Mr S. had been informed by the police of the date and place of the hearing. However, the methods used by the police to inform Mr S. were found to be inadequate and in need of reform.

The Ombudsman recommended to the Commissioner of Police 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 any information against another citizen at a police station".

The Commissioner of Police issued Circular No. 85/16 in response to the Ombudsman's recommendations.

Case No. 53

Conflict over parking

Mr P. complained that, when booking him for double parking, an officer of the Highway Patrol had used unnecessary force, tore his shirt and unnecessarily arrested him.

Investigations revealed that the complainant and the two police officers involved gave consistent accounts of the initial facts. Mr P.'s car was double parked outside a restaurant while he was out of the car discussing arrangements for dining with the people whom he had driven to the restaurant. As he returned to the parked car, two police officers were issuing parking tickets to cars behind where his car was double parked. He got into his car, turned on the headlights, started the engine and commenced to drive away.

At this point, the versions of the complainant and the police differed as to what happened. The account given by one of the police was as follows:

> He (Mr P.) had driven the car about 10 cm when I held up my left hand and signalled for him to stop. I shouted "STOP" to him. The person P. then stopped his car and I went to the driver's side door and said to him, 'You have to wait a couple of minutes for me to finish what I am doing, sir'. He said , 'No I'll just drive off, you can't book me when I come out to my car'. I said. 'If you drive off, sir, I'll have no alternative but to stop you down the road and arrest you for disobeying my direction'. Mr P. then drove the car off in K. Street.
>
> I immediately ran back towards the Police car and I commenced to drive in the same direction as [Mr P.]. The vehicle again double parked some yards further on. I approached the parked car in the police vehicle. I turned on the blue flashing lights, sounded the car horn twice, stopped behind his car and approached Mr P.
>
> I said, 'Produce your driver's licence, sir'. He failed to produce his licence and I said, 'You have failed to produce your licence, state your name and place of abode'. Mr P. did nothing and said nothing. I repeated the request to Mr P. to state his name and place of abode or he would be arrested. Mr P. again said nothing and did nothing. Constable 1st Class B then said to Mr P., 'Sir, you've failed to produce your driver's licence. Now if you fail to state you name and place of abode you're liable to be arrested'. He said, 'Well, arrest me then'.

> I called for another police car to assist in the arrest, as P. was obviously not going to go along peacefully ... Another police vehicle arrived. I said to Mr P., 'You are under arrest for refusing to state your name and place of abode. Get into the police car'. He did nothing but just sat there in the driver's seat with his arms folded. I then reached down into the inside of the car and grabbed him by the shirt collar and pulled him towards the police car. This failed to move him. I then took hold of him by his arm and pulled him out of his car. With the assistance of other police he was walked to the rear of the police vehicle. He was then searched, handcuffed and then conveyed to the Police Station.
>
> After arriving at the Police Station, Mr P. was asked at least ten times to supply his name and address. He did and said nothing. He was then charged under the particulars which appeared on a licence in a wallet found on him when he was searched. He was charged with 'Disobeying a reasonable police direction' and for refusing to state his name and place of abode when stopped by police after having driven a motor vehicle. (Note: These offences constitute proper grounds for arrest, in accordance with the provisions of the Motor Traffic Act and in accordance with Police Instruction 31-8A, paragraph 14.)

By contrast, here is the complaint's version of what took place:

> I walked to the car and saw a Constable booking cars behind me. I got in and started the car up, moved a few metres when I heard a whistle. I stopped. The Constable was walking towards the car. He spoke to me in a formal tone of voice, 'Sir, your car is double parked'. I said to him, 'Even though I am in the car and the car is already moving'. He said, 'You have already committed the offence of double parking'. I said, 'OK'. He said, 'I have already got your number down in the book'. I saw a car moving out from a parking spot about three cars in front of me. I said to him, 'Is it alright to move the car into that parking spot? You've got all the details. He said 'No. You stay here and don't move'. I said, 'I can't see what the problem is. I'm only moving up here to park the car'. He said that if I moved the car, he would arrest me. I replied to him, 'You've got all the details. I am not disputing it, you can give me the ticket and I will mail it.'... I moved off to park the car. The Constable came up behind me in the police car with the sirens going and the lights flashing and parked behind me, stopping me getting into the parking spot. He got out and said to me, 'OK driver, I want to see your driving licence'. I said to him, 'Let me park the car'. His fellow officer then said to me, 'You've got five seconds to produce your licence'. I said, 'Let's forget about the five seconds and let me park the car. I have got the driver's licence'... With that the Constable reached into the car and pulled the keys out. He opened the driver's door and dragged me out of the car by my clothes. He twisted my arm behind me and handcuffed me, he pushed me against the boot of the police car and took my wallet and keys out of my pocket. I said, 'What am I getting arrested for?' He said, 'You'll find out when we get to the police station.' We then came to the police station. They asked me my name and everything and I didn't tell them, I was real angry. I wanted to speak to somebody who was going to be a bit reasonable. I was told if I didn't give my name and address I would be locked up and go to Court.

The available evidence relating to the complaint was conflicting. If there were any witnesses to the occurrence, they failed to make themselves known to police. Because of the conflicting evidence, it was not possible to determine where the truth lay. Mr P. did not request re-investigation, and the complaint was deemed not sustained, in accordance with Section 25A of the Police Regulation (Allegations of Misconduct) Act.

Case No. 54

Goods in custody

Mr D made several complaints about the conduct of police on 17th and 19th January, 1984. He complained that on 17th January uniformed police, together with his landlord, entered his room without his permission, removed two guests, and gave no reason for their action. Mr D. also complained that on 19th January several uniformed police entered his room, again accompanied by his landlord. On this occasion, after inspecting some of the property in the room, Constable S. arrested Mr D. for having stolen goods in his custody.

Among the allegedly stolen goods were three bank passbooks, two in the name of R and one in the name of S. Mr D. complained that the police had put a 'stop' on these accounts, preventing him from operating them. According to Mr D., the accounts were his own, but were conducted by him in other names.

Mr D. also complained that the police and his landlord placed the rest of his personal possessions, including a calculator, into a number of green garbage bags before taking him to the police station. When his property was returned to him, upon his release on bail, he found that the calculator was missing. Mr D. also complained that two items the subject of the charge of 'goods in custody', an adaptor cord and a packet of batteries, were not returned to him after the charge was dismissed.

Finally, Mr D. complained that the evidence given by Constable S. at court was perjured, although he later said merely that the evidence of Constable S. was not consistent with events on 19th January, 1984, and that the constable's memory was deficient.

Investigation by the Internal Affairs Branch revealed that:

1. Eviction of guests

   (i) the whereabouts of the two guests was not known, and one was known to the complainant only by his first name;

   (ii) extensive searches of police records, including car diaries, duty rosters, telephone message pads and occurrence pad entries, failed to confirm the attendance of any police officers at Mr D.'s premises on 17th January, 1984.

2. Charge of "goods in custody"

   (i) although the Magistrate found a prima facie case against Mr D. at the conclusion of the prosecution case, the charge was dismissed after Mr D. gave evidence and produced receipts relating to his purchase of the goods, and gave an explanation for his possession of the passbooks;

   (ii) Mr D. had not previously shown these receipts to Constable S. or other police. Some of the receipts were hidden under a tablecloth in this room and others were in his wallet. Mr D. was worried that, if he produced the receipts, they would be destoryed, just as a rent receipt had allegedly been torn up by the landlord in the presence of police;

   (iii) according to the Police Prosecutor, the Magistrate remarked that, had Mr D. been as frank with the arresting police as with the Court, the charge may not have eventuated.

3. "Stopping" of Bank Accounts

   (i) Constable S. issued subpoenas to the relevant banks to produce records of the accounts;

   (ii) the banks entered a particular code on these accounts, requiring a teller to refer any operation on the accounts to a superior;

   (iii) upon the dismissal of the charge, the passbooks were returned to Mr D., and the code removed.

4. Loss of calculator

   (i) the property placed in the green garbage bags was not listed either by Constable S. or at the police station; the garbage bags, but not their contents, were entered in the Prisoners Property Book;

   (ii) some items were left in Mr D.'s premises after his arrest;

   (iii) Mr D. did not check his property, and did not raise the issue of the missing calculator until he spoke to his parole officer;

   (iv) thus it was not clear that the calculator was placed in one of the garbage bags by police.

5. Failure to return property

   (i) the adaptor cord and packet of batteries, together with other property the subject of the charge, were entered in an Exhibit Book at the police station for production at court in accordance with normal practice;

   (ii) when the charge was dismissed the property was returned to Mr D., who signed the Exhibit Book to acknowledge receipt of the property.

6. Evidence of Constable S.

(i) no cross examination of Constable S. by Mr D.'s legal representative was conducted on this point, and no adverse comment was apparently made by the Magistrate about Constable S.'s evidence.

The Internal Affairs Branch investigation concluded that none of the complaint was sustained.

Mr D. was not satisfied with the investigation, and asked the Ombudsman to re-investigate the complaints under the Ombudsman Act. The Ombudsman examined the documents prepared by the Internal Affairs Branch and concluded that complaints (2), (3), (5) and (6) were "not sustained".

The evidence on complaints (1) and (4) was conflicting, and the Ombudsman considered whether to re-investigate those matters. However, having regard to the facts disclosed by the Internal Affairs Branch investigation and to the resources required for a re-investigation, the Ombudsman decided that such a re-investigation should not be carried out. Accordingly, by virtue of Section 25 of the Police Regulation (Allegations of Misconduct) Act, the complaints were deemed to be not sustained.

The investigation did reveal a failure by Constable S. and the Station Sergeant to comply fully with Police Instruction 32, paragraph 25, in recording the personal possessions of Mr D. at the police station. The Assistant Commissioner (Internal Affairs) advised that he intended to have both officers counselled by their Divisional Officer as to their responsibilities.

Case No. 55

Threatening gesture

Mr S. complained, among several other things, about the conduct of Detectives H. and M. at the Sydney District Court, Darlinghurst, on 4th November, 1980.

Mr S. initially complained through his solicitor that, following Mr S.'s acquittal by a jury on three charges of armed robbery, Detective M., who had been involved in the case, glared at him in a courtyard outside the court. Detective M., placing his fingers against his head, made a gesture indicating the firing of a pistol. In a later interview with an investigator from the Internal Affairs Branch, Mr S. stated that the incident had occurred inside the courtroom in the presence of the judge and jury, and that the gesture had been made by Detective H., the officer in charge of the case. Mr S. maintained that his mother, brother and a witness who had given evidence on his behalf had seen the incident. Mr S. also told the investigator that he had informed his solicitor of the gesture by Detective H.

When interviewed by the Internal Affairs Branch, the solicitor said that he had not witnessed the incident, and had written the letter of complaint on Mr S.'s instructions. Mr S.'s mother said that the gesture was made inside the courtroom by Detective H., but after the judge and jury had left. Mr S.'s brother maintained that Detective H. was responsible, and that the incident took place as the detectives were walking out of the Court. The expert witness did not see any incident, and believed that Mr S.'s brother had not been present. Detectives H. and M. denied the allegation.

The investigation was referred to the Police Prosecuting Branch. In his examination of the material, the Acting Superintendent in charge of the Branch restricted his comments to the question of whether there was evidence to support a prosecution for the offence then commonly known as "serious alarm and affront" under Section 5 (now repealed) of the Offences in Public Places Act. The Acting Superintendent commented that the complainant's statement, together with those of his two witnesses, might, untested, indicate the commission of such an offence. However, the offence was a summary one, requiring that an information be laid within six months, and so any prosecution was already statute barred.

Because of the number and nature of other complaints made by Mr S., the investigations were not completed until late in 1984. It was then concluded that the complaint was not sustained. Mr S. was dissatisfied with this finding and asked the Ombudsman to re-investigate the complaint. However, the Ombudsman decided that, having regard to questions of utility and public interest, there should be no re-investigation. Accordingly, the complaint was deemed not sustained, pursuant to Section 25A of the Police Regulation (Allegations of Misconduct) Act.

CASE NO. 56

"Punchy" and the Rugby player

The complainant maintained that he was assaulted in the Glebe Police Station when detained there as an intoxicated person. Owing to the extreme state of his intoxication, the complainant, a university student who had been celebrating a faculty Rugby victory, had a blurred recollection of events. After leaving a Glebe hotel, he had been discovered lying in a vacant allotment by two passing police officers. Their attention had been drawn to him by two young women whom he had been allegedly "hassling", and next to whose car he was lying.

During his detention at the vacant allotment the complainant was truculent and physically aggressive. He had no recollection of the period between leaving the hotel and walking into the Glebe Police Station. Accordingly, the Ombudsman, when re-investigating the complaint, had to rely on the testimony of the police that the complainant fell while trying to swing out of their grasp. This caused one of them to overbalance on to him, inflicting facial injuries.

The complainant was taken from the vacant allotment to the Glebe Police Station and there placed in the dock. He said that, in response to his truculence, aggression and bad language, one of the police, at the instigation or with the approval of a uniformed Sergeant, struck him on more than one occasion. The police denied that any such assault took place but one of them, under questioning, said, "He might have got his . . . images of what happened mixed up", and, "He hasn't remembered rightly what's happened". The Sergeant on duty said, "I don't know what happened outside, of course . . . I'm told certain things . . ." and said that the nickname of one of the police was "Punchy". One of the officers said that he thought the complainant's behaviour was "anti-police". The Ombudsman decided that three of the police were other than frank in the evidence they gave.

The complainant was released the morining after being detained, and returned to his university college. He told a friend about the incident and the friend, showing some presence of mind, took photographs of the facial injuries. Some time later his sister told his father about the incident, and the complainant was examined by a doctor. She found that he had a fractured nasal bone and other injuries; this was later confirmed by X-rays.

After the complaint was made, an identification parade was conducted by the investigating police. The complainant identified as his assailant a police officer whose appearance did not accord with his previous description of his assailant. There was some disagreement between the complainant's medical practitioner and the Senior Police Medical Officer as to the likely cause of the complainant's injuries, but the Senior Police Medical Officer gave evidence that if the complainant had been amnesic from the effects of alcohol, is was possible that a blending of the physical features of persons present during the alleged assault could occur. On both sets of medical evidence it appeared that a punch or punches could have caused the injuries, or at least some of them, although the evidence of the complainant's doctor favoured this conclusion more than the evidence of the Senior Police Medical Officer.

The Ombudsman found that, during the course of his detention in the vacant allotment, the complainant struggled and fell to the ground, that a police officer fell on top of him, and that the complainant sustained a graze and a bump to the left side of his forehead, and possibly a bump to the left side of his head and some injury to his nose. He also found that at the Glebe Police Station later that evening, the complainant, who was apparently aggresive and truculent, was struck at least once between the eyes by one of the four uniformed police present. The Ombudsman found that the complainant's initial description of the police officer who struck him, and his subsequent identification of a certain police officer as this person, were confused because of his intoxication. The Ombudsman was unable to determine which of the four police officers struck the complainant. He thought it likely that the assault was at least condoned, if not instigated, by the station sergeant in an attempt to "quieten down" the complainant.

The Ombudsman found that the assault on the complainant by an unidentified police officer was contrary to law. He recommended that the New South Wales Police Department formally apologise to the complainant, reimburse him for medical expenses incurred by him as a result of the assault, and make an ex-gratia payment of $100.00 to him to cover the travelling and other ancillary expenses to which he and his father had been put in connection with the making of the complaint. He further recommended that the New South Wales Police Department indeminify the complaint for any medical expenses which he may in future incur as a result of the injuries sustained by him from the blow.

In his comments on a draft of the Ombudsman's report, the station sergeant said, "As you have tried to discredit me, I invite you to now recommend that I be charged with an appropriate offence, perhaps taken before a court where the matter could be heard before an unbiased arbitrator". Accordingly, the Ombudsman recommended that advice be obtained from the Crown Solicitor or independent counsel as to whether sufficient evidence existed to prefer a departmental charge of "Misconduct" against the station sergeant. If there were sufficient evidence, then the charge should be prosecuted before the Police Tribunal by the Solicitor for Public Prosecutions or an independent legal practitioner. The Police Department has said that it does not propose to adopt any of these recommendations. However, the Assistant Commissioner (Internal Affairs) has been provided with tape recordings of the evidence given at the hearing, in order to decide whether to take Departmental action against the station sergeant.

Case No. 57

Unjustified arrest

Mr H. drove his car in excess of the speed limit and was stopped by police operating a radar instrument. He produced his driver's licence and held it in his hand, but it was not taken by police. He wanted the police to record that only one constable had observed the radar display, before surrendering his licence.

Police alleged that Mr H. held his licence in his hand and pulled it away from them each time they reached for it. Mr H. alleged he kept offering the licence, but that the police would not take it. Mr H. was arrested for "Exceed speed limit" and "Not produce licence". At no time did police seek to identify Mr H. by asking for his name and address. He was arrested because he failed to hand his licence to police.

The arrest was not justified. The police officers ought to have sought to identify Mr H. by asking for his name and address. Had he provided this information, both offences could have been reported by way of Traffic Infringement Notices. Had he refused to provide this information, the arrest would have been justified.

The complaint of unjustified and unnecessary use of the arrest procedure was therefore sustained.

Case No. 58

Wounding following a car chase

About 1 a.m. on 9th November, 1980, an armed robbery took place at the Greystanes Inn, Merrylands. The three offenders fled from the scene in a motor vehicle. They were pursued by two civilians in another vehicle. During the chase, the offenders fired shots at their pursuers, one of whom received a fatal gunshot to the head.

Shortly afterwards, the offenders abandoned their vehicle and, brandishing firearms, forced their way into a nearby house. They took the keys of a motor vehicle, ripped the telephone from the wall and fled in the stolen vehicle.

By this time a large scale police search had commenced and the vehicle containing the three offenders was sighted by police and the police helicopter. The offenders abandoned the vehicle and fled on foot. Two of the offenders were quickly arrested but the third eluded arrest until some days later.

During the search for the offenders a motor vehicle was observed driving at a high speed in the vicinity of where the offenders were last seen. A police vehicle, containing two officers, intercepted this vehicle and one of the officers incorrectly identified the driver of the speeding vehicle as one of the offenders wanted for the armed robbery and the murder.

The driver of the vehicle allegedly failed to stop when police identified themselves and directed him to pull over, accelerating away at high speed. The police again positioned themselves alongside the speeding vehicle and directed the driver to pull over; this direction was not acknowledged and the chase continued.

The chase continued for some distance, during which time the police fired shots at the vehicle, which was continually illuminated by the police helicopter's spotlight. Eventually, the vehicle stopped and the driver ran into the yard of a nearby house. At this time he was still illuminated by the spotlight and police state that they observed that he was carrying a pistol in his hand. He ran into the street where, after calls were made to him to stop, police fired shots at him. He kept running. Police then fired a shotgun at him; the charge struck him in the lower portion of his body and he fell to the ground. The police alleged that at this time he threw away a handgun he had been carrying. Police evidence was that they found a .38 calibre Star brand automatic pistol nearby.

After his discharge from hospital, where he had been treated for gunshot wounds to both thighs, the driver was charged with carrying an unlicensed pistol, driving at a speed dangerous to the public and driving in a manner dangerous to the public. He later defended the charges, but was convicted of carrying the pistol and driving in a dangerous manner. No appeals were lodged against the convictions or sentences.

The wounded man's step-father complained about the action of police, stating that his step-son had never possessed a pistol. An investigation, carried out by the Police Internal Affairs Branch, established that the police officer who shot the wounded man, was at the time, of the belief that the person he was pursuing was wanted for armed robbery and murder and, consequently, that his action could be justified. Senior officers of the Police Department were of the view that there was no breach of Police Instructions, and suggested that the complaint was not sustained.

Copies of the reports and documents relating to the police investigation were sent by this Office to the complainant, seeking his comments. There was no response, and a telephone call elicited the information that the complainant wanted nothing further to do with the matter.

As a result, the matter was finalised; the Ombudsman was unable to determine where the truth of the matter lay, and no re-investigation was carried out, since the complainant did not request one and the main issues had already been determined by the court.

Case No. 59

Crime data based on racial appearance

The Aboriginal Legal Service complained about the collection of police statistics based on racial characteristics. The investigation focused on whether information provided to the Bureau of Crime Statistics and Research and to the Department of Aboriginal Affairs was compiled in accordance with a system which could produce clear, accurate and repeatable classifications; whether any checks on the accuracy of information were made before it was provided; and whether an adequate system existed for ensuring that inaccurate and misleading information was withheld.

The Crime Information Intelligence System (CIIS) is a computerised and centralised, high-speed reference index of all crimes committed within New South Wales, data for which are collected through Crime Information Reports (CIR) and Further Crime Information Reports (FCIR). CIRs are used to report crimes or alleged crimes coming under the notice of police, either by way of report, detection or arrest. FCIRs are used to record additional information about crimes that have already been reported in CIRs. Some minor offences are not reported because information about them is not thought to be very valuable to crime intelligence. These forms generate a permanent record of crime, both in the office covering the area in which the crime is committed and in the computer at the Modus Operandi Section at the Criminal Investigation Branch; the latter is the master record of crime statistics.

After Crime Information Reports are compiled by investigation police, the forms are sent to the Divisional Detective Sergeant's office, where index numbers are added to the forms. The forms are then checked before being sent to the Modus Operandi Section, where they are coded and entered into the computer. The Modus Operandi Section processes several thousand of these forms each week.

Sixty-three separate pieces of information are recorded on a CIR and fifty-one on an FCIR. Among the items is a two-part racial coding system, introduced in 1972, requiring entries under the headings of "zone of birth" and "racial appearance".

Training in the completion of Crime Information Reports is given at the Department's Initial Training Course, Secondary Training Course and Detectives Course. In addition, training staff from the Planning and Research Branch hold regular courses for divisional education officers; these courses include the completion of crime information forms. In turn, divisional education officers promulgate information obtained from these courses within their respective divisions. No special emphasis is placed on the identification and recording of the racial appearance offenders in such courses, and there are no specific instructions or guidelines on the racial coding system in the Initial Training Course, the Secondary Training Course or in the handouts on submission of CIRS issued by the Computer Training Group.

The information collected in CIRs and FCIRs is intended for internal police use. However, in 1982, criminal statistics on the basis of racial appearance were supplied to the Bureau of Crime Statistics and Research and to the Department of Aboriginal Affairs.

A detailed investigation was carried out into the operation of the system for recording racial appearance, with particular emphasis on the realiability of the resultant statistics. The investigation of the provision of statistical information on "offenders by racial appearance" to the Bureau of Crime Statistics and Research and the Department of Aboriginal Affairs in April/ May, 1982 by the Police Department led the Ombudsman to form the opinion that the information provided was likely to have been unreliable because of two principal weaknesses in the Crime Intelligence and Information System. The first is that there appear to be insufficient guidelines and instructions for interpreting and recording racial appearance data on Crime Information Reports and Further Crime Information Reports. Secondly, the racial appearance code is structured so that categories overlap or merge or have internal inconsistencies. The system does not produce accurate and repeatable classifications from different recording officers.

The Ombudsman found that the conduct of the Police Department in providing the statistical information to the Department of Aboriginal Affairs and the Bureau of Crime Statistics and Research in April/ May, 1982 on "offender by racial appearance" was wrong in terms of the Ombudsman Act, in that it was in accordance with an established practice but that the practice was unjust and improperly discriminatory.

The Ombudsman made the following recommendations in his report:

> That the Police Department cease supplying any statistical information deriving from racial appearance data recorded in the Crime Information and Intelligence System to outside bodies. (The Police Commissioner accepted this recommendation and has advised that appropriate instructions will be issued.)
>
> That the Commissioner direct the Planning and Research Branch to co-ordinate a review of the racial coding system used in the Crime Information and Intelligence System and to take whatever action necessary to modify it in order to improve the reliability of information recorded by it. (The Police Commissioner has advised that revised racial appearance coding will be introduced with the new Crime Information and Intelligence System.)
>
> That following the review of the racial coding system, a further review be made of all training lectures and material concerned with Crime Information Reports and Further Crime Information Reports, with a view to developing specific instructional material on the recording of racial appearance information in order to promote more realiable classification and recording of such data. (The Police Commissioner has advised that arrangements will be made for the Planning and Research Branch, in conjunction with the Training Development and Examination Branch, to review all training material in this field.)