Annual Report

Ombudsman of New South Wales

YEAR ENDED 30TH JUNE, 1986

THE OMBUDSMAN OF NEW SOUTH WALES

ELEVENTH ANNUAL REPORT
(1 July 1985 - 30 June 1986)

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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 eleventh such Annual Report and contains an account of the work and activities of the Office of the Ombudsman for the twelve months ended 30 June 1986. 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 1986) have been mentioned where there is merit in bringing material up to date. In addition, material required in terms of the Annual Reports (Departments) Act is included in the Report.

The Ombudsman, G G Masterman QC, was appointed in June 1981, making this his fifth Annual Report.

Previous Annual Reports have noted increased numbers of complaints received by the Office; the year ended 30 June 1986, for the first time, saw a slight reduction in the number of complaints received.

CHARTER

In introducing the Ombudsman Bill to Parliament, the then Minister for Justice, Mr Maddison, referred to certain social and political factors which prompted the initiative, including:

1. the emergence of a mass of legislation regulating the relationship between the individual and the State;

2. the increase in the range of discretionary benefits which citizens may receive, and the consequent increase in the exercise of discretionary powers by public officials;

3. the growth of the public sector.

These factors led the Government to the view that "there is a need for an independent official who will approach in a consistent way, having regard to the justice and the merits of each individual case, complaints made to him on administrative decisions".

The Office of the Ombudsman of New South Wales was established under the Ombudsman Act, which was assented to on 18 October 1974 and, with the exception of Part III of the Act, commenced on that date. Part III, which enabled complaints about the conduct of public authorities to be investigated, took effect from 12 May 1975. From 1 December 1976, the Ombudsman was empowered to investigate certain complaints against local government authorities. The Police Regulation (Allegations of Misconduct) Act, giving the Ombudsman a role in the investigation of complaints against police, came into force in February 1979. A significant expansion of the role of the Ombudsman occurred in February 1984, when the Office of the Ombudsman was given the power directly to reinvestigate complaints about the conduct of police officers.

AIMS AND OBJECTIVES

The function of the Office of the Ombudsman is to receive and investigate complaints about matters of administration within the New South Wales public sector, and to report the findings of investigations to the responsible Minister and, if necessary, to Parliament.

The Office receives very many oral and written complaints. The Office employs three Interviewing Officers to deal with enquiries from the public; they assess enquiries and, if a matter falls within the jurisdiction of the Ombudsman, suggest that a written complaint be lodged. If this Office is unable to help complainants, the Interviewing Officers suggest whether State or Federal Government organisations or non-government organisations might be able to assist.

Access to the Office of the Ombudsman is not restricted in any way, by reasons of residence, citizenship or otherwise.

ACCESS

The official address and telephone number of the Office of the Ombudsman is:

14th Floor
175 Pitt Street
Sydney NSW 2000

Telephone: 235 4000

The official hours of service are 9 am to 5 pm, Monday to Friday. It is usually possible to obtain assistance from 7.30 am to 6 pm, Monday to Friday.

MANAGEMENT AND STRUCTURE

The principal officers of the Office of the Ombudsman are:

George Masterman MA(Oxon) LlB(Syd) QC	-	Ombudsman
Brian Jinks BA(Qld) PhD(Syd)	-	Deputy Ombudsman
Priscilla Adey BA LlB(Syd)	-	Assistant Ombudsman
John Pinnock BA LlM (Syd)	-	Assistant Ombudsman
Gordon Smith Dip Crim(Syd)	-	Principal Investigation Officer
David Brogan	-	Executive Officer

The Ombudsman is, ex officio, a member of the New South Wales Privacy Committee. The Ombudsman has made submissions to the Government that the statutory requirement that the Ombudsman be a member of the Privacy Committee be removed. No other member of the staff of the Office is a member of a significant statutory body by virtue of any association with this Office, and the Office does not have membership in any inter-departmental committee.

Committees

The only committee within the Office is that established to formulate the Equal Employment Opportunity Management Plan; it

was set up in April 1985. The committee comprises a central sub-committee, of the Executive Officer, the Personnel Officer and the branch delegate of the Public Service Association, and an advisory sub-committee of volunteers from within the Office who have an interest in Equal Employment Opportunity.

LEGAL CHANGE

During the year both the Ombudsman Act 1974 and the Police Regulation (Allegations of Misconduct) Act 1978 were amended.

The most important amendments were effected by the Ombudsman (Police Regulation) Amendment Act 1985 and the Police Regulation (Allegations of Misconduct) Amendment Act 1985, both of which were assented to on 10 December 1985. Sections 10 and 32 of the Ombudsman Act were amended to authorise an acting Ombudsman, the Deputy Ombudsman and any Assistant Ombudsman to carry out investigations under the Ombudsman Act of the conduct of members of the Police Force, and validated certain actions of the Deputy Ombudsman which he had earlier taken. Before the Act was amended, only the Ombudsman, or a special officer of the Ombudsman who was also a member of the Internal Affairs Branch, was entitled to investigate such conduct. Section 48 of the Police Regulation (Allegations of Misconduct) Act was amended to remove anomalous restrictions on the power of the Deputy Ombudsman, and to extend the power of an Assistant Ombudsman to seek information from the Commissioner of Police. The reasons for and effect of these amendments are explained in more detail elsewhere in this Report.

The two Acts were also amended by the Miscellaneous Acts (State Drug Crime Commission) Amendment Act 1985, which was assented to on 1 November 1985. The Ombudsman Act was amended by adding to Schedule 1 an additional item of conduct excluded from the Ombudsman's jurisdiction, namely:

> Conduct of a public authority where acting as a member of the State Drug Crime Commission, or the State Drug Crime Commission Management Committee, under the State Drug Crime Commission Act 1985.

The Police Regulation (Allegations of Misconduct) Act was amended by adding a new subsection to section 5, the effect of which was to enable a valid complaint under the Act to be made, even though the complaint was being considered by the State Drug Crime Commission Management Committee for referral to the Commission, or was being or had been investigated by the Commission.

GENERAL AREA

Broader Issues

1. Role of the Ombudsman

Many of those who favoured the appointment of Ombudsmen in Australia saw the office as a supplement to Parliament's investigation and scrutiny of public bureaucracies. Beyond that, there can be widely differing opinions as to what an Ombudsman should do and how Ombudsmen investigators should behave. At one extreme there are those who like to see the Office of the Ombudsman of New South Wales as nothing more than a minor ameliorative: an agency to steer people in the direction of the appropriate bureaucrat and to console them in their woes. At the other extreme there are some who seem to believe that the Office of the Ombudsman was designed to undermine the powers of the government and to disrupt the work of its agents.

The staff of the Ombudsman's Office spend a significant amount of time helping people in their general enquiries and in suggesting avenues for assistance: to that extent the Office carries out a kind of socially ameliorative function, as can many other agencies of government. As for the perception that the Ombudsman's Office is somehow aggressive and obstructive: that is no more than a perception. It results in part from the fact that the Ombudsman is a relatively new institution to Australia; it has been borrowed from European cultures, some of which have a long history of direct investigation of administrative actions. When the Ombudsman function has been introduced in the countries of the British Commonwealth, it has required both bureaucrats and politicians to adjust to changes in the so-called Westminster

style of government. On this point the Chief Parliamentary Ombudsman for Sweden, Per-Erik Nilsson, said at a conference of Ombudsmen in Vienna in June 1986:

> If the institution functions in an administrative system based on the Westminster model ... there is a risk that an effective and independent ombudsman may come into conflict with the political bodies and be felt to be "a disturbing element" in the social order.

If this happens, then there are other causes than the mere novelty of the Ombudsman institution: among them, the expectation of governments in the "Westminster-style" system that, having parliamentary majorities, they should ultimately get their own way; and the hope of bureaucrats that the convention of individual Ministerial responsibility will protect them from the sharpest personal attacks by the Opposition, the media and the public. The institution of Ombudsman can disturb this pattern. For example, an error or omission that in the usual course of events would produce no more than a few headlines, and perhaps a speech by an Opposition spokesman, might, under investigation by an Ombudsman, result in detailed scrutiny over a period of months and a report finding "maladministration" or "wrong conduct", with the report sometimes being tabled in the Parliament itself, or being summarised in the Annual Report of the Ombudsman. The investigation and the report do not concern the actions of governments, Ministers or Parliaments, over which, in Australia, Ombudsmen have no jurisdiction. Yet the mere fact of an investigation, and some occasional publicity, can be portrayed as an attack on the government of the day.

In New South Wales, for example, a report on the Department of Education's failure to investigate an alleged assault by a teacher on a pupil was made out by the Minister to amount to interference in the running of schools, although the statistics of investigations showed nothing of the sort (see Annual Report 1984-85, pp.9, 19-20). The 1984-85 Annual Report also suggested, on the basis of evidence given during a hearing of a complaint against police, that reasons might be given for "no-bill" decisions, at least to the investigating and prosecuting police, in order to reduce rumours of "scandalous circumstances" in which

a "no-bill" had allegedly been granted. The response from the Attorney-General was heated, but, as a legal columnist pointed out, did not address the central point of the Annual Report item. These events, together with the mention of such things as an alleged pool party for police officers (used to illustrate an unacceptable delay by police in investigating complaints against their colleagues) perhaps prompted the then Premier, Mr Wran, to suggest that the Ombudsman should proceed more quietly. Per-Erik Nilsson further noted in his June 1986 speech:

> It is in itself understandable that there are politicians who do not willingly take the risk of seeing such [a disturbing element] realised or for that matter, in countries which have realized the idea, do not willingly refill a post which has become vacant. And, as we all know, there are cases from countries in which the institution has been established when politically troublesome ombudsmen have not received a new mandate or been replaced by a person of a more acquiescent kind.

In fact, during his terms as Premier Mr Wran gave this Office strong support, although there is little doubt that it was criticised by some of his Ministers and some senior bureaucrats.

The Office of the Ombudsman is established by statute, and some of the procedures and obligations placed upon it by the Act have caused Ministers to complain. Reports of wrong conduct provide an example. On more than one occasion it has been said that such a report was unjustified, because the conduct was not sufficiently serious to be termed "wrong". Yet the definition in Section 5 of the Ombudsman Act is very broad, and includes conduct that is "unreasonable". The Act says that, where conduct is found to be wrong, a report must be made to the Minister. It was noted in previous Annual Reports that wrong conduct reports could provide Ministers with insights into the working of the public authorities within their portfolios. Attitudes might change, however, when a wrong conduct report, which this Office is obliged to make, concerns a matter which is irritating or embarrassing to the Minister or the government. That is the consequence of establishing the institution of Ombudsman, and one which this Office understands.

The previous Annual Report pointed out that wrong conduct reports on local government authorities must be sent to the Minister for Local Government, but that they had only once led to a consultation of the kind envisaged by the Ombudsman Act. At the 1986 conference of local government authorities the recently-appointed Minister, the Honourable Janice Crosio, said that the Department of Local Government was having to devote too much time to reports from this Office. This seemed less than discerning, in view of the amount of information about local government contained in the reports, but the procedure is one required by law, and becomes part of the Ombudsman's role. If the government believes that there is a need for change, then it is able to amend the Ombudsman Act to, say, require that wrong conduct reports on local government authorities be tabled by the relevant Council.

Some of the Ministerial criticism of the Office of the Ombudsman seems to have been prompted by complaints from public authorities themselves, perhaps seeking to engage Ministers as shields against Ombudsman investigations. The clearest example in 1985-86 was, again, provided by the Minister for Local Government at the 1986 conference, when she said that local government authorities were spending time on "trivial" complaints. This Office responded immediately with statistics to show that only a small proportion of complaints against local government authorities were carried through to a full investigation, and that many of those investigations did not result in findings of wrong conduct. It was clear, however, that the Minister's comments stemmed from information supplied by councils and the Department of Local Government; indeed, the Department later asked councils for details of "trivial" complaints directed to them from the Ombudsman's Office. Leaving aside the fact that this Office advises people to refer their complaints to the relevant public authorities in the first instance, this reaction shows a narrow view of the Ombudsman's Office among some public authorities.

At the least, preliminary enquiries about complaints made to this Office give public authorities some measure of their relationships with the community. On those occasions when there

is an Ombudsman finding in favour of the authority, it can point to this as a kind of testimony to its efforts, provided by an unbiased authority. Even reports of wrong conduct might be looked upon as productive, since they often contain recommendations for useful changes in procedures.

The fact that not all public authorities respond to this Office in a positive way stems partly from the past secretiveness of public administrators: there has been no Freedom of Information Act in New South Wales, and officials have certainly not been accustomed to having their every day files pored over by outside investigators. Some resent being asked to respond to enquiries by a fixed date and, in the few cases where it is necessary, to produce documents on demand. (This usually only happens when there has been no useful response to a series of requests.) In serious cases of delay in responding to enquiries, individual public authorities have been required to attend a hearing constituted under the Royal Commission powers of Section 19 of the Ombudsman Act. Experience has shown that the person most likely to provide useful information to such a hearing is the head of the department or the chief executive of the statutory authority. The reactions of some of these people have suggested that they are not accustomed to participating directly in investigations of their organisations' activities: no doubt lesser officials usually deal with other government agencies which exercise investigatory powers, while legal counsel represent the organisation in any court proceedings that might arise. An Ombudsman hearing, by contrast, requires personal involvement, even though the person being interviewed may be (and often is) assisted by legal counsel or other advisers. There are few other occasions when senior administrators are open to such examination, perhaps with the exception of parliamentary committees, of which there are few in New South Wales.

There are major differences between an Ombudsman investigation (including a hearing exercising Royal Commission powers) and the proceedings of a court or parliamentary committee, however. The first is privacy. Section 17 of the Ombudsman Act provides that investigations "shall be made in the absence of the public". The second difference is that, unlike a court, the Ombudsman does not

reach a judicial conclusion, handing down decisions that are enforceable at law. The Ombudsman makes only recommendations, which may be accepted or rejected by a public authority, as it wishes. The only "sanction" available to the Ombudsman - if it is indeed a sanction - is that of publicity some time after the event: the conduct of a public authority may be noted in the Annual Report or, in relatively few cases, in a report to Parliament. The third difference follows from the second: the Ombudsman Act concerns investigation, which is procedurally different from judicial hearings under what might be termed the British system.

Reaction by public authorities to Ombudsman investigations sometimes suggest that the Office of the Ombudsman is seen as an aloof observer of a contest between the citizen and the bureaucrat, eventually deciding the issue according to the weight of the evidence presented to the Office by the respective parties. (It scarcely needs saying that in such a context the bureaucrat, supported by far greater resources, would almost always be in the superior position). This is not the case. The Office of the Ombudsman is an active participant in the investigation, eliciting and testing evidence from both parties. The Office wants to obtain all of the evidence, and the best evidence, whenever possible. It is not bound by the "rules of evidence" applying to court proceedings. That is not to say that worthless evidence is given weight: merely that all available information is considered on its merits. It is this active role of the Ombudsman Office that has a parallel in the European legal system, where administrative tribunals have a long history, rather than in the "British model". Public authorities, and particularly department heads attending Ombudsman hearings, sometimes have difficulty in understanding this distinction.

The Office's investigative role is wholly consistent with the principles of natural justice. The procedures of this Office have been set out in previous Annual Reports: complainants and public authorities are invited to comment upon each other's correspondence and statements and, if there appears to be wrong conduct in terms of the Ombudsman Act, a statement of provisional findings and recommendations is distributed to those concerned, inviting comments and further evidence.

When hearings are conducted as part of an investigation by this Office, public authorities sometimes ask to "cross-examine" complainants and their witnesses, and to be given transcripts of all of the oral evidence that has been taken. Such requests sometimes reflect a lack of appreciation by public authorities of their part in an investigation: if they were to cross-examine other parties, then those parties should be allowed to examine the public authorities, with the assistance of counsel, if required. In fact, examination is conducted by this Office as part of its active role in investigation, usually by an Investigation Officer or seconded special officer, with the Ombudsman or another senior person taking part in the examination where appropriate. As for transcripts, this Office normally provides a copy of the relevant tape recording to each person who requests it, for the purpose of commenting upon a statement of provisional findings and recommendations, but rarely sees the need to provide recordings of all evidence, since the evidence has been tested - often exhaustively - by those carrying out the investigation. It is also relevant that Ombudsmen were intended to carry out fairly speedy investigations : to take on elaborate procedural trappings would slow investigation considerably, without adding to the safeguards afforded to the parties; all of the investigative procedures employed in the New South Wales Ombudsman's Office have been arrived at with the advice of counsel and senior counsel.

Complainants, too, sometimes misconstrue the functions and procedures of this Office. Apart from the fairly large proportion of complainants who believe that the Office can issue directions to public authorities, there are some who ask that the office make "representations" on their behalf for special treatment. Although the mere existence of the Office might give it influence, it never tries to influence the decision of a public authority short of making specific recommendations in a report of wrong conduct. One of the dangers of such an office "leaning on" public authorities in order to play a larger ameliorative role is that misallocation of resources could result: it is not the role of the Office of the Ombudsman to secure action for those, often well-educated, people who have the ability and resources to complain loudest and longest, and in many cases to make effective representations on their own behalf.

A small proportion of complainants ask for "confidential" investigation, in which their name is not disclosed to the public authority concerned. In some such cases there is an assumption that this Office will embark upon a kind of fishing expedition in response to rumours or generalised media reports. If there is good reason for protecting the identity of a complainant, an investigation can be commenced of the Ombudsman's "own motion", as envisaged by Section 13 of the Ombudsman Act, but this would be done only when there were serious allegations supported by significant evidence. It was noted in the previous Annual Report that most anonymous complaints are referred to public authorities for their information and comment; those that contain only vague accusations or appear to be prompted solely by personal malice remain within the Office. The most important factor in determining whether a complaint proceeds to preliminary enquiries and then perhaps to full investigation, is the strength of the evidence provided by the complainant, by the public authority in response and, in a few cases, by media reports which might lead to an "own motion" investigation; beyond these points, the gathering of evidence is in the hands of Investigation Officers. Contrary to suggestions that have been made since the publication of the last Annual Report, the Office of the Ombudsman does not seek to move into the jurisdictions of other persons and organisations and does not deal in trivia. Given present high volumes of complaints and finite resources, the Office is basically a reactive, rather than pro-active organisation, responding to complaints from citizens. The very considerable powers available to the Ombudsman when conducting investigations are used in a small minority of cases, and then only as a final resort: all "coercive" action must be approved in advance by the Ombudsman. The Office of the Ombudsman has a socially ameliorative function, but only insofar as this does not interfere with the considered allocation of resources by public authorities. Findings of wrong conduct, when made, are set out in a report, as required by the Ombudsman Act, and according to procedures arrived at with expert legal advice. Suggestions that the Office is exceeding its charter or is overly-aggressive are thus based on lack of information or understanding. They may also be influenced by the fact that the Office has refused,

From "Stay-in-Touch", Sydney Morning Herald, 4 November 1985

unlike some regulatory agencies, to become "captive" to the authorities it is supposed to regulate, and that it is a new, and sometimes uncomfortable, addition to the institutions of the "Westminster model" or "British tradition".

2. The Ombudsman and the Government

Lest it be thought that the position of the New South Wales Office of the Ombudsman described in the preceding section is unique, it is instructive to note the comments appearing in the Report of the Saskatchewan Ombudsman, Mr Tickell, for the year ended 31 December 1985, made shortly prior to his retirement.

> To some extent, it may be inevitable that an Ombudsman who works up to his mandate will have something other than a smooth working relationship with the executive branch of government. The cumulative effect of appearing to be constantly in search of change and remedies for the public, and finding it necessary to air differences with the government in public several times each year, must put this relationship in some jeopardy. Sooner or later, there is a tendency to shoot the messenger when governments don't like the message. It may be because governments, once they settle in, wish to appear infallible and become less tolerant of differing views. It may also be because the Ombudsman is the recipient of only bad news and runs the risk of developing a jaundiced attitude towards government systems. In any event, there is no greater challenge for an Ombudsman than to attempt to maintain a good working relationship with government. There are days when I am convinced that the only way to do so is by defaulting on one's other obligations - and then there are other days!
>
> Having observed the approaches and experiences of a dozen or so provincial Ombudsmen, I can say with some certainty that every new Ombudsman enjoys a honeymoon period of variable duration with his or her government. From my own experience, I can also say with certainty that a change of government also brings with it a period of "calm" and an exceptional opportunity to produce good results for his complainants. I would encourage my successor to make the most of it. The honeymoon can last for months or even years, if the Ombudsman is adept and if the government is genuinely committed to working with a representative of the public.
>
> Issues rather than personalities usually end the honeymoon and this is perhaps as it should be. For example, my most productive time with the present government was considerably shorter than with the government before it. It ended in April of 1983 when I made a public issue out of the prospect that the Department of Finance might be arbitrarily deleting two-fifths of my investigative staff. Public reports since

that time involving public safety, child protection and other issues have ensured that the working relationship continued to be somewhat tense.

After the honeymoon, the ongoing relationship between an Ombudsman and government is fraught with difficulties unless he or she understands certain realities about the relationship.

1. Governments, for reasons that escape me, have a desire to appear infallible, or as nearly infallible as possible, and tend to view even constructive criticism as "political" criticism.

2. Governments fervently hope that an Ombudsman will concentrate on the "nuts and bolts" of public administration by keeping his efforts to issues between the Ombudsman and the public service and by otherwise avoiding higher profile issues. The Ombudsman has a duty to do otherwise because of his legislative mandate, as confirmed by the recent pronouncements of the Supreme Court of Canada.

3. Governments dearly hope that an Ombudsman will keep his issues internal to government systems and not make them the subject of public discussion and debate.

4. In Saskatchewan, governments will oppose structural moves to firm up the Ombudsman's accountability to the legislature and to reduce his dependence on the executive branch. This occurs, I assume, because the executive branch fears some loss of control over the Ombudsman's activities.

5. Governments also have a tendency to draw the best from an Ombudsman's work by accepting his system recommendations to prevent future problems while at the same time denying remedies to the very persons who first brought the problem to the attention of the Ombudsman and the government. This is grossly unfair and has been the reason for taking issues to the public on a number of occasions ...

6. Unless an Ombudsman operates on the premise that a satisfied government overrides his other responsibilities, his working relationship with government will never be entirely harmonious. Where a government is displeased, an Ombudsman can anticipate paying some kind of price for its displeasure ....

3. Functions of the Annual Report

Under Section 30 of the Ombudsman Act the Ombudsman is required to submit an Annual Report to the Premier for presentation to Parliament. In fulfilling this statutory requirement, the Ombudsman is informing Parliament of his work and activities for


NO – IT'S NOT TICKING...
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the previous twelve months, and providing statistical data recording that work. The Ombudsman is also concerned that the public are similarly informed of the work of his Office. The secrecy provisions of the Ombudsman Act prevent the Ombudsman from disclosing information about the work of his Office to the public, except by way of a comprehensive Annual Report. The Ombudsman takes the view that it is in the public interest that information about the work of his Office is made available to as many people in the community as possible.

In order to achieve this aim, the Ombudsman makes his report as readable and comprehensive as possible. In recent times the Ombudsman has also held press conferences on the Annual Report in order to expound the report and the reasons for the recommendations contained in it. This practice has been adopted by a number of other Ombudsmen, within Australia and overseas. It is the means by which citizens can be properly informed, and provided with the opportunity for publicly debating the Annual Report. In replying to questions from the media and the public, the Ombudsman is therefore not limited merely to repeating or summarising what is said in a report. Debate also helps to prevent the Ombudsman and his Office becoming complacent or insular.

Despite criticism of the manner in which the Ombudsman makes the Annual Report available for public comment, he continues to believe in the importance of the Annual Report, not just in terms of his responsibility to the Parliament, but also to the people of New South Wales. Thus, the Ombudsman in his Annual Report for the year ending 30 June 1986 and in the public discussion of it, aims to inform Parliament and the public of the work of his Office as fully as is possible under the terms of the Ombudsman Act.

4. Secrecy - yet more problems

Successive Annual Reports have set out the problems caused by the secrecy provisions of Section 34 of the Ombudsman Act, and two

reports on the subject have been made to Parliament. This year saw yet more of the problems that have arisen from these restrictions. Some have been irritating and have consumed valuable time, but in other respect are ludicrous; for example:

1. The Deputy Ombudsman found wrong conduct by Sydney City Council in failing to deal with the operations of the Paddington bazaar in a reasonable and lawful manner. The Ministers for Planning and Environment and for Education, and the respective Departments, had a close interest in the matter, but the Deputy Ombudsman had to ask the public authority against whom he had found wrong conduct to send copies of his report to the Ministers and the Departments. Further details of this and other examples can be found in the case notes appended to this Annual Report.

2. Another report of wrong conduct against a council contained information likely to be of interest to the Minister for Planning and Environment, but it could not be sent to him directly, because he was not the responsible Minister in terms of the Ombudsman Act. A copy was eventually sent to him, at the request of this Office, by the Minister for Local Government, but only after she had objected to having her office used as a "post box".

Other problems caused by the secrecy provisions have denied information to citizens, to Members of Parliament and to legal advisers; for example:

3. Misleading information was circulated about a complaint concerning the alleged punishment of students for not wearing school uniform; a report was made to Parliament, and the matter was set out in detail in the 1984-85 Annual Report. This led to a press report which seriously misrepresented this Office's position on school uniforms and produced, in turn, a number of enquiries and objections. This Office was prevented from issuing a press release in sufficient detail to correct the misrepresentation; and has thus had to send copies of its report to Parliament to a variety of persons and organisations, yet without being able to give details of further developments (set out in this Annual Report).

4. The leader of an anti-smoking organisation distributed to Members of Parliament a highly selective account of a woman's complaint to this Office against the Minister for Industrial Relations and his advisers. The complaint concerned refusal of permission to take legal action for alleged injury from "passive" smoking in the woman's work place.

This Office has no jurisdiction over Ministers or over people acting as legal advisers to public authorities, and there was no utility in beginning an investigation of other advice to the Minister, since it was bound to move quickly from matters of administration, as prescribed in the Ombudsman Act, to technical questions of the dangers of smoking, in which this Office does not have expertise. The President of the Non-Smokers' Movement of Australia, Mr B McBride, visited the Office of the Ombudsman to make representations on behalf of the complainant. The Deputy Ombudsman decided that Mr McBride was acting as the complainant's professional counsel, but still experienced difficulty in conveying details of the Office's decision to him. Mr. McBride's subsequent letter to Members of Parliament was sent to this Office by Mr D Beck, MP, Member for Byron, but because of the secrecy provisions the Deputy Ombudsman was again able to give only a generalized account of the Office's procedures to Mr Beck, and no details of the outcome of the specific complaint.

5. In some instances when complaints against police officers have been found "sustained", it has been recommended that the report be referred for legal advice as to whether a charge would be likely to succeed before the Police Tribunal. In recent instances the Assistant Commissioner (Internal Affairs) has asked that tape recordings of the relevant inquiry be provided to legal advisers, to assist them in responding to this Office's recommendations. Unfortunately, the Ombudsman has no power to provide information of this kind once a reinvestigation by this Office has ended, and so has had to refuse the Assistant Commissioner's requests. An alternative would be for the legal advisers to re-interview those who gave evidence to this Office's inquiry; the Ombudsman commented, "I agree that [this would be] time consuming and wasteful but, as the law stands, I am bound by

the secrecy provisions of the Ombudsman Act, however lacking in sense they continue to be."

In even more serious cases, the prohibition upon this Offices's providing information in the public interest might have reduced the effectiveness of other serious and far reaching investigations; examples include:

6. The special Inquiry under Section 101 of the Public Service Act into the conduct of the Chairman and Commissioners of the Corporate Affairs Commission in relation to the Commission's investigation of the Balanced Properties group of Companies, sought from this Office correspondence concerning a complaint against the Commission. The Ombudsman was unable to provide the correspondence, telling the Inquiry, "Until such time as Parliament decides to amend the Ombudsman Act, I am bound by the law as it stands and I am not able to accede to requests of the nature that you have made."

7. The Management and Audit Division of the Public Service Board asked for information about an investigation by this Office into a certain public authority,in order to help the Division to decide whether it should conduct an efficiency audit of that public authority. This Office was prevented from assisting the Public Service Board in this matter.

8. The Casino Control Division of the Treasury requested a copy of a statement of provisional findings and recommendations concerning allegations by police officers which related to, among other things, poker machines. The Board apparently wanted the statement to assist it in its investigation of the operation of proposed casinos in New South Wales. Once again the Ombudsman was precluded from providing any relevant information.

9. The Nevada Gaming Control Board wished to obtain a copy of the same statement of provisional findings and recommendations, in relation to an application by a New South Wales manufacturer of "slot machines" to sell machines in Nevada. A representative of that body, visiting Australia, sought a copy of the document and an interview with the Ombudsman. Because of

the secrecy provisions, this request was refused. Later, solicitors for the manufacturer asked the Ombudsman whether a copy of the statement could be given to the Nevada Gaming Control Board. The Ombudsman replied that he was certainly unable to provide the document, but that, although the question had not been determined by the courts, the law very probably placed no restriction upon other persons to whom the Ombudsman was obliged to give a statement from passing the document on (subject to the laws of defamation). Nevertheless, the Ombudsman, precluded as he was from supplying information, was unable directly to place conditions upon its being relayed to yet more persons. In the particular circumstances, he sought to have the solicitors obtain an agreement of total confidentiality from the Nevada Gaming Control Board, should the solicitors decide to give the Board a copy of the statement; any such decision was wholly in the hands of the solicitors. It can thus happen that, by imposing secrecy, section 34 of the Ombudsman Act also weakens the Ombudsman's direct control over the use of information, obtained by this Office in discharging its functions, by other persons or organisations.

Even if the system of totally open access by the media and the public to the files of the Office of the Ombudsman, as practised in Sweden, is not thought appropriate for New South Wales, there are obvious, and sometimes very important, instances where disclosing certain information is in the public interest. This was recognized by the Commonwealth and Western Australian governments when they amended their respective Ombudsman Acts. The New South Wales Ombudsman again seeks a similar amendment in the following terms:

> (1) Nothing in this Act shall be taken to preclude the Ombudsman from disclosing information, or making a statement, to any person or to the public or a section of the public with respect to the performance of the functions of, or an investigation by, the Ombudsman under this Act if, in the opinion of the Ombudsman, it is in the interests of any Department, prescribed authority or person, or is otherwise in the public interest, so to disclose that information or to make that statement.
>
> (2) The Ombudsman shall not disclose information or make a statement under sub-section (1) with respect to a particular investigation where the disclosure of that

information, or the making of that statement, is likely to interfere with the carrying out of that or any other investigation or the making of a report under this Act.

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

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

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

5. Consultations with Ministers: purpose and effect

Successive Annual Reports have noted that the main purpose of consulting with Ministers on draft reports of wrong conduct, as provided by Section 25 of the Ombudsman Act, is to give Ministers another window upon the world of the departments and authorities under their control. They are at liberty to disagree with the views of this Office, and their comments at consultations are recorded and taken into account. Unfortunately, the staff of some Ministers have done little more than refer draft reports back to the public authority, which has already had opportunities to present its views (see 1984-85 Annual Report, pp.11-12); this is always repetitive, and rarely instructive.

It has also been pointed out that some Ministers' offices are lax in responding to draft reports, and to enquiries as to whether the Minister wishes to consult. Ombudsman investigation officers have found that certain Ministers' offices mislay files, are uncertain which person is handling a draft report, neglect to return telephone calls, and break promises about sending letters. In such cases a great deal of time can be wasted in trying to observe the provisions of the Ombudsman Act and the usual courtesies extended to Ministers.

In a few instances Ministers have said that they do not wish to consult, but have sent sometimes lengthy letters which appear to

re-state the public authority's case or which raise objections about the findings and recommendations in a draft report. In such cases, the implementation of recommendations is pursued directly with the public authority, as provided by the Ombudsman Act.

Experience now suggests that Ministers rarely make best use of the opportunity to consult, as afforded by Section 25 of the Ombudsman Act, but that this is due to lack of knowledge among members of their staff. In one instance during the year the ignorance of a Minister's adviser and the secrecy provisions of the Ombudsman Act produced a fiasco. The Deputy Ombudsman, after finding wrong conduct against a local government council, sent a copy of the draft report to the responsible Minister, the Minister for Local Government, as prescribed by the Ombudsman Act. The Deputy Ombudsman recommended, among other things, that a copy of the draft report be sent by the Minister for Local Government to the Minister for Planning and Environment, as it dealt with some environmental questions; the secrecy provisions of the Ombudsman Act are so ridiculously restrictive that the Deputy Ombudsman would have been liable for a $1,000 fine if he had sent a copy of his draft report to the Minister for Planning and Environment!

A member of the staff of the Minister for Local Government had the Minister sign a letter which objected to the use of the Minister's office for what was termed a "post box", and demanded to be told the criteria for sending draft reports to one Minister rather than another. In reply, the Ombudsman explained the secrecy provisions of the Ombudsman Act, pointed out the definition of "responsible Minister" in Section 5 of the Act, and noted that the Act thus required that all reports concerning councils be sent to the Minister for Local Government; if the Minister did not approve, then she might wish to propose an amendment to the Ombudsman Act, particularly since there had been only one consultation, some years ago, out of the scores of draft reports about councils. (Indeed, the 1984-85 Annual Report posed the question of whether draft reports to the Minister for Local Government were "so much waste paper"). The Minister's office eventually sent a copy of the draft report to the Minister for Planning and Environment.

Wrongheaded advice from Ministerial staff is only one factor that can devalue the consultation provision of the Ombudsman Act: so can misleading claims made to Ministers by public authorities. Presumably in response to representations from the Department of Local Government and from some councils, the Minister for Local Government told the annual conference of the Shires Association in June 1986 that the Department, and local government generally, were subject to "trivial" investigations by the Office of the Ombudsman. On the question of the Department, the Minister had again been badly advised, for she said that her officers were "inundated" with inquiries and "minor complaints dealing with little more than ... garbage lids not being replaced". In fact, complaints about councils' actions are not directed to the Department: obviously, they go to the Councils themselves. As to complaints against councils, the statistics for 1984-85 were:

Number of complaints	1099
Number fully investigated	61
Wrong conduct reports	47

The 47 reports were sent to the Minister for Local Government, as required by the Ombudsman Act. Of the complaints against councils that were processed by the Office of the Ombudsman during the year, 466 were "declined": that is, they were not even brought to the attention of the councils concerned. In addition, preliminary enquiries revealed no prima facie evidence of wrong conduct in 268 matters; these were discontinued - that is, they did not proceed to a full investigation. During 1984-85 there were only 4 complaints against the Department of Local Government, one of which was resolved and another discontinued after preliminary enquiries.

With these statistics in mind, the Ombudsman had to disagree with the Minister's assessment when asked for comments by the media. He was particularly disappointed that the Minister had not so much as mentioned any concerns to him before relaying the inaccurate information from her staff to the Shires Association conference; indeed, as recently as 11 March 1986 the Minister had written to him about the "valuable service" of the Office in the

local government area! The Ombudsman pointed out that the Office carefully screens complaints: with more than 3600 non-police complaints a year and only eighteen investigation officers to deal with them (in addition to doing some work in the police area), it was essential that attention be devoted to the more significant issues.

The Ombudsman was concerned about the Minister's reference to allegedly "trivial" complaints. When questioned by the media, the Minister's office apparently gave two examples, one concerning a $20 fine for playing music after the stipulated time in a council hall, and the other about vehicles parked on a public reserve. At this point the misleading nature of the information given to the Minister by her advisers and others became most serious. In the first matter, the issue was not the amount of the fine, but the admitted fact that it had been levied without authority: an excessive use of power of the kind that Ombudsmen all over the world have sought to check. As to the second complaint: a bulldozer, two trucks and a boat had been regularly parked on a public reserve in a country town for three years, despite regular requests to the council from a nearby resident that something be done to end the damage to the reserve. Here again, there were important underlying issues: the failure of the council to carry out its responsibilities and to respond to the requests of citizens. The fact that these cases were represented to the Minister as "trivial" reflects poorly upon the advisers and council personnel who apparently sought her intervention.

In the light of the experience of recent years, there seems to be no practical purpose in sending copies of draft reports about councils to the Minister for Local Government. It would be more useful if consultations, when required, were held with Mayors and Shire Presidents, and if councils were required to table reports from this Office. Other sections of this Annual Report show, however, that much more significant amendments to the Ombudsman Act have been requested, with little success; attention will have to be devoted to those areas for the foreseeable future.

On the question of consultation generally, some Ministers, including the Premier, have suggested that wrong conduct reports should be reserved for serious misdeeds; nevertheless, the Ombudsman Act requires that wrong conduct, which the Act says may be no more than "unreasonable", must be the subject of a report. The Ombudsman asked the former Premier whether the Government wished to retain this mandatory provision, and was told that it did. Thus 130 non-police reports of wrong conduct were sent to Ministers during 1984-85, and 130 letters invited the Ministers whether they wished to consult. As those letters pointed out, it is entirely a matter for the Minister whether a consultation takes place.

6. Reports to Ministers and to Parliament

Reports to Ministers

During the past year, 118 reports of wrong conduct (80 against departments and authorities and 38 against local councils) have been made to Ministers under section 26 of the Ombudsman Act. Draft reports are presented to the Minister responsible for a particular authority, and the Ombudsman asks whether the Minister wishes to consult with him. Some fruitful discussions have taken place about possible improvements to procedures in departments.

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.

During the year, five special reports under Section 31 were presented to Parliament on non-police issues that the Ombudsman regarded as significant and in the public interest. There were four reports under section 27 where recommendations made by the Office were not carried out by the relevant public authority.

Three reports on police issues were made to Parliament under section 31 of the Ombudsman Act and section 32 of the Police Regulation (Allegations of Misconduct) Act.

Special Reports under section 31 of the Ombudsman Act

Statement in reply to the Minister for Education, the Hon R M Cavalier.

Report on misinformation about the compulsory wearing of school uniforms (Education Department).

Report on the failure to comply with the provisions of the Environmental Planning and Assessment Act prior to giving consent to the construction of the building known as Grosvenor Place (Sydney Cove Redevelopment Authority).

Report on whether Local Council employees are "Public Authorities" within the Ombudsman Act (continuing need to amend New South Wales Ombudsman Act).

Report on the delay in increasing the rate of statutory interest on outstanding amounts of compensation following acquisition of land by public authorities.

Non-compliance Reports under section 27 of the Ombudsman Act

Report on the failure to give an opportunity to make submissions (Mulwaree Shire Council).

Report on the failure to accept the Ombudsman's recommendations for establishing a command structure and guidelines for the control of goals during strikes by Prison Officers (Department of Corrective Services).

Report on the failure to accept Ombudsman's recommendations for payment of compensation for illegal detention (Department of Corrective Services).

Report on the failure to properly investigate a complaint (Department of Local Government).

Special Reports under section 31 of the Ombudsman Act and section 32 of the Police Regulation (Allegations of Misconduct) Act

Report on the delay by the Police Department in investigation of complaints that Police assaulted blind people.

Report on the present position of the Police Department investigation into complaints made by Constables Miles and McKinnon.

Report on the exclusion of civilian investigators from reinvestigation of police conduct.

7. Need to give reasons

The High Court in Public Service Board of New South Wales v Osmond, a decision handed down on 21 February 1986, ruled that the Public Service Board was under no duty to provide Mr Osmond with its reasons for dismissing his appeal against a decision rejecting him for a job. The Chief Justice, in the leading judgement of a unanimous decision, said:

> There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests or defeat the legitimate or reasonable expectations of other persons.

The High Court heard the matter as the result of an appeal from the decision of the New South Wales Court of Appeal, which decided by majority that the Board was under a legal duty to give reasons for its decision. The President had stated:

> [Authorities] presumably have reasons for their decisions. The obligation to think out and articulate those reasons, justifying them in a public way, is likely to provide a discipline that will ensure that the decision is better as a consequence.

The Ombudsman is charged with examining the administrative conduct of New South Wales public authorities and, without in any way disagreeing with the statement of the law by the High Court, believes that the giving of reasons for decisions is a sensible and desirable administrative practice.

For the past few years this Office has been conducting an investigation into the policy and procedures of all New South Wales local councils when denying liability in cases involving public liability insurance. Persistent complaints to this Office had revealed widespread dissatisfaction with existing practices and, in conjunction with the Local Government and Shires' Associations, a set of recommended procedures was developed. Central to these procedures is the giving of adequate reasons to claimants for the denial of their claims. The majority of local councils have now adopted the recommended procedures and the number of complaints to the Ombudsman about this type of matter has declined.

When people are given reasons for decisions they are able to make their own assessments of the grounds of decision and are less likely to complain of unfair treatment. A person who has been disappointed with the decision of a public authority is predisposed to feel aggrieved. The giving of reasons raises public confidence in the authority and in the administrative process whereby decisions are made.

A recent complaint to the Ombudsman concerned an application to a public authority by a professional who wished to describe, for advertising purposes, his new relationship to his old firm as "consulting". The authority refused to given him reasons for rejecting his application, saying that it was under no legal obligation to do so.

In his draft report the Deputy Ombudsman found the authority's conduct to be "wrong" in terms of the Ombudsman Act and commented:

> ... to refrain from giving reasons for an administrative decision, merely because there is no legal requirement to do so, is both unconstructive and to invite doubt in the good faith in which the public authority acts.

The giving of reasons goes some way towards ensuring that public authorities act responsibly and correctly: it is a check on the exercise of discretion and assists in building and maintaining public confidence in the instrumentalities of government. As a general principle the Ombudsman considers the failure to give reasons to be undesirable and contrary to the public interest. This Office will not hesitate to find wrong conduct in cases where a public authority has unreasonably or unjustly failed to give reasons for an administrative decision.

8. Function of Ombudsman Investigation Officers

It has been noted in previous Annual Reports that Investigation Officers are required to exercise initiative, while working under delegation from the Ombudsman when investigating complaints; final decisions as to whether there has been wrong conduct by public authorities are made by the Ombudsman or Deputy Ombudsman. Highly specific procedures have been evolved to ensure that all parties are kept informed of the progress of an investigation, but a small number of public authorities still attempt to attack Investigation Officers personally, instead of addressing the facts disclosed by the investigation (see 1984-85 Annual Report, pp 61-4 and the next item).

In the past year the Director-General of Education, Mr R B Winder, has sought to challenge the power of Investigation Officers to exercise their delegations under the provisions of the Ombudsman Act. In one case an Investigation Officer made preliminary enquiries of the Director-General on 24 February 1986 about a complaint involving school transport in the Riverina area, requesting a reply within four weeks. On 1 April the Investigation Officer asked the Department's liaison officer when a reply might be expected; on 3 April he was told that a draft reply should soon go to the Director-General and that, if it did not, he would be told. No further information had been received

by 23 April, when the Investigation Officer again wrote to the Director-General, making a "formal request" for a reply by 28 April and reminding the Director-General that the subject of delay might be made the subject of a report to Parliament, as previously indicated by the Ombudsman.

On 30 April the Director-General, in his reply to the preliminary enquiries, objected to "receiving a letter written in such a critical vein and signed by an Investigation Officer". Having considered the Director-General's response, the Investigation Officer decided that there appeared to be evidence of wrong conduct, and issued a notice of investigation, as required by Section 16 of the Ombudsman Act, in a further letter to the Director-General. The Director-General replied that he had "considerable difficulty in accepting the actions of the Investigation Officer". He continued, "... I have to state that I will not accept a letter signed by one of your Investigation Officers advising me that the conduct of this Department appears to be improper ...".

The Ombudsman pointed out to Mr Winder that he was able to delegate certain powers under the Ombudsman Act to Investigation Officers, and that the delegation to the officer in question had been made on 27 March 1984. The Ombudsman expressed the view that the officer "in this case, and in all cases, has exercised his delegation appropriately and in accordance with such directions as I have given him from time to time"; the Ombudsman enclosed, for the Director-General's information, the extract from the 1984-85 Annual Report mentioned above.

The Ombudsman continued, "I expect that you and your officers will give my investigation officer every co-operation and assistance in this investigation. If the investigation officer later recommends it, I will consider utilising the provisions of Section 19 of the Act". Section 19 of the Ombudsman Act confers on the Ombudsman the powers of a Royal Commissioner.

9. Personal denigration of Investigation Officers unhelpful

It is the practice of the Office to refer a statement of provisional findings and recommendations to public authorities whose conduct has been investigated, to the complainant and to any parties commented upon adversely as a result of the investigation. The purpose of this is to give all parties an opportunity to comment on the accuracy of the facts, and to state their views about the provisional conclusions and findings put forward by the Investigation Officer. The Ombudsman considers those comments and views before deciding whether to send a report to the responsible Minister.

As noted in previous Annual Reports, occasionally a public authority responds to a statement of provisional findings and recommendations by personally denigrating the Investigation Officer who conducted the investigation, rather than concentrating wholly on the facts, conclusions and recommendations contained in the statement itself. The Ombudsman is pleased to report that this tactic was seldom used during the past year; there was one notable exception.

A statement of provisional findings and recommendations issued in April 1986 disclosed serious issues of public interest in the administration of mental health services in the prisons area. The facts of the case are outlined elsewhere in this report (see topic "Prisoners and the Mental Health Act").

Dr M J Sainsbury, Senior Specialist, Mental Health Services in the New South Wales Health Department, was one of the public authorities whose conduct was investigated. He wrote to the Ombudsman on three occasions, severely criticising the Investigation Officer responsible for the investigation. In his first letter he described the provisional conclusions and findings as an "amalgam of moral pronouncements, confused attempts to state and apply the law, polemical comment upon certain provisions of the Mental Health Act 1958 and sketchy reference to alleged facts". The letter variously stated:

> ... your officer fails to draw from the facts the conclusion which was open to him and to which the facts overwhelmingly pointed ...
>
> The references [to several persons detained for long periods in mental hospitals] serve the sole purpose of conveying by innuendo your officer's distorted conviction that he is to take credit for the discovery of the tip of the iceberg of injustice perpetrated against mentally ill offenders in NSW ...
>
> As a result of inadequate investigation you officer fails to find the facts relevant to the subject of his conclusion. He draws his conclusion from the absence of facts known to him, an absence for which he is responsible ...
>
> There is no factual support for these conclusions, your officer having brushed aside existing administrative practice, made unsubstantiated charges of injustice in other cases for which I am responsible and having jumped to conclusions without bothering to inquire into facts which are easily discoverable ...

The Investigation Officer and an Assistant Ombudsman later interviewed Dr Sainsbury for the purpose of clarifying some of the issues that he had raised in his letter. He made no criticism of the officers' performance during the interview, which took place in the presence of Dr Sainsbury's legal advisers. Yet, in a letter marked "Private and Confidential", Dr Sainsbury shortly afterwards wrote to the Ombudsman:

> As someone who has always been a supporter of the Ombudsman in any society I feel compelled to express my disappointment in your officer's recent performance.
>
> I would expect nothing less than investigations of the highest calibre to be conducted by your Office. It would seem to me that to achieve this it would be essential to have officers who have not only some understanding of the field under investigation, but also an attitude characterised by an open-minded and objective approach biased only [by] the concern to produce a clear picture.
>
> To have an investigation carried out in the manner of the present investigation by [the Investigation Officer] does not help the community in any way, nor does it reflect positively on your own respected office.
>
> While I would be the first to admit that my feelings were extremely hurt by [the Investigation Officer's] provisional finding that my conduct was unreasonable and unjust, especially as I have stuck my neck out many times for forensic patients, I am more concerned about the public image of your office.

Six days later, Dr Sainsbury wrote again. This time he criticised not only the Investigation Officer, but the Assistant Ombudsman as well, and accused both of being "civil rights champions". Dr Sainsbury began his letter:

> I had in mind to write to [the Investigation Officer] following his Investigation held at McKell Building on Friday, 23 May 1986 in order to clarify some issues about which he appeared to be unclear. Some of what I had drafted would have been critical of [the Investigation Officer] and as even a harmless wobbygong shark will attack if threatened I am writing direct to you, Sir, giving some straight information about major issues only.

Most of the "straight information" had been covered in the interview and in the doctor's previous correspondence. The purpose of Dr Sainsbury's letter was apparently to convey the impression that the officers were prejudiced against him and that, in his own words, "a firm civil rights line was being pursued to the exclusion of other factors in the equation relevant to the management of the mentally ill".

A revised statement of provisional findings and recommendations has been issued, taking into account material considered to be of substance.

This Office values constructive comment upon statements of provisional findings and recommendations, but personal denigration of Investigation Officers is deplored. The Ombudsman told Dr. Sainsbury that he was satisfied that the interview with the Investigation Officer and the Assistant Ombudsman had been conducted in accordance with the correct procedures of this Office.

10. Visits to juvenile institutions

The 1984-85 Annual Report noted that there had been fewer visits to juvenile institutions during that year, because there were fewer institutions and fewer complaints from those institutions, and because resources were allocated to juvenile remand centres and prisons. This trend continued in 1985-86.

With the announcement that the Department's programme of community placement of young offenders is to be abandoned, it may be that this Office will need to make more regular visits to the larger institutions. The situation will be kept under review.

VISITS TO JUVENILE INSTITUTIONS -
ORAL COMPLAINTS RECEIVED and DEALT WITH
1 July 1985 to 30 June 1986

NATURE OF COMPLAINTS	INSTITUTION				TOTAL
	MINDA, LIDCOMBE	YASMAR, ASHFIELD	COBHAM, ST.MARY'S	MT.PENANG, KARIONG	
Department of Youth & Community Services					
Activities	2			2	4
Alternative Accommodation		1			
Cleanliness of premises	1	1			
Clothing				1	
Conduct of officers		3	5		8
Day leave				3	
Facilities or physical conditions	1			3	4
Food	1		1	3	
Medical treatment				3	3
Other residents	3	1			4
Phone calls	1				1
Property				1	1
Schooling		5			5
Smoking	1			2	3
Transfer	1			7	8
Visits	2			1	3
Work	1			1	2
T O T A L S :	14	11	6	27	58

(continued following page)

Other authorities:

Police	1	3	2		6
Courts (no jurisdiction)			1	4	5
T O T A L S :	1	3	3	4	11
TOTAL ORAL COMPLAINTS DEALT WITH	15	14	9	31	69

Investigation of Young Offenders' Complaints

Written complaints received from young offenders are allocated throughout the Office and dealt with by the majority of Investigation Officers. Very few written complaints are received from residents of juvenile institutions.

Investigation Officers responsible for the major juvenile institutions are set out below:

INSTITUTION	RESPONSIBLE OFFICERS	BACK-UP OFFICERS
Minda, Lidcombe	Mary Bolt Jane Deamer	Yvon Piga
Yasmar, Ashfield	Greg Andrews Sue Bullock	Julia Hall
Worrimi, Broadmeadow	Julia Hall Brian Seelin	Allan Hartigan
Endeavour House, Tamworth	Allan Hartigan Kieran Pehm	Andrew Paton
Mt. Penang, Kariong	Claudia Douglas Margaret Tung	Brian Seelin

(continued following page)

Riverina Remand Centre, Wagga Wagga	Gordon Smith Mary Bolt	Kieran Pehm
Cobham, St. Mary's	Andrew Paton Jane Deamer	Margaret Tung

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11. The Ombudsman and the Privacy Committee

Requirement that Ombudsman be a member of the Privacy Committee undesirable

Section 5(3) of the Privacy Committee Act provides that the Ombudsman is a member of the Committee. For some time it has been the view of the present Ombudsman that this provision is undesirable. In a letter to the Attorney-General dated 10 July 1985 the Ombudsman set out the reasons for his view as follows:

(1) The role of the Ombudsman, both under the Ombudsman Act and under the Police Regulation (Allegations of Misconduct) Act, 1978 (as amended), is a very demanding one. These burdens have increased over recent years, both with an increase of complaints generally and the introduction of a new Police complaints system which involves secondment of ten Police Officers to the Office of the Ombudsman. These seconded Police Offiers become Officers of the Ombudsman and are directly responsible to the Ombudsman.

(2) For the reasons set out in (1) it has not been practicable for me to attend Privacy Committee meetings for some time. In the circumstances, I think it is highly undesirable that the Ombudsman should be a defacto member of the Committee, when the Ombudsman's duties may substantially preclude the holder of that Office from being involved in the work of the Committee. Further, there exists an undesirable risk that the conduct of some matter by either authority may by reason of the Ombudsman's membership of the Committee be attributed to the other authority.

(3) The Ombudsman and the Privacy Committee have different roles and there is a risk of undesirable conflict of interest while the Ombudsman remains a member of the Committee. In one case already, the Committee believed that the amendments affecting the work of the Ombudsman being introduced by the Minister of Police, Mr Anderson (under the heading "Police Discipline Package") in November 1983 infringed in one

respect proper "privacy" principles. As Ombudsman I disagreed with the Privacy Committee's view, obtained counsel's opinion that there was no adverse privacy implication in the new legislation, and forwarded copies of this opinion to the Committee and the Police Minister. The Committee disagreed with the opinion but the Minister agreed with it. Such conflicts of interest are quite possible in the future.

(4) Membership of the Committee is not necessary for effective co-operation between the Ombudsman and the Privacy Committee. I and officers of the Ombudsman have had fruitful contact with both present and past Executive Members of the Privacy Committee and staff. A sensible method of dealing with border line cases between the two jurisdictions has been worked out and there is a precedent for the continued co-operation and discussion when necessary, irrespective of whether the Ombudsman is a member of the Privacy Committee or not.

Subsequently, the Ombudsman learned from the Minutes of the Privacy Committee that the Committee was proposing that the Deputy Ombudsman should be substituted as a required member of the Privacy Committee. The Ombudsman believes that this proposal would not improve the situation, and might make it worse. On 20 March 1986 the Ombudsman wrote to the then Premier and to the Attorney-General as follows:

> I have not attended the Privacy Committee meetings for some time and believe that you should know that I do not agree that the Deputy Ombudsman should be substituted for the Ombudsman in the legislation. Indeed, I regard the arguments against the Deputy Ombudsman being appointed as equally strong, if not stronger, than those I put forward in support of my original proposal. The Deputy Ombudsman has a heavy work-load of investigations and, in my evaluation, would be even less in a position to make time available from his demanding role to usefully serve as a member of the Privacy Committee. He, like myself, and indeed other officers of this Office, may be subject to complaint under the Privacy Committee Act and, without stating what I believe about the complaint, one such complaint has been made to the Committee in respect of an investigation carried out by the Deputy Ombudsman.
>
> I have discussed the matter with Dr Jinks. He tells me he was in no way consulted before or after the resolution referred to in the Privacy Committee minutes and that he does not agree with the proposal that the Deputy Ombudsman, by statute, should be a member of the Committee. I respectfully ask that the proposal of the Privacy Committee be rejected and that my original proposal, namely that the statutory requirement that the Ombudsman be a member of the Committee, be removed.

In his reply dated 24 April 1986, the Attorney-General said:

> As you are aware, the Premier has lent his support to your request to be deleted from the Privacy Committee, and at this stage the question of an appropriate replacement on the Privacy Committee is under review.
>
> Thank you for bringing your views concerning the Deputy Ombudsman to my attention.

Because of the demands on his time, it is now some time since the Ombudsman attended a meeting of the Privacy Committee. The Ombudsman requests that a decision be made on this matter as soon as possible.

"Policy" decisions of the Privacy Committee

From time to time the Privacy Committee makes decisions on what might be called "policy" issues; that is, issues which do not result from investigation of complaints (as compared with the manner in which the Ombudsman is required to proceed under the Ombudsman Act). Such policy decisions sometimes receive wide media coverage as the views of the Privacy Committee.

One example concerns the trenchant opposition of the Privacy Committee to the Commonwealth Government's proposals for the Australia Card. Like many issues, such a policy question involves the balancing of often competing interests, and not merely the privacy of individuals. In the case of the Australia Card another interest to be taken into consideration is the claimed utility of the Card as a weapon to combat tax evasion and social welfare fraud and as a means of spreading the burden of taxation more equitably.

On issues such as this the views of individuals may differ. If the Ombudsman were to disagree with the Privacy Committee on an issue such as the Australia Card, and were publicly to announce that disagreement, he would be entering into political controversy, with possible detriment to his primary role.

This consideration reinforces the Ombudsman's view that neither the Ombudsman nor the Deputy Ombudsman should be a member of the Privacy Committee, and should confine their energies to the arduous tasks clearly laid down in the Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act.

Complaints against the Ombudsman to the Privacy Committee

Thee are likely to be occasional complaints to the Privacy Committee about the Ombudsman or his officers. One such complaint arose out of an item in last year's Annual Report. That item, under the heading "An Alleged Extraordinary Party", set out the terms of a complaint to the Ombudsman by Constable McKinnon about the conduct of an Inspector of police, a former senior member of the Internal Affairs Branch (described in the Annual Report item as Inspector K), who had allegedly boasted to junior police officers, in the circumstances set out in the item, that on at least one occasion he had in effect colluded with police whom he was investigating to enable them to avoid any charge or criticism.

The integrity of Internal Affairs Branch investigations is of vital importance to the New South Wales Police Force and the allegation was seen by the Office of the Ombudsman as a serious one. The police investigation of this and other substantial complaints made by Constables Miles and McKinnon had been delayed for an inordinate period.

When the Privacy Committee commenced the investigation of the complaint by Inspector K, the Ombudsman sought the opinion of Robert Hayes, an expert in privacy law, who as a Commissioner of the Australian Law Reform Commission had been primarily responsible for the Commission's longstanding project on Privacy. Mr Hayes, who has recently been appointed a member of the Commonwealth Administrative Appeals Tribunal, advised the Ombudsman:

> Under no privacy protection principle, whether developed under Australian State, Federal, or International Law; or by the Privacy Committee itself, can the Ombudsman's conduct as set out in the complaint by [Inspector K] to the Privacy

> Committee, be criticised as invasive of [Inspector K's] privacy.

Mr Hayes also referred to his doubts about the jurisdiction of the Privacy Committee in relation to the Ombudsman's Annual Report item. A copy of this opinion was sent to the Committee.

The Privacy Committee is continuing with its inquiry. The Ombudsman will carefully consider the final decision of the Privacy Committee, when it is received. Like recipients of Ombudsman reports and recommendations, the Ombudsman will remain free to agree or disagree with the Committee's conclusions.

New Matters

12. Delay by Department of the Attorney-General in processing annulment requests

The 1984-85 Annual Report foreshadowed the need to investigate the procedures of the Department of the Attorney-General in processing requests for annulment or remission of penalties. A question of jurisdiction had to be settled, however.

Administrative problems arose with the introduction of the Self Enforcing Infringement Notice Scheme in July 1984, so that numerous requests for annulment of convictions or remission of penalties were made to the Secretary of Justice. An officer of the Department of the Attorney-General said that, because the Traffic Branch had made hundreds of errors, which the Department now had to correct, there were bound to be delays.

This Office discontinued enquiries about complaints of delay by the Traffic Branch on the grounds that requests by the Police Department for annulment or remission would resolve them. Those complaints re-emerged, however, as complaints about delay by the Department of the Attorney-General in processing these requests from the Police Department. Complaints were also received from people who tried to deal directly with the Department.

The first complaint referred to the Department was that of Mr K, who in more than twelve months had received only an acknowledgement of his request for a refund. The Secretary, Mr T Haines, provided information about Mr K's complaint "as a matter of courtesy" and questioned the Ombudsman's jurisdiction. Following the intervention of this Office, Mr K received his refund cheque.

In response to Mr D's complaint, it was arranged in March 1985 between the Department of the Attorney-General and the Police Department that, as a matter of priority, a refund of $166 would be issued. Mr D had paid his original fine, but a warrant was issued in error and Mr D, under duress, had paid the fine and costs a second time. Six months later this Office was told that it would be at least another month before the administrative details could be completed and a cheque issued to Mr D. This delay was said to be "par for the course"; there were "massive backlogs", and the fact that Mr D's payment had been made in 1983 made him no more deserving than any of the many others who had been waiting as long. Complainants Mrs R and Dr W were in a similar position.

In September 1985 the Ombudsman suggested that, if the Secretary still contended that these matters were outside jurisdiction, he should obtain an opinion from independent counsel. No response was received by 5 December 1985, despite numerous enquiries, and the Secretary was advised, in a hand-delivered letter, of the possibility of a Section 19 inquiry being instituted. A letter dated 26 November 1985 was received that afternoon. Again, "as a special courtesy", the Secretary provided information on the outstanding complaints.

The Secretary explained that:

> As a direct consequence of the introduction of the Self Enforcing Infringement Notice Scheme (SEINS) in July of last year, the Claims and Remissions Section of this Department experienced a 400% increase in remission and annulment applications during 1985; with the annual rate of applications rising from 4,000 per annum to 20,000 per annum.
>
> This huge increase in work volume led to a substantial

> arrears situation and to extended delays occurring in the processing of many of these applications during 1985.
>
> The situation has now been remedied to a very large extent and I am confident that undue delay in these matters will be avoided in 1986 ...
>
> I will acquaint you with the terms of legal opinion on the jurisdiction question as soon as such advice is to hand.

Even with these substantial arrears, it was not clear why Mr M, another complainant, had had to wait more than a year, and why his three phone calls and two letters, one hand-delivered, had been ignored. Following the intervention of this Office, his file was located and a reply sent.

After a further reminder by this Office, the Secretary advised in March 1986 that he had received an opinion from the Crown Solicitor on the question of jurisdiction, but had now sought a further opinion on the matter from the Office of the Solicitor General. The Ombudsman asked for a copy of the opinion by the Crown Solicitor, but the Secretary said that he did not consider that it would be "appropriate" to make a copy of the opinion available.

On 5 August 1986 the Secretary of the Attorney-General's Department advised the Ombudsman:

> I have now had the benefit of the Solicitor General's advice in relation to this matter. In her advice she considers the ambit of the expression "relating to the exercise of the royal prerogative of mercy" as used in Clause 9 of Schedule 1 to the Ombudsman Act, 1974.
>
> The Solicitor General notes in respect of Clause 9 that it applies not merely to the conduct of the Governor (cf. Clause 1) or to the conduct of a Minister of the Crown (cf. Clause 2) but to the conduct of a public authority which is defined in S.5(1) of the Act to mean, inter alia,
>
> > "(c) any officer or temporary employee of the Public Service;
> >
> > (d) any person in the service of the Crown or of any statutory body representing the Crown."
>
> The Solicitor General has come to the view that the exclusion of conduct by a public authority, as distinct from the conduct of a Minister of the Crown and/or the Governor, relating to the exercise of the prerogative of mercy

> strongly suggests that what is excluded is not merely the conduct immediately involved in the exercise, but also the anterior processing of applications.
>
> In view of this advice from the Solicitor General I believe that it is not appropriate for you to investigate the processing of matters involving the exercise of the royal prerogative of mercy.
>
> Nor do I believe it appropriate to make available advice tendered by crown law officers in these cases.
>
> Accordingly, in the future persons seeking relief in this area should be referred to me so that I might take appropriate action.

It is regrettable that the Secretary was not prepared to send the Ombudsman copies of the opinions of the Crown Solicitor and the Solicitor General so that the validity of their reasoning could be scrutinised. However, to the extent that the Secretary expeditiously deals with complaints to this Office, no harm is done by the denial of jurisdiction. If, however, the legitimate complaints of citizens in this area are not promptly answered it will be necessary for the Ombudsman to expend public monies to brief independent Queen's Counsel to advise on the issue of jurisdiction and, if necessary, take action in the courts.

13. Department of Environment and Planning - In-house legal advice

During an investigation of the Sydney Cove Redevelopment Authority's approval of the Grosvenor Place development, it became apparent that the Department of Environment and Planning had been concerned about the development. This Office then investigated the alleged failure of the Department to commence legal proceedings against the Authority's approving the building without first obtaining an environmental impact statement or otherwise complying with the provisions of the Environmental Planning and Assessment Act.

The investigation was discontinued when the Sydney Cove Redevelopment Authority (Amendment and Validation) Act was passed by Parliament in December 1985. The Act provided that the Authority was bound to comply with Part V of the Environmental

Planning and Assessment Act and validated the actions of the Authority prior to the date of assent, including the approval for the Grosvenor Place development. The Ombudsman believed that there would be little utility in pursuing the investigation of the Department of Environment and Planning, given the introduction of that legislation. However, during the course of the investigation into the Department's conduct, it was learned that the Department had relied on internal legal advice in a matter of significant public interest. The Ombudsman believed that the legal advice was confused, indefinite and, in parts, inaccurate. The Ombudsman wrote to the Director of the Department of Environment and Planning in the following terms:

> Notwithstanding the decision to discontinue any further investigation, I believe I should express my concern at the Department's decision to rely on purely internal legal advice in a matter of significant public interest. The relevant facts are briefly as follows:
>
> (a) The Department, and yourself as its Director, had, relatively early in the piece, rightly expressed concern at the likely adverse effects of the proposed building known as Grosvenor Place.
>
> (b) According to the Department's letter to me of 25 June 1985: -
>
> > ... The question of whether the re-development proposal fell within Part IV or Part V of the Environmental Planning and Assessment Act, 1979 was considered by the Department's Solicitor and a senior legal officer of the Department. You will have seen those advisings. Though not completely free from doubt, both officers concluded that the subject re-development proposal fell within Part IV of the Act. Therefore, the question of the application of Part IV or Part V was not raised again.
>
> Indeed on closer perusal, the advice of the then Manager of the Legal (Drafting) Branch, Ms D Campbell, dated 27 May 1983 was that, in her view and not without doubt, the effect of the 27 May 1983 Amending Act was that the Authority was the consent authority. This correct advice meant that Part V did apply. However, she went on to say that the "safest course" was to regard the Council's consent as still being necessary, a view with which Mr Hort, the Solicitor, agreed and which as he said in his memorandum of 21 March 1984 "that being the case Part V has no application".
>
> (c) Notwithstanding the doubts expressed by the in-house legal advisers, and notwithstanding your own and the Department's continuing concern about Grosvenor Place,

the Department proceeded to act on the basis that Part V did not apply and hence that the Department had no right to intervene in any way. No outside legal advice was obtained from experienced solicitors or counsel.

(d) Following receipt of a complaint against the Authority, advice was obtained by this Office from Mr Symos QC and Ms Blackman. That advice, and advice subsequently obtained by the Sydney Cove Redevelopment Authority from Mr Gleeson QC, makes clear that Part V of the Act did apply at all relevant times following the assent to the Sydney Cove Redevelopment Authority (Amendment) Act, 1983. All eminent counsel were of the view that Part V did apply to the Grosvenor Place development and should have been complied with, and had not been. By that stage (as distinct from when the matter was considered by the Department) the building was half completed and the practical realities considerably changed.

The Director of the Department of Environment and Planning, Mr R B Smyth, replied:

> With hindsight I agree that in view of the doubts raised by the Department's legal officers, outside expert advice could have been obtained. I will in future seek such outside advice when the situation is not clear.

The Director's response was satisfying. The benefits of outside, specialist legal advice are obvious from the facts of this particular case. The Director's decision will go a long way towards ensuring that similar future breaches of the law do not occur.

14. Ombudsman scrutiny of recommendations to Ministers

Mr A complained that he had applied to the Department of Industrial Relations for renewal of his Theatrical Agents License and had received no response for a considerable time. Upon investigation, it was clear that there was serious delay in relation to Mr A's application, which the Department had taken almost two years to process.

The Department put forward various reasons for the delay and eventually its Acting Executive Officer prepared a submission for the Minister for Industrial Relations. The submission, which

recommended refusal of Mr A's application for renewal, was approved by the Minister, and Mr A was advised by letter of the Minister's decision. The letter was signed on behalf of the Under Secretary of the Department and did not give reasons for the decision to refuse renewal.

The investigation of Mr A's complaint uncovered several matters of concern, apart from the delay, including the fact that the submission to the Minister was prepared soon after the delay had been brought to the attention of the Department by Mr A; it had taken a ridiculously long time to process the application, but the submission to the Minister was prepared within six weeks.

The conduct of the Department was found to be wrong, a statement of provisional findings and recommendations was sent to the Department and, after comments on it were considered, a draft report was sent to the Minister. The Minister made the following comment upon the draft report:

> It is my opinion that I have an unfettered discretion in the exercise of this power. If you are suggesting that I should explain my action in exercising this discretion to my Department, who then pass on this information to the applicant, then I find your suggestion incredulous and beyond your power.

The conduct of Ministers does not come within the jurisdiction of the Ombudsman, and the Minister for Industrial Relations has absolute discretion under the Industrial Arbitration Act to approve or refuse the renewal of certain licenses. Nevertheless, the Department, when making a submission to the Minister should not, because of the Minister's absolute discretion, fail to advise him reasonably and fully. The Ombudsman replied to the Minister:

> ...I should point out that where complaints similar to this arise in the future, I will give consideration to whether, in the circumstances, I believe Departmental officers have acted wrongly in terms of the Ombudsman Act. In my view, in particular circumstances, a recommendation to you by a Departmental officer that an application for renewal of a license be refused, should be accompanied by a recommendation that reasons be given to the applicant. Of course, it would be a decision entirely for you as to whether reasons should

> be given. But the failure of a Departmental officer to make such a recommendation in a case, for example, where a person's livelihood is affected, may of itself constitute wrong conduct in terms of the Ombudsman Act in that such inaction is unreasonable.

This applies to all Departments and Ministers. All departmental officers, in making submissions to their Ministers, come within the jurisdiction of the Ombudsman. If this Office believes that an officer has not acted reasonably, in making submissions to the Minister, then that conduct, or the conduct of the Department, may be found to be wrong.

When the final report in this matter was issued, the Department had taken action to ensure that Mr A's application was not renewed. However, Mr A wrote to the Ombudsman in April 1986:

> As a consequence of matters brought to the attention of the Department by your investigation, the Department has now granted a license.
>
> Please communicate my sincere thanks to members of your Office.

15. "Own motion" investigation of the Fish Marketing Authority

In May 1986, as a result of information received in the course of an investigation into the conduct of another public authority, an investigation was commenced into the conduct of the Fish Marketing Authority. Specifically, the investigation concerned allegations that:

1. employees of the Fish Marketing Authority could purchase, without safeguards, fish sold by the Authority on behalf of other persons or co-operatives, and, in particular, fish sold across the auction floor at the Authority's Pyrmont premises.

2. the Fish Marketing Authority and certain employees levied a commission of only five percent on sales on behalf of certain persons, when a higher rate of commission should have been charged.

The Fish Marketing Authority operates under the Fisheries and Oyster Farms Act. The Act requires that fish must be sold, by the Authority or by a registered co-operative, in a market established under the Act, in the Authority's Pyrmont Market, or at a council-controlled market set up under the Local Government Act. An exemption may be granted, and fish legitimately purchased may be resold. Before a registered co-operative can operate a legal fish market, the Authority must recommend that it be allowed to do so. The Authority also issues exemptions and consents. Further, the Authority has a virtual monopoly on the wholesale vending of fish in the Sydney area because of the conditions of marketing approvals held by registered co-operatives.

With these powers, the Authority has a responsibility to ensure that New South Wales fish suppliers obtain a fair market price for fish sold through the Authority. Where employees of the Authority purchase fish sold by the Authority on behalf of suppliers, the most stringent safeguards are required, to ensure that they behave correctly and are seen to behave correctly.

Investigation showed that employees of the Authority, including auctioneers, were buying very large quantities of fish at the Authority's daily auctions. One employee of the Authority (who, the Authority's Assistant General Manager said, supplied three Chinese restaurants) purchased 3,591.8 kilograms of fish between 1 October 1985 and 30 May 1986; another (who reportedly ran a stall at Paddy's market) purchased 49,754 kilograms of fish in the same period. Another purchaser of large volumes of fish, the Assistant General Manager said, bought on behalf of a buyer "who can't hang around"; the purchases were probably made on commission.

When interviewed by the Ombudsman's investigator, the General Manager of the Authority said that he was aware that staff bought fish, but expressed surprise at the quantities being purchased. He said that he had attempted to stop the practice when he first become General Manager, but that the Public Service Association had opposed him, saying that the "right to purchase" was a

"condition of employment" of the Authority's staff. The Assistant General Manager said that there was no mechanism for checking whether, for example, an Authority auctioneer sold fish to himself, other than the protest that this would prompt from other buyers on the market floor.

The Director-General of the Department of Agriculture and Fisheries, Mr G H Knowles, is a member of the Authority. Shortly after the Ombudsman's Office gave the Authority notice of its decision to investigate the Authority's conduct, the Director-General recommended to the Authority certain guidelines for the purchase of fish by Authority staff. The guidelines were based on those applying to private practice by officers of the New South Wales Public Service, and provide that:

1. the work must not arise from, nor can it be associated with, the staff member's official knowledge and duties although, in approved activities, technical or professional expertise may be utilised;

2. the work must be done in the staff member's own time; and

3. the work must not involve a conflict of interest with the staff member's duties.

The Public Service guidelines provide that staff should act in the general public interest and not in the interest of themselves or any other individuals, and that they should be able to show that they have done so. Officers of the Public Service are required to disclose in writing to a senior officer any pecuniary or other interest held by them immediately on becoming aware that a potential conflict between personal interest and official duty, whether real or apparent, has arisen or is likely to arise.

The Director-General, in recommending the adoption of these guidelines, said that "the present arrangements are not those which would be approved in normal circumstances within State Government departments". He continued, "Purchases of large quantities of fish seem not to be adequately covered by the rules

of the Authority. It could reasonably be argued that employees purchasing large quantities of fish are in fact engaging in private practice."

At the Authority's June meeting rules were adopted to prohibit the purchase of fish, except in "domestic quantities" (one crate per week per staff member), and to provide detailed procedures to be followed in those cases. Further, except with the Authority's permission, "private practice" by employees and employment of Authority staff in the fish industry, were forbidden.

The Authority charges sellers a commission for fish sold through the Authority. In the Authority's 1985 Annual Report it was said that the commission rates charged by the Authority were:

Individual returns	12%
Co-operative returns	9%
Bulk fish sold to processors	5%

Enquiries showed that a number of suppliers had been charged five per cent on fish that should have attracted twelve per cent commission. In a number of cases this was said to be due to "error". Yet one supplier was charged five per cent commission simply on his own assertion that the fish was to be processed. In several cases it was not, and twelve per cent commission should have been charged. The Authority did not check whether the fish was in fact processed.

Moreover, the Authority's Assistant General Manager had tried to attract interstate suppliers to the Pyrmont Fish Market by charging them only five per cent commission, when New South Wales suppliers would have had to pay twelve per cent. As well, individuals who sold more than $250,000 worth of fish per annum were charged only nine per cent commission. This was not recorded in the Annual Report.

At its June meeting the Board resolved that individuals who sold in excess of $200,000 worth of fish per annum would be charged the reduced nine per cent commission rate; that frozen and fresh processed fish would attract a five per cent commission rate; and

that interstate suppliers would no longer receive the concessions which the Assistant General Manager had granted them.

The Authority maintained that frozen fish fillets and processed bait prawns attracted five per cent commission, but said that there had been no such sales in the current financial year. Further checking revealed that there had in fact been such sales; but only three suppliers had been charged five per cent commission; all other suppliers had been charged nine per cent or twelve per cent commission on these sales.

The Ombudsman's investigation is continuing.

16. Delays by public authorities in making advance payments for resumed land

Over the past few years the Ombudsman has investigated several complaints about delay by public authorities in making advance payments to people whose land has been resumed.

In the Ombudsman's view, a person whose land is resumed by a public authority is placed at a considerable disadvantage; this is compounded when the land is a principal income-producing asset.

In general, resumption of land is governed by the provisions of the Public Works Act. Procedures for resumption and for the payment of compensation are specified in Parts V and VI of that Act. The Act places the onus on authorities to make payments of compensation expeditiously. It also empowers an authority to make part payment on account of compensation to be paid, and provides for the payment of interest on that compensation. The question of statutory interest payable on compensation for resumption of land is dealt with elsewhere in this Report and in the Ombudsman's Annual Reports for 1982-83, 1983-84 and 1984-85.

Once a notice of resumption of land is gazetted, the land is vested in the resuming authority and the owner becomes entitled to receive compensation. The Act provides that, when a claim for

compensation is made, an authority should have the land valued and inform the claimant of the valuation as soon as practicable. The claimant is entitled to make an application for part payment of the compensation after the claim for compensation has been lodged and if the authority is satisfied that the claimant is entitled to receive compensation. The proportion of the full amount of compensation payable in advance varies between government departments; the Department of Environment and Planning, for example, generally pays 80 per cent of the assessed value upon resumption.

The Ombudsman believes that public authorities should make part payment of compensation at as high a proportion of the full amount of compensation as possible. The propriety of maximising advance payments has also been recognised by the Interdepartmental Committee on Land Acquisition Procedures. The Committee also recommended that, upon acquisition of land, payment should be made as expeditiously as possible. It said that "so much of the compensation as is not in dispute should be paid to the claimant as soon as possible after the date of resumption" and that this "should be done by an advance payment of compensation to the claimant on proof of his title to the interest in respect of which compensation is claimed".

In one case the Ombudsman found the delay by Dubbo City Council in making a part payment to be unreasonable and unjust. The Council had been legally in a position to make a part payment of compensation on land it had resumed from Y Pty Ltd in June 1983. Nevertheless, it was not until February 1984 that the Council resolved to make a part payment, nine months after the application had been made by the claimant. The land resumed was a grazing property, and a principal source of income for the director of the proprietory company.

In an earlier report about the Department of Environment and Planning, the Ombudsman recommended that, when compensation was approved by the Department, it should also seek approval for the payment of an advance, together with statutory interest, and pay the claimant as soon as possible.

The Ombudsman recognises that a former owner of resumed property can resort to the Land and Environment Court for compensation. However, that remedy is costly and involves delay. Not only does the Public Works Act place an onus on an authority to compensate a former owner as expeditiously as possible, but it is , in the Ombudsman's view, reasonable for claimants to expect government authorities to make prompt assessments of the value of the land they resume and, as soon as possible thereafter, make a realistic advance payment of principal, as well as statutory interest.

17. Problems with Crown reserved roads

The Department of Lands is composed of a number of Divisions, two of the better known being the Land Titles Office and the Crown Lands Office. The Crown Lands Office usually attracts the great majority of complaints about the Department of Lands received by the Ombudsman each year. A number of these complaints, usually reaching double figures, concerns the use of Crown reserved roads.

The Crown Lands Office has the responsibility for management and supervision of Crown reserved roads, and administers them through the Metropolitan Lands Office and a number of Regional Offices throughout New South Wales.

Most Crown reserved roads were created over 100 years ago, during the subdivision of Crown land in New South Wales. Each parcel of land was to be served by a public road. In many cases, these so called "reserved" or "Crown subdivision roads" have become public roads, under the supervision of a local government authority. However, the original parcels into which the State was subdivided were often too small to constitute economically viable farming blocks, and the majority of rural properties comprise a number of original parcels, each serviced by its own Crown reserved road. Consequently, many of these roads lie within the boundaries of private property and are "fenced in" or "enclosed" by means of gates or other structures within private property. Members of the public have a right to use these roads, but many of the roads are unconstructed and unused, and only exist on maps held by the Department of Lands.

As opposed to public roads, which are maintained by local government authorities, Crown reserved roads are not maintained by the Department of Lands, but by the regular users of the road who obtain benefit from it.

Disputes can easily arise between landholders over the use of Crown reserved roads and, in most cases, the parties in dispute turn to the local Lands Office for assistance to resolve the dispute. Crown reserved roads may be closed or opened (when circumstances warrant) under the Public Roads Act. Owners of land through which a Crown reserved road passes may enclose the road within their property, usually by means of gates, and thus make use of Crown land for grazing or other purposes. In such circumstances, landholders are required to obtain a road permit and pay rent to the Department for use of the land.

In disputes over the opening or closing of Crown reserved roads, and the issuing of road permits, the local Lands Office can become the "meat in the sandwich", with one of the landholders complaining to the Ombudsman.

The relevant legislation (the Public Roads Act 1902 and the Crown Lands Consolidation Act 1913) is antiquated and complex. Few landholders understand the status of Crown reserved roads, or the procedures involved in opening or closing a road. A number of complaints involve allegations of misleading or incomplete information provided by a Lands Office, or even bias on the part of the Lands Office.

Very few complaints result in findings of wrong conduct under the Ombudsman Act. Many are declined at the outset or discontinued after preliminary enquiries are made. One of the main reasons for this is that the disputes are often referred to a Local Land Board for decision, either before or at the time that a complaint is made to this Office. The substantive issue in dispute is then determined by the Board and those proceedings, being analogous to Court proceedings, are outside the Ombudsman's jurisdiction. There is often little utility in this Office considering the remaining ancillary areas of complaint.

Cases taken up by this Office often concern the actions of the Department before the matter is referred to a Local Land Board, and so recommendations by this Office involve Departmental procedures rather than the specific problem which motivated the complaint.

Three examples are:

1. Nine landholders in the Goulburn area complained about the actions of officers of the Goulburn Lands Office in dealing with them and in giving them information about their road opening application. They claimed that the Lands Office was favoring the other party to the dispute.

A subdivision had recently been effected, and most of the nine landholders were new to the area. Legal access to the landholders' properties was by way of a Crown reserved road. The track in use did not follow the reserved road in its entirety, and part of the road used by the landholders was thus on private land. When the farming company through which the road passed moved to prevent the nine landholders travelling on the road, problems began. It was discovered that the legal road passed through a dam on the property. The nine landholders thought that the existing constructed road should simply be exchanged for the legal road. The intervening landholder opposed this course of action, however. The matter went to a Local Land Board, which found in favour of the proposition put forward by the nine landholders. It was only after the hearing that the landholders discovered that they would also have to pay $5,000 compensation to the intervening landholder. Furthermore, the Regional Manager of the Goulburn Lands Office estimated that the actual cost of the road opening, which would normally have to be borne by the applicant, was $11,000. The nine landholders alleged that they had never been alerted by the Department to these potential costs. During this Office's enquiries, the Department refunded a large part of the costs to the landholders.

The Deputy Ombudsman found that the Department had failed to give the landholders detailed and necessary information regarding the

likely cost of their road opening application. The landholders were also unable to challenge the Department's assessment of compensation payable to the intervening landholder, because the legislation prevented then from doing so; the Deputy Ombudsman found that the legislation was in that respect unjust and made recommendations to overcome certain procedural defects.

2. The second case involved a dispute over whether it was appropriate for a Crown reserved road to be enclosed within a property. An adjoining owner wished to have free use of the road, without having to stop continually to open and close gates while travelling along the road. The dispute originally arose over whether the landholder through whose property the road passed should fence out the road from his property. In 1980 both parties to the dispute approached the local Lands Office seeking advice as to how the matter could be resolved. At that time both parties were advised that neither could obtain a road permit to enclose the road, as each objected to the other's application. Three years later, without notification to the adjoining owner, the Lands Office issued a road permit to the new owner of the land, after he had erected unauthorised gates on the road. The matter was subsequently taken to a Local Land Board, which decided that the gates could remain. The complainant alleged that the Department had been inconsistent in first refusing an application for a road permit and later granting it; she also made allegations of bias. The case is yet to be completed. However, the Ombudsman has made a draft finding that the Department of Lands, between 1980 and 1983, gave incomplete, inconsistent and wrong advice to certain landholders regarding matters surrounding the use of the Crown reserved road. He also made a draft finding that the decision of the Department to issue a road permit to one landholder, in the face of the adjoining landholder's objections, without hearing the matter, was legal but unreasonable. Draft recommendations have suggested ways in which the legislation can be simplified and made fairer, together with alterations to departmental procedures regarding advice which departmental officers should give to members of the public.

3. The third case involved the Department's actions in closing a Crown reserved road without notifying an owner of land

who relied on the road to gain access to his property. The complainant raised the issue of what obligation the Department had to notify nearby landholders, who may be affected by a road closure, of an application to close the road. This case is also yet to be finalised. A preliminary finding has been made that the Department should have notified the complainant.

As in case 1, landholders in a subdivision were reliant on the legal guarantee which the Crown reserved road provided in gaining access to their land. The cost to the complainant, in this case, of applying to open a new Crown reserved road so that he can again drive to his land could well be in excess of the value of the land.

The Secretary and Registrar General of the Department of Lands has advised the Ombudsman that the legislation governing Crown reserved roads and their enclosure in being reviewed, and that there is a proposal to introduce a new Crown Lands Act to replace the present Crown Lands Consolidation Act 1913. It is hoped that the Ombudsman's recommendations for legislative change arising out of the above cases will be incorporated in the new legislation. This Office will continue to follow up the recommendations which are made, in an attempt to ensure that the necessary legislative and procedural changes are implemented.

18. Sale of teaching materials

A former staff member at Kuring-gai College of Advanced Education maintained that a Department of the College sold course notes and workshop materials to students at substantial profit, and that the money was used by lecturers within the Department to attend conferences in Australia and overseas.

The College agreed that notes were sold, but said that this was a recognised fund raising activity and that it produced benefits. The College argued that the standard of lectures and tutorials was improved by the production of high-standard teaching materials, and that the use of the funds to assist lecturers to attend academic conferences improved their professional competence.

The profits from the sale of the notes went into a separate departmental account, which was subject to an annual audit. There was no evidence that the funds were not being adequately monitored, although the complainant alleged that the use of the profits was kept a secret within the Department and that the majority of students were not aware of how the profits were used.

As part of the investigation, this Office surveyed the practices of a number of other Colleges of Advanced Education in New South Wales, as well as those of the Department of Technical and Further Education. The survey revealed that none of those institutions was selling notes at much above the cost of producing them, and that many notes were given to students.

During the course of the investigation by this Office, the College set up a working party to consider the sale to students of publications produced by the College. The working party consisted of the Secretary of the College, departmental representatives and two officers of the Student Representative Council. Having considered the working party's report, the College decided that the cost of academic input - that is, the profit margin above production and distribution cost - was to be limited to a range of between 5 and 15 per cent of production cost. The approval of the Principal of the College had to be obtained before any academic input charge could be made. This decision led to a substantial reduction in the price of the notes which were the subject of complaint.

The working party's recommendations were largely adopted by the College Council, and this Office was satisfied with the new procedures for calculating the price of College-produced notes. The investigation was discontinued, on the basis that the matters raised by the complaint had been substantially resolved by the College. The material collected during the investigation of the complaint will be retained by the Office for reference, should further complaints be received about the sale of publications by educational institutions.

Matters Followed Up

19. NSW Division of Forensic Medicine - new procedures for the retention of blood stain test plates and photographs

In 1983 solicitors acting for Mr Michael and Mrs Lindy Chamberlain complained to the Ombudsman about the procedures used by the New South Wales Division of Forensic Medicine for identifying blood samples likely to be used as evidence in criminal trials. The Ombudsman directed his investigation of the complaint to the Division's scientific experiments and tests of blood samples likely to be used in criminal trials, the recording of the results of those experiments and tests, and the preservation of the evidence relating to those tests.

Progress reports on the Ombudsman's investigation of the complaint, and his findings, appeared as items 33 and 41 in the 1983-84 and 1984-85 Annual Reports respectively.

On 8 August 1985 the Deputy Premier and then Minister for Health, the Hon R J Mulock, told the Ombudsman that he had instructed the Department of Health to implement the Ombudsman's recommendation 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". The Department, at that time, was also implementing the Ombudsman's recommendation 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 NSW Forensic Laboratory". The Minister said that the Ombudsman's recommendation that "the Department introduce the practice of photographing blood stain test slides and provide the necessary facilities to enable this to be done" was the subject of a research project within the Department so that its effectiveness and its usefulness in court cases could be tested.

On 18 April 1986 the Ombudsman visited the laboratory of the Division of Forensic Medicine in order to carry out an inspection of the new facilities which had been introduced as a result of his recommendations. The Ombudsman was advised that all blood

stain test plates which could be dried and stained permanently were retained, and he inspected the storage facilities. Photographic equipment had been purchased for the further recording of blood stain test plates and slides and the photographic process was being refined. The laboratory was still unable to photograph certain plates satisfactorily, but was continuing its research. Those plates not photographed can be retained and stored. Most plates are routinely photographed.

During the course of the Ombudsman's original investigation, a departmental officer, in opposing the proposals, had indicated to the Ombudsman that the overall cost of photographing the plates and slides was estimated by the Department to be $300,000 per year. However, during the recent inspection, an officer said that the capital cost was approximately $6,000 and the processing cost per year was in the vicinity of $1,000. The system has been set up so that the photographic work is carried out by existing staff.

As to the procedures for testing anti-sera, the Ombudsman was shown an anti-sera quality control book. The book had been established in mid-1985 to record testing of one part of each new batch of anti-sera before use.

At the meeting, the officers responsible for the operation of the Division of Forensic Medicine agreed that the laboratory was now geared so that it could present more evidence of its laboratory procedures in court, were its findings to be challenged. The evidence retained by the laboratory can be used, where necessary, to substantiate the results it has obtained from the raw material, and can also be used by other experts in drawing their own conclusions.

In August 1986 Mr Gordon Messiter, Secretary of the Department of Health, sent to the Ombudsman copies of written instructions about procedures implemented as a result of the Ombudsman's recommendations. These instructions have been placed in the laboratory's Methods Book.

The Ombudsman is satisfied that his recommendations are now being fully implemented, and appreciates the Department's co-operation.

20. Forestry Commission: Environmental Impact Statements

In the 1984-85 Annual Report the Ombudsman referred to complaints that the Forestry Commission had failed to consider properly the effects of logging upon the environment.

The Ombudsman has since discontinued an investigation into a complaint that the Commission failed to properly examine and take into account all matters affecting or likely to affect the environment in relation to the proposed extension of logging in the Coolangubra State Forest. A member of the Towanba Valley Catchment Protection Association, which had complained to this Office, was granted legal aid to institute proceedings in the Land and Environment Court to obtain an order restraining the Commission from carrying out certain forestry activities in three state forests, including Coolangubra State Forest, unless and until the Commission obtained, examined and considered an environmental impact statement. No logging has yet taken place, and no legal proceedings have been instituted. According to the complainants, the Commission has undertaken to give 14 days notice before commencing roading or logging in the specified state forests. The Ombudsman has asked the Commission and the complainants to inform him of the outcome of any court proceedings.

In April 1986 the Ombudsman issued a statement of provisional findings and recommendations in connection with the investigation, referred to in the previous Annual Report, of the alleged failure of the Commission to comply with the provisions of the Environmental Planning and Assessment Act before the construction of the Nevasae Road to service proposed logging operations in the Blackbutt Plateau in the Nullum State Forest.

The statement noted that the Commission had decided to construct a road on the basis of an "environmental review"; this highlighted the deficiencies in the Commission's knowledge of

species or other environmentally significant matters in the Nullum State Forest.

The Ombudsman came to a provisional conclusion that, in deciding to construct, and in constructing the Nevasae Road, the Commission failed to comply with the provisions of section 112 of the Environmental Planning and Assessment Act, in that it failed to obtain, examine and consider an environmental impact statement before deciding to construct the road. The Ombudsman made a provisional finding that the conduct of the Commission was contrary to law.

After considering responses to the statement or provisional findings and recommendations, the Ombudsman concluded, subject to anything that is said in any consultation with the Minister:

> I find that the decision of the Forestry Commission of New South Wales to construct the Nevasae Road in the Nullum State Forest and to conduct logging operations in that Forest without having first prepared an Environmental Impact Statement was contrary to Section 112 of the Environmental Planning and Assessment Act and this constitutes wrong conduct under the Ombudsman Act.

In his response to the Ombudsman's statement, the Commissioner for Forests, Dr W Gentle, had challenged the power of the Ombudsman to make a finding that the Commission's conduct was contrary to law and therefore "wrong" in terms of the Ombudsman Act.

The advice of Mr R D Giles, QC, on this question was that the Ombudsman could find that the Commission's conduct was contrary to law. Mr Giles wrote:

> The Ombudsman may investigate, and report upon, the conduct of a public authority. "Conduct" is defined in s.5(1) of the Act to mean -
>
> > (a) any action or inaction relating to a matter of administration; and
> > (b) any alleged action or inaction relating to a matter of administration.
>
> "Administration" is defined to include administration of an estate or a trust whether involving the exercise of executive functions of government or the exercise of other

functions, a definition which is obviously not exhaustive. In Glenister v Dillon (No 1) (1976) V R 550 it was held, in relation to the equivalent Victorian act, that administration denoted the performance of the executive function of government, as distinct from performance of the judicial or legislative functions of government, that distinction being adopted and applied in Booth v. Dillon (No 3) (1977) V R 143 and Glenister v Dillon (No 2) (1977) V R 153. While there are some differences between the Act and the equivalent Victorian act, I do not think that the differences make the distinction inapplicable to the Act, and it can be seen to be reflected in the reference to executive functions of government in the definition of administration to which I have referred.

It may not follow that, if the action or inaction does not relate to the performance of the judicial or legislative functions of government, it must relate to a matter of administration: to be in the area of performance of the executive function of government may not be a sufficient condition to result in relationship to a matter of administration. Booth v Dillon (No 3), supra, did appear to reason that it was a sufficient condition. But it is enough to ask whether or not the conduct of the Commission the subject of the Ombudsman's investigation is properly described as relating to a matter of administration, with the guidance which the distinction to which I have referred provides.

One of the functions of the Commission is to control and manage State Forests, including the construction or permitting the construction of logging roads (Forestry Act, 1916, s.11). What the Commission was doing was considering whether or not logging should proceed in the Nullum State Forest and, as part thereof, whether or not the Nevasae road should be constructed, having regard in particular to the environmental effects thereof. In so considering, the Commission was quite clearly performing an executive function of government, as distinct from a judicial or legislative function. If some further refinement be needed in order to decide whether or not it was engaged in a matter of administration, it was in my view so engaged because it was doing that which it was required to do in controlling and managing the Nullum State Forest. In controlling and managing the Nullum State Forest, it was required to consider whether logging should proceed and whether the Nevasae Road should be completed, that being part of administering the Forestry Act. The environmental review was prepared as a step in the consideration to which I have referred, and the decision to which it was addressed of whether or not an environmental impact statement should be prepared was a step to be taken in the course of controlling and managing the Nullum State Forest and was itself an administrative step.

If follows, in my opinion, that what was done or not done by the Commission in deciding whether or not an environmental impact statement should be prepared was action or inaction relating to a matter of administration. It did not lose that character because part of the decision involved

> reference to s.112 of the Environmental Planning and Assessment Act and a consideration of whether or not, within the meaning of that section, the activity of logging and road construction was likely to significantly affect the environment. Action or inaction of a public authority relating to a matter of administration often involves reference to and the application of legal criteria, and that such action or inaction may so require is recognised by the Act, which includes as a respect in which conduct of a public authority is wrong that it is contrary to law (s.5(2)(a)). The conduct of a public authority is not excluded from investigation simply because it involves the application of a legal criterion, but on the contrary may call for investigation because of a wrong application of a legal criterion.
>
> In my opinion, therefore, it was open to the Ombudsman to investigate the conduct the subject of his investigation. If the Ombudsman adheres to the finding expressed by him in his draft report, namely that the decision of the Commission to construct the Nevasae road and to conduct logging operations without having first prepared an environmental impact statement was contrary to s.112 of the Environmental Planning and Assessment Act, it is open to him to so find, because he is thereby finding that the conduct of the Commission was contrary to law, one of the available grounds on which it might be found to be wrong.

The Ombudsman has recently sent to the Minister a draft report which includes the finding in question, so that the Minister may determine whether a consultation is required. A copy of Mr. Giles' opinion accompanied the draft report.

21. Grosvenor Place

Last year's Annual Report discussed an investigation of the Sydney Cove Redevelopment Authority's consent for the Grosvenor Place development. The building will be 43 storeys high and will have a total floor area of approximately 80,000 square metres. When completed, it will be one of the largest office buildings in the southern hemisphere. There has been a good deal of public concern about overshadowing of the Australia Square Plaza by Grosvenor Place, particularly during lunch-time in winter.

In October 1985 the Ombudsman found that the conduct of the Sydney Cove Redevelopment Authority was wrong; it had failed to comply with Part V of the Environmental Planning and Assessment Act because it had not prepared an environmental impact statement

prior to giving its consent to the development. In addition, it had failed to take any positive action in relation to suggestions by Sydney City Council that an environmental impact statement be prepared. Because the matter was of significant public interest, the Ombudsman made a report to Parliament in November 1985.

The Minister for Planning and Environment, the Hon R J Carr, consulted with the Ombudsman about the matter. The Ombudsman made three recommendations in his report:

1. that an application be made to the Land and Environment Court by the Authority, as a matter of urgency, seeking declarations as to the status of the partly-completed building, given that the Authority had acted contrary to law;

2. that the Authority implement administrative procedures to ensure that all developments considered by the Authority be dealt with in accordance with the provisions and requirements of the Environmental Planning and Assessment Act;

3. that the Authority not take action to exempt itself from the provisions of Part V of the Environmental Planning and Assessment Act.

The Ombudsman noted that the Environmental Planning and Assessment legislation had been the subject of prolonged discussion and consideration in the community before its enactment. The legislation reflected the recognition that no public authority should be a law unto itself where its economic or other interests might lead to a significant long term detriment to the environment. The Ombudsman recommended that the Sydney Cove Redevelopment Authority Act be amended to make it clear that Part V of the Environmental Planning and Assessment Act applied to the Authority when it approved developments in its area.

In December 1985 the Sydney Cove Redevelopment Authority Act was amended by the Sydney Cove Redevelopment (Amendment and Validation) Act, which provides that the Authority is bound to comply with Part V of the Environmental Planning and Assessment Act. The Act also validated the actions of the Authority prior

to the date of assent to the Bill. In this way Grosvenor Place was lawfully approved, but no similar development can be approved in the future unless the Authority complies with the provisions of Part V of the Environmental Planning and Assessment Act. In other words, an environmental impact statement will have to be prepared for any future development which may significantly affect the environment.

It is not surprising that no positive action was taken to prevent the Grosvenor Place development itself. It would have been unrealistic to expect that to happen; the development represented a $300,000,000 investment. However, the endorsement of the principle that the Authority should comply with the law and remain within the scrutiny of regulatory bodies such as the Department of Environment and Planning and the Sydney City Council was an important outcome of the investigation.

At the time of the investigation of the conduct of the Sydney Cove Redevelopment Authority, investigations were commenced into the conduct of the Department of Environment and Planning and the conduct of Sydney City Council for failing to ensure that the Authority complied with the legislation. With the passing of the Sydney Cove Redevelopment (Amendment and Validation) Act, the investigations into the department and the council were discontinued.

22. Interest on compensation for resumed land

The last three Annual Reports mentioned the grossly unfair rate of statutory interest payable on outstanding amounts of compensation in the first twelve months following acquisition of land by public authorities under the Public Works Act. The need to raise this interest rate was first set out by the Ombudsman in the Annual Report for the year 1982-83, where details were given of an investigation of resumption of land by the Department of Environment and Planning: that investigation highlighted the injustice of the low statutory rate, which since 1976 has been four percent per annum.

The low rate has caused hardship to people whose land has been acquired, sometimes compulsorily, by Government bodies. Moreover, it often takes more than twelve months from the date of notification for compensation to be settled. Under the Public Works Act public authorities have the power to make part payments of compensation prior to full settlement, but the Ombudsman has investigated a number of complaints about delay in making part payments. When an amount of compensation is outstanding, the claimant receives only four percent interest on that compensation in the first twelve months following notification.

On 28 April 1986 a Special Report was tabled in Parliament on the delay in increasing this rate. The report recommended that Parliament immediately amend the Public Works Act to allow the Treasurer to determine the rate of interest payable by public authorities on outstanding amounts of compensation in the first twelve months following notification of acquisition, and that, upon this amendment becoming effective, the Treasurer set a fair and reasonable rate commensurate with prevailing interest rates.

On 30 April 1986 the Minister for Public Works, the Hon L J Brereton, informed the Ombudsman that, following discussions with the Treasurer, he had agreed to recommend to Cabinet that the Public Works Act be amended to allow the Treasurer to determine the rate. Enactment of this amendment is awaited.

23. Misleading advertising by government authorities: very slow progress on 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 because the site had been filled with all sorts of rubbish - old washing machines, bottles and the like.

The Ombudsman recommended in a report to Parliament that the Government should consider the introduction of trade practices


WHAT YOU'RE GETTING HERE IS NOT JUST A HUNK OF SOIL BUT A FUTURE ARCHAEOLOGISTS' DELIGHT...
HIGH QUALITY BLOCK

legislation to apply, among other things, to the sale of land and to other commercial transactions of State Government departments and authorities; the legislation should, as far as possible, give citizens legal protection against government authorities similar to that which exists against private corporations.

Following publication of the report, the then Premier said:

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

The then Minister for Consumer Affairs, the Hon G Paciullo, later told this Office that he hoped to seek Cabinet approval of a Fair Trading Act by late 1984. In April 1985 Mr Paciullo said 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. In November 1985 Mr Paciullo submitted to Cabinet a Minute about proposed fair trading legislation.

Following the appointment of the Hon R J Carr as Minister for Consumer Affairs, and in accordance with established policy, the Cabinet Minute was recalled to determine whether it should proceed under his name. Upon the return of the Minute, discussions were held with the Department of the Attorney-General to try and resolve a number of objections raised by the Attorney-General in his advice to Cabinet on the recommendations contained in the Cabinet Minute. Following these discussions, a number of amendments were made to the Cabinet Minute.

The Minute was again held over pending approval of amendments to the Trade Practices Act by the Commonwealth Parliament. This action was apparently considered necessary because the fair trading proposals incorporated most of the amendments included in the Commonwealth Trade Practices Revision Bill. The Bill was altered in the Senate, following acceptance by the Government of a number of Australian Democrat amendments.

Mr Carr later told this Office that he expected the Minute to be considered by Cabinet by mid-June 1986, and the legislation to be introduced during the Budget Session of Parliament.

The matter was again delayed because of the appointment of the Hon D Grusovin as Minister for Consumer Affairs. Mrs Grusovin has told this Office that she has directed the Department of Consumer Affairs to present a revised Cabinet Minute for her consideration and that she expects to have it before Cabinet soon.

24. Government Insurance Office - an improvement

In the 1984-85 Annual Report, as well as in a Special Report to Parliament in September 1984, the Ombudsman detailed the problems this Office had experienced in dealing with the GIO. The reports noted that there were numerous complaints, particularly about failure to reply to correspondence, and that very real administrative problems appeared to exist within the GIO.

In his reports the Ombudsman made recommendations about such standard business practices as acknowledging letters when there was likely to be a delay in replying. The Managing Director, Mr W Jocelyn, chose not to take any action on these recommendations.

Other complaints appeared to confirm that similar problems still existed, and that little progress had been made by the GIO since 1984.

There appear to be two main reasons for delay: letters are not received (or "disappear" en route to the relevant Section), or are received by the appropriate Section, which takes no action on them.

In one case a broker seeking information and payment of outstanding commissions wrote eight letters over a period of 14 months. The only correspondence he received from the GIO in this time was a letter advising him that his brokerage facilities had

been cancelled. It was only after this Office intervened that the broker received a reply. According to the GIO, only two of the eight letters sent by the broker had been received. However, the GIO had failed to act even on those two letters prior to the intervention of this Office.

This Office believed that it was most unlikely that Australia Post "lost" six of the broker's eight letters, particularly when a cheque attached to one of the "not received" letters had been presented for payment by the GIO. Letters bearing the correct reference and forwarded by the Document Exchange system, or delivered by hand, were "not received" or failed to reach the right Section. This suggested that the problems lay not with the delivery system employed by clients or complainants but with the GIO's system (or lack of it) for handling correspondence.

In another case there was a 19 month delay in the Third Party Section. This matter, too, was resolved after intervention by this Office. The GIO said that the delay had resulted from an unusually high turnover of legal staff since 1983. Yet in another case, when it was evident that accounts were outstanding, the claims officer nevertheless closed the file. The GIO said that "these actions were contrary to standard office procedures and were most unsatisfactory". The claims officer was replaced. The GIO added "The various letters sent by the Solicitor were received by the GIO and attached to the file in accordance with normal procedures. No action, however, was taken by the officer except to place the file in his cabinet. This was also contrary to standard procedures."

Yet another complaint concerned delay by the GIO in paying interest due from a settlement made in August 1984. Seven letters were sent over a period of 18 months, there were numerous discussions with the local GIO representative, but no response was received from the GIO. Following the intervention of this Office, payment was made and an explanation was given. The GIO readily admitted that "the actions of a number of people involved in this matter were contrary to accepted office standards".


GEE - WE HAVEN'T RECEIVED ANY OF YOUR EIGHT LETTERS... BUT THANKS FOR THE CHEQUE...
GIO
SK.

Two recent wrong conduct reports have met with a cooperative response from the GIO. The Managing Director has told this Office that action is being taken on a July 1986 report which repeated some earlier recommendations. He outlined structural changes which had been made and commented:

> The Board is quite confident that the present response to customers is generally much more satisfactory than it was and is improving all the time. Some areas, notably Worker's Compensation and Third Party Claims, are still in the process of change to a decentralised approach and continue to present difficulties. Recent changes to the management of both areas are expected to hasten the transition.

He concluded:

> You will appreciate from the above that recommendations made in the context of practices dating from 1984 or earlier are not necessarily translatable to the new environment which is being created. Nevertheless in principle the ideas behind the recommendations made in your report are accepted and in fact are quite consistent with the thinking behind the changes which are occurring within GIO.

25. Sydney Harbour foreshores management: little action since 1982

The 1984-85 Annual Report mentioned delays that had occurred in implementing recommendations, made by the Ombudsman in 1982, 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 Ports, the Hon L J Brereton, agreed that a review of this kind was warranted. The Minister said that the review would be undertaken as 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 mid-1985 the Minister for Ports told the Ombudsman that, after further consideration, it had been decided to formulate a Regional Environmental Plan specifically for Sydney Harbour. In this regard the Minister for Planning and Environment said that a brief for the preparation of the plan was being prepared by the Department in consultation with the Maritime Services Board. It was hoped that work would proceed before the end of 1985.

In fact, it was not until December 1985 that expressions of interest were sought from consultants who wished to be considered for the project. In February 1986 a steering committee selected four consultants and, in April 1986, after the Minister for Ports had agreed to the steering committee's proposals, the consultants were issued with the brief. Although early in June 1986 the steering committee selected the consultants to undertake the study, it was not until late August that the Minister for Ports confirmed the committee's recommendation, and consultants were appointed.

The study by the consultants is to be completed within six months, but more than twelve months passed before the consultants were selected and appointed.

As noted in the previous Annual Report, there is no dispute that the review is badly needed. Nevertheless, four years have passed since the Ombudsman made his original recommendations, and the review has only just commenced.

26. Segregation of juveniles in the Department of Youth and Community Services

The 1983-84 Annual Report set out the results of an investigation of a "special containment programme" at Endeavour House Training School, Tamworth. The investigation showed that two boys, one of whom had been in the programme for over 4 months, had been locked in their cells without association with other boys, and with very limited access to exercise and other activities. The Ombudsman found that the programme constituted segregation and that the Child Welfare Act did not empower the Department of Youth and Community Services to segregate children under its care.

The Director-General of the Department later advised the Ombudsman that the programme had been terminated, and that there was to be "no replication of the programme or anything allied to it".

In March 1986 a solicitor complained that a youth in Endeavour House had been subjected to the kind of programme allegedly "terminated". She believed that the Department's conduct was "outrageous and unacceptable".

Investigation showed that the youth was being guarded by officers of the Department of Corrective Services, who had been specially seconded to the Department of Youth and Community Services. The youth was kept in the visitors' room during the day and locked in his cell at night. Residents wishing to visit him had first to gain written approval from the Superintendent and, if the visit occurred during the evening, had to be searched and escorted to their cells after each visit, without being allowed to rejoin other residents.

The programme was begun because staff at Endeavour House refused to supervise the youth and took industrial action. This was because the youth had previously assaulted and threatened a youth worker. The youth had served periods in prison, but on appeal the Supreme Court had declared some of his convictions to be "bad in law", and had ordered his return to the Department's care. When the youth arrived at Endeavour House, a statewide walkout was threatened by youth workers if he were admitted. To avert the strike, the Director-General ordered that the youth be confined in the Tamworth Police Station. The Director-General told the Ombudsman that he did this after learning that a charge of gross insubordination, arising from the youth's previous behaviour in Endeavour House, would be heard by the Local Court at Tamworth within two days.

In the event, the Magistrate disqualified himself from hearing the case after comments were made in the media by the Local Member of Parliament and by staff at Endeavour House. The Magistrate was reported as saying:

> There are indications of an intent and an attempt by public servants and a politician to influence a court to deal with a young person in a certain way. It does appear that it was a concerted attack on the independence of the judicial system ... that unless this young man went to jail certain action would follow ... I could not be confident the public thought the young man had a fair trail ... [The Department] should not look to other outlets to answer their problems but look within the system.

The charges could therefore not be heard as quickly as the Director-General had anticipated, and the Minister for Youth and Community Services was asked for directions. According to the Department, he ordered that the youth be kept in the police cells, where he remained for 17 days, until arrangements were made to hear the case in Sydney. A Children's Court Magistrate at Minda later found the charge of "gross insubordination" proven, but the District Court quashed the conviction and the youth was again returned, by Court direction, to Endeavour House. The staff demanded that the youth be segregated and guarded 24 hours a day. The Director-General agreed to the staff demands, to the extent that two Corrective Services officers were seconded to Endeavour House to guard the youth during the day. However, the aim was to "assimilate" the youth back into the resident population by gradually increasing his association with other boys in the Training School.

The Department argued that the programme for the boy did not amount to segregation, but was a constructive programme to re-integrate the youth into the Unit. The investigation is proceeding.

The Community Welfare Act, when proclaimed, will permit the Department to transfer difficult youths to the custody of the Department of Corrective Services, even against a Court direction, where such juveniles are not considered to be profiting from the juvenile institutional system. Gaols are not designed to contain youths, who are inevitably placed in segregation in order to protect them from sexual assault by older prisoners. The Ombudsman believes that the containment of difficult juveniles within the criminal justice system is an issue yet to be satisfactorily addressed by the two departments.

27. Ex gratia payments and the Ombudsman Act

The last three Annual Reports have noted that, both overseas and in the Australian States and Territories, it is common for Ombudsmen to recommend, where it is considered appropriate to do so, that a department or authority make an ex gratia payment to a complainant.

In April 1985 the Ombudsman made a special report to Parliament, outlining difficulties in making ex gratia payments. 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.

In July 1986 the Premier wrote to the Ombudsman:

> Your proposal has been noted and considered. As advised previously, the system of ex gratia payments administered by the Treasurer appears to be operating satisfactorily; there continues to be an absence of substantial evidence that corporate public authorities claim lack of power to implement recommendations.
>
> It would appear that at this stage there is insufficient justification for the amendment that you propose, and there is no current need to change existing procedures in relation to the making of ex gratia payments.

The Ombudsman holds to his view that the system of ex gratia payments is not satisfactory, because many public authorities appear to lack the power to make them. In a recent case the Ombudsman recommended that the Hunter District Water Board and the Newcastle City Council buy two houses subject to severe flooding. The Board and the council claimed that the purchase would amount to an ex gratia payment, and that they had no power

to make such payments. The council also believed that it had no power to join with another statutory authority in purchasing property. It is also likely that the matter is now statute barred, and that there is no longer an effective remedy available to the complainants.

This is another example of the need for the Ombudsman Act to be amended to allow all public authorities a source of power to compensate, ex gratia. The present situation severely restricts the Ombudsman's ability to make constructive recommendations to resolve complaints arising in some areas of his jurisdiction, particularly where no other remedy is available.

In another case, the Police Department has claimed that it has no power to make an ex gratia payment of $20,000 recommended by the Ombudsman as compensation to a citizen of a country town who was wrongly charged with horse stealing, without any proper evidence of intent. The commencement of the proceedings attracted local media attention and, as a result, the citizen lost his job. He was subsequently acquitted, a result that should have been evident as inevitable from the beginning.

The Ombudsman considers that this situation should be rectified forthwith 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.

28. Stormwater drainage

This Office continues to receive complaints about stormwater damage which raise significant issues:

1. Newcastle City Council and the Hunter District Water Board

In March 1985 two families from the Newcastle suburb of Merewether complained to the Ombudsman that they were unable to reach a satisfactory conclusion with either Newcastle City Council or the Hunter District Water Board over a continuing problem of flooding to their homes. They considered that both the council and the Board were shirking their responsibilities in failing to rectify the problem.

The Ombudsman's investigation revealed that the council, when approving a major subdivision in Merewether Heights, failed to advise the Hunter District Water Board that drains containing stormwater from the new development would be connected to the Board's stormwater system. The Ombudsman found that neither the council nor the Board could have been in a position to investigate adequately the likely consequences of the connection, because the Council had not asked the Board for information about the capacity of the Board's channel. The council allowed the developers to connect two major stormwater drains to a Water Board channel able to cater for only minor storms. The two houses in question are situated on the lower slopes of Merewether Heights and lie in a low point in the road, opposite a steep street to the south. After heavy rain, surface water collects at the intersection, because it cannot enter the heavily overloaded channel, and a sewerage pit opposite the houses often discharges into the intersection. Other properties behind the complainants' homes are similarly affected.

Complaints from successive owners of the houses prompted investigation over the years. The council was prepared to alter the profile of the street in front of the houses to redirect the surface runoff through the Board's easement, but the water would then have flowed through the land of another resident. The Board argued that the council's proposal merely transferred the problem elsewhere. It apparently believed that inaction was the best course. The council argued that section 36 of the Board's Act gave the Board sole responsibility for stormwater channels, and that the Board was neglecting its statutory duty by not rectifying the problem.

On this question the President of the Board, Mr A McLachlan, wrote to the Ombudsman:

> The Board does not defend arguments on failure to exercise functions. The exercise or non-exercise of a function is a matter of government policy, as directed by the Minister. There have been no policies generally to initiate extension of stormwater channels without request from Local Government.

The Board's expenditure on stormwater channel extensions and construction has dropped to negligible levels in recent years, because the Board's drainage fund has barely been able to meet interest payments on the Board's capital debt and administrative and maintenance costs; the Board has not been able to carry out all of its functions, and the construction of stormwater channels has suffered.

In a statement of provisional findings and recommendations, the Ombudsman noted that the differences between the two authorities were irreconcilable. He recommended an inquiry under section 149 of the Board's Act into a range of issues affecting the discharge of the duties and functions of each authority in relation to stormwater drainage.

Both authorities maintain that they have no power to purchase the houses as an act of grace. For the reasons discussed in the topic "Ex gratia payments and the Ombudsman Act", the Ombudsman believes that this impasse is completely unsatisfactory. The Government has told the Ombudsman that it does not intend to amend the Ombudsman Act to enable public authorities to act in such situations.

2. Landcom and Gosford City Council

Mr B, of Kariong, complained of flooding similar to that experienced by the Merewether residents. His property had twice been flooded following construction of the Kariong Landcom estate. Mr B's concern was that, while Landcom and the Gosford City Council apparently agreed that something should be done, each was "passing the buck".

Investigation showed that the Landcom development used an existing downstream drainage system, with capacity for a rural catchment area. Landcom assured the council that it would construct a system of retarding basins to "attenuate" the additional flow of stormwater generated by its subdivision.

The council wished to inspect Landcom's final engineering plans of the development before issuing formal consent, but Landcom's consultant maintained that Landcom had no liability to consult with council under the Local Government Act; Landcom would send the plans to the council for its information, but would lodge the subdivision plans directly at the Registrar-General's office, without needing council's approval.

When Landcom's development was completed, Mr B wrote to Landcom, saying that the existing drainage was not able to cope with the large amount of runoff generated by Landcom's subdivision. Landcom, after consultation with the council, agreed to commission a study to assess whether the design of the drainage system could be changed to comply with council's current codes - that is, a level of flood protection to cater for a storm occurring once in 100 years. The report of the consultants made a number of recommendations, none of which was acted upon by Landcom.

In November 1984 Mr B's home was flooded. Effluent from the sewerage tanks backed up through the bathroom and flowed through the house. Following complaints from Mr B, Landcom commissioned a report from another firm of consultants. This report concluded that the basins "were inadequate to provide the desired level of protection to houses downstream". The report also noted that water was being forced out of an open drain in a street adjacent to Mr B's home and that a "sealed pipe system downstream" was essential if the flooding problem was to be eliminated. It appeared that the consultants who prepared the original design for the basins had failed to investigate the downstream drainage, and that the system of retarding basins was therefore ineffectual.

This report did not change Landcom's attitude: it maintained that the problem had to be resolved by the council, merely noting that there were differences in technical calculations between the two consultants. Landcom was not prepared to meet council's code of flood protection for the downstream drainage, despite the fact that this standard was adopted both in its own code and in the code adopted by the Department of Environment and Planning at the time.

The Ombudsman concluded that Landcom had not observed its assurance to the council that it would "attenuate" the stormwater flow from the development to meet the capacity of the existing drain. There was no statutory requirement binding Landcom to comply with council's codes, and so the council was not able to force the issue with Landcom. The law appeared to say that Landcom had no liability to consult with the council on detailed designs for land development, and that Landcom, merely by virtue of depositing the subdivision plans at the Registrar-General's office, could pass responsibility for the drainage system to the council, without any avenue of objection. The council's Risk Management Consultants advised the council that the implications of this process for council's exposure to public and professional liability risk were "frightening".

This Office has issued a statement of provisional findings and recommendations on this matter, the Ombudsman's provisional view being that Landcom attempted to evade its responsibilities. The Ombudsman recommended that Landcom increase its contributions to the council under section 94 of the Environmental Planning and Assessment Act to assist council in meeting the construction costs of a further retarding basin in the area. Also recommended was a further review of the existing basin system to meet the council's codes for flood protection.

29. Milk sediment testing in New South Wales

The last two Annual Reports included details of the Ombudsman's investigation into milk sediment testing in New South Wales. Sediment testing is designed to determine whether foreign

material is present in milk. The Ombudsman found that the procedure used by the New South Wales Dairy Corporation was too subjective, because it was based entirely on the visual assessment by different graders of sediment in milk. The corporation was testing by field trial an electronic machine called the Chromameter II for measuring sediment. The Ombudsman recommended that the field trials continue and that, should the machine prove suitable, the use of the Chromameter be promptly introduced.

Last year's Annual Report recorded that the New South Wales Dairy Industry Conference had rejected the Corporation's recommendation that the machine be introduced. In fact, the Conference questioned the usefulness of sediment testing at all in New South Wales. In the face of opposition to testing by the industry, the Corporation in October 1985 conducted a symposium on all aspects of sediment testing. The symposium was attended by representatives of the industry, the New South Wales Department of Health, the New South Wales and Victorian Departments of Agriculture and the CSIRO, and agreement was reached on the desirability of testing as a routine quality control measure.

The Dairy Industry Conference agreed to continuation of the present subjective test procedures, but approved further extensive field trials of the Chromameter.

By the end of June 1986 seven factories had participated in the CSIRO-designed field trials. The Corporation expects that testing will be completed soon and that, following tabulation of results, a further proposal will be put to the Conference. A decision about introduction of the Chromameter and, therefore, a more objective method of sediment testing, is unlikely until late in 1986.

30. Zoning of milk vendors in the Sydney metropolitan area

In the previous Annual Report the Ombudsman, as a result of investigation of a complaint, outlined his concern at the role of the New South Wales Dairy Corporation in the zoning of milk

distributors in the Sydney metropolitan area. The Corporation assigns each milk vendor a geographical, street by street area of distribution and directs that each vendor deal with a specific milk processing company. Consequently, the four milk processing companies in Sydney (Dairy Farmers, Peters, United Dairies and Perfection Dairies) operate in zones of exclusive distribution, the area of which depends upon the number of milk vendors allocated to each processor. Although, in theory, the Corporation has power to re-direct vendors to other processors, it does so only where agreement has been reached between processor companies for a transfer or re-allocation of the market share.

Following a meeting with the Ombudsman, the Corporation prepared a discussion paper for the New South Wales Dairy Industry Conference on the sharing of metropolitan milk sales. The paper concluded with the following recommendation:

> That consideration be given to the deregulation in respect of the condition in the certificate of registration of dairy produce merchants by vehicle nominating the pasteuriser and depot and to allow such dairy produce merchants by vehicle the freedom of choice as to where they may obtain their milk and cream supplies.

In November 1985 the Conference decided not to accept the recommendation of the Corporation, and this decision was supported by delegates of the Amalgamated Milk Vendors' Association of New South Wales. The Ombudsman has the power to investigate the conduct of the Conference, but it consists of thirty-nine members representing various interests within the industry and their reasons for voting are not disclosed.

The Conference says that it is a purely advisory body, without managerial responsibility, but its rejection of the Corporation's recommendation effectively ends action on the matter.

The Corporation's regulation of milk vendors excludes a particular vendor from dealing with anyone other than the milk processor specified in the registration certificate. The Corporation allocates vendors to processors in accordance with tradition, and will only re-direct a vendor to another processor

where the processors agree to such a transfer. In effect, with the co-operation of the Corporation, the major milk processors in the Sydney metropolitan area determine shares of the available market by agreement.

Where a dispute develops between the processors, perhaps as a result of a growth in the market which has not been equally shared, the Corporation and Conference encourage the processors to resolve the dispute by agreement. The Corporation has statutory power of regulation, but seems prepared to extend indefinitely time limits imposed for agreement.

On 3 June 1986 the Trade Practices Commission revoked an interim authorisation it had granted for a Milk Sales Percentage Plan, which was in force in the Adelaide market. Under the Plan the processing companies agreed "not to take or solicit each others customers for whole milk; to maintain agreed percentages of milk sold and to share increased sales and new business in order to maintain the agreed percentages". The system in Adelaide appears to be similar to that operating in Sydney.

The Trade Practices Commission, in dismissing the milk processor's application, said ".... the arrangements ... bring about a substantial lessening of competition between the processors". The Commission also said, ".... there appears to be no general reason ... why the major processing corporations ... that may otherwise be in competition with each other, should be permitted to shelter from competition".

The New South Wales Dairy Conference, in rejecting the "deregulation" proposal put to it by the Dairy Corporation, indicates the dairy industry's determination to maintain its traditional practices. The Trade Practices Commission's views about the Sydney system are not known.

31. Wearing of school uniforms

The 1984-85 Annual Report contained a lengthy account of correspondence with the Department of Education about

requirements for wearing school uniforms. There had been some misunderstanding and misrepresentation of this Office's role in the debate about uniforms; the secrecy provisions of the Ombudsman Act made it impossible to issue a sensibly detailed press release, and so a report had to be made to Parliament. The report noted that this Office had not determined whether school uniforms should be compulsory, but that an investigation would be conducted if there were evidence of students being punished or disadvantaged for not wearing school uniforms; the Department of Education had said that students would not be punished in such circumstances.

A newspaper then gave a coloured version of this Office's report, saying in effect that any student punished for not wearing school uniform would be "defended". Several Parents and Citizens Associations objected to this alleged stance by the Office of the Ombudsman, extolling the virtues and economics of school uniforms, and in one or two cases suggesting that the discipline and moral fibre of today's youth would be weakened seriously if students were able to attend classes without wearing school uniform. These correspondents were sent copies of the report to Parliament and the extract from the Annual Report.

Independently of the report to Parliament, a single supporting father complained that a circular letter from the Deputy Principal of a country high school had threatened punishment for students not wearing the correct school uniform. The complainant said that he could not afford sufficient items of uniform to ensure that his children were always dressed according to the school's requirements, and believed that the Deputy Principal was unfair. This Office found wrong conduct on the part of the Deputy Principal, in that his circular letter was contrary to the policy of the Department of Education. The wrong conduct report noted that there was still some confusion as to whether the wearing of school uniforms was compulsory, and suggested that the question be settled.

The Department has now issued the following guidelines:

The wearing of a school uniform can encourage pride in the school, assist in the maintenance of tone and good conduct, and reduce to a minimum the undesirable distinctions between children in the same school because of clothing. The wearing of a school uniform may provide greater security for children travelling to and from school. No student, however, may be prevented from attending school, participating in excursions, representing the school, or placed in a position of embarrassment because he or she is not wearing a school uniform.

Whilst encouraging the wearing of school uniforms, principals should be responsive to economic, personal and social factors. Some parents may advance various objections to the wearing of school uniforms, including "reasons of conscience". If a student raises an objection of conscience the parent who enrolled the student is to be the point of consultation otherwise the student's objection should have no standing. Principals should deal with each situation sensitively and flexibly. The wearing of a school uniform cannot be made compulsory.

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

For several years the Ombudsman has been concerned about the role of taxi co-operatives in controlling entry into the taxi-cab industry; he has suggested changes in the procedures for determining eligibility, in order to make them fair and equitable.

In July 1986 the Commissioner of Motor Transport told this Office that the recommended changes arising from the review had been referred to industry organisations for comment. Following further refinement in the light of the responses received and after discussions with the Minister, the recommendations generally had the support of the Taxi Council, the Motor Traders' Association, the Transport Workers' Union and the Australian Funeral Directors' Association.

The Commissioner said that a draft Cabinet Minute setting out proposed legislative and administrative changes was being prepared and would shortly be submitted to the Minister for Transport.

33. Alleged bribes for drivers' licences

In the last Annual Report the Ombudsman referred to an anonymous complaint alleging the payment of bribes for drivers' licences. In June 1986 the Deputy Commissioner for Motor Transport advised the Ombudsman:

> I am satisfied that extensive investigations carried out over a lengthy period, culminating in [a] programme of selective re-testing, have failed to substantiate the allegations contained in the anonymous complaint directed to you on 15 April 1985.

The Deputy Commissioner said that surveillance would continue, and that, should any evidence of malpractice emerge, immediate action would be taken.

34. Tendering information now available

The last Annual Report noted a case of wrong conduct involving the refusal of the State Contracts Control Board to supply an interested party with the name of a successful tenderer. The Board had declined to release the name on the grounds that there was no Public Service Regulation that gave it authority to divulge such information. By comparison, it was found that, in the Commonwealth sphere, public authorities were required to publish in the Government Gazette the names of successful tenderers and the value of tenders.

The Deputy Ombudsman concluded that the public interest supported such information being made available, and he recommended that the Public Service Regulations be amended to provide that the name of the successful tenderer may, on request, be supplied by the Board to any bona fide tenderer or person who has submitted a quotation.

The Ombudsman considered that the need for such an amendment was a matter of public significance and made a special report to Parliament. The former Premier said that he considered the recommendations in the report to be reasonable, and he instructed

the Minister for Industry and Decentralisation to make the name of the successful tenderer available to the complainant. He also asked that the Minister, in conjunction with the Public Service Board, conduct a review of tendering regulations and develop a system for the future release of information of this type.

Following the review, Clause 16(2) of the Public Service (Stores and Services) Regulation 1984 was amended to read as follows:

> The prices and names of the accepted tender may upon request be supplied by the Contracts Board or a delegate to any interested person.

35. Registration of business names

Previous Annual Reports have outlined the problems created by "inadvertent" registration of business names by the Corporate Affairs Commission. This year has seen a decline in the number of complaints, but in two instances the Commission took excessive time to cancel names.

The Commission's procedures have to some extent been improved. The Commission first tries to negotiate; if unsuccessful, and unless a senior legal officer advises otherwise, the Commission then says that it considers the names to be different, and that it is up to the parties concerned either to take civil action or to negotiate among themselves.

The Commission now uses a more informative registration form, with detailed instructions, an experienced person is available at the lodgement counter to give advice, a staff reorganisation has ensured that more highly graded officers now do the searching, and a computer has been installed.

The Chairman of the Commission has said:

> Because of the human element involved in the registration of names, there is no guarantee that despite extensive staff training and the introduction of a computer system, ... inadvertent registrations will not occur. I would point out however that the number of inadvertent registrations is a

> very small proportion of the total number of searches conducted ...

The Administrative and Legislative Policy Committee is considering a proposal that would abolish subjective tests. Indeed, a proposal to repeal the Business Names Act had been put forward for public comment; no decision has yet been made.

Should the present system be retained, the public perception of the effect of registering business names needs to be altered, so that people do not assume that registration gives them proprietory rights to "their" business name.

36. Department of Consumer Affairs - dangerous hose attachments

The 1984-85 Annual Report again drew attention to the continuing failure of the responsible public authorities to prevent the sale of unapproved devices, operated by attachment to domestic water connections, to dispense detergents, liquid fertilizers and other chemicals. Water supply authorities believe that these devices are unsafe; the maximum penalty for connecting them to the Sydney water supply is $1,000 plus $50 for each day of continued use. The prohibition has not been publicised, however, and the devices remain on sale.

The Ombudsman has been told that new measures will allow action to be taken against suppliers and users of the devices, and that manufacturers are being encouraged in new product design. It is expected that goods with the improved safety features will be on the market fairly soon.

37. Consumer Claims Tribunal Act - amendments still awaited

The 1984-85 Annual Report noted that the Commissioner for Consumer Affairs expected to make a submission to the Government on proposed amendments to the Consumer Claims Tribunal Act before the end of 1985.

The Commissioner has told this Office that, in December 1985, the proposed legislative programme for the Consumer Affairs portfolio was submitted to the former Premier; amendment of the Consumer Claims Tribunal Act was listed as a priority for the Autumn 1986 session of Parliament. Political developments, including two changes of Minister, brought a re-ordering of priorities. The most significant of these followed the change of Ministers in February 1986, when the former Premier announced proposals for a new Residential Tenancies Tribunal with powers to review disputes over excessive rent increases. This initiative had to be given immediate attention.

Work is proceeding on a draft Cabinet Minute setting out the proposed amendments to the Consumer Claims Tribunal Act, and the Commissioner has said that discussions are now being held with the Attorney-General's Department to resolve a number of issues. The Commissioner will discuss the proposals, and their history, with the new Minister, the Hon D Grusovin, before preparing a Minute for presentation to Cabinet.

Subject to Government approval, the Commissioner expected that a Bill would be ready for consideration by Parliament in the 1986 Budget session.

LOCAL GOVERNMENT AREA

Broader Issues

38. The Department of Local Government - a new role?

It seems that there is a belief that the Department of Local Government has the power to regulate the actions of local councils. This Office believes that the Department has the power and responsibility to investigate serious complaints about the conduct of councils and, where necessary, to take action. Until recently, it was evident that the Department did not agree. Two matters the subject of wrong conduct reports by this Office serve to illustrate the problem.

1. In June 1983 Mr F complained to the Minister for Local Government that differential charges for removal of garbage levied by a council were unfair to occupiers of non-ratable properties. In this case, a charge of $75.81 had been levied for a garbage removal service to ratable properties, while a charge of $162 had been levied for the same service to non-ratable properties. The matter was examined by a departmental legal officer, who concluded that the council was not able to levy its charges in this way. The Department, in February 1985, suggested to council that it discontinue the higher charge, but council resolved not to do so. The Department took no further action; its file read, "... there is little this Department can do, short of maybe taking legal action".

2. The Ombudsman received a number of complaints about certain Aldermen and confirmed that the Department intended to take no action, despite the fact that it had obtained a legal opinion from the Crown Solicitor which suggested that, prima facie, there had been breaches of the Local Government Act. The Ombudsman decided, of his own motion, to conduct an investigation. From examination of the Department's file, it was obvious that a resident had complained about the alleged failure of certain Aldermen to declare a pecuniary interest and had asked that the matter be investigated with some urgency. The council itself had requested an inquiry by the Minister, and the local Member had concurrently raised the matter in Parliament. The Minister referred the matter to the Department for investigation, but no constructive action was taken, other than to obtain an internal legal opinion and, later, another from the Crown Solicitor. No enquiries were made of council, no other information was sought and no real investigation took place.

The former Secretary maintained that the Department rarely had the duty and power to enforce the provisions of the Local Government Act, and that neither of these cases warranted the Department's intervention.

It is the Ombudsman's view that, where alleged breaches of the Local Government Act are brought to its attention, the Department

has a responsibility to investigate them. The Department could well decide not to initiate legal action after a full and proper investigation, but it is in no position to do so without conducting any real investigation or inquiry. Once the Department is made aware of alleged breaches of the Local Government Act, its failure to act might be seen as condoning such things.

The Department said that it did not take action because successive State Governments had adopted a policy which prohibited the Department from prosecuting local councils for breaches of the law. This policy appeared to be based on the fact that councils are elected bodies and that, where councils fail to regulate themselves properly, it is a matter for the electors, ratepayers and residents to take appropriate action. In principle, this may appear sound; in practical terms, to expect individuals to take action is often unrealistic. The costs involved in obtaining legal opinions and taking court action are usually beyond the means of individual citizens.

In a Report to Parliament the Ombudsman recommended that:

1. the Department vigorously investigate complaints made to it which disclose prima facie evidence that a council or its members or officers have acted contrary to law, and determine whether prosecutions should be launched;

2. to facilitate this investigatory role, an internal complaint handling unit be set up.

These recommendations have not yet been complied with, but the Minister for Local Government, the Hon J A Crosio, has approved the establishment of a working party on "prosecutions policy" to establish guidelines for determining whether prosecutions should proceed and to identify classes of cases which the Department should regard as being prima facie actionable. The working party was to report to the Minister by 1 September 1986.

39. Project management and professional services in local government

This Office has conducted a protracted investigation into the use of project managers in constructing a new administration building for Narrabri Shire Council. A statement of provisional findings and recommendations brought numerous comments from the parties and opinions from Queen's Counsel, to the point where additional evidence will have to taken by way of inquiry under Section 19 of the Ombudsman Act. Nevertheless, the investigation has attracted considerable attention, because the use of project managers is widespread in this and other States. The secrecy provisions of the Ombudsman Act have prevented this Office from responding in sensible detail to media reports and inquiries, some based only on rumour, and it is in the public interest that an outline of the investigation be set out in the Annual Report.

Public authorities should be held accountable for the public money that they spend; they thus have to submit budgets for examination and, among other things, go to tender when making large purchases or undertaking substantial projects. Ordinance 23 under the Local Government Act provides that contracts for goods or services likely to cost more that $22,000 must be advertised by local government councils for tender. There has been legal debate over the meaning of "contract" in this context, and the Ordinance provides certain exemptions. An additional exemption, effective from mid-December 1984, was for "professional services". The then Secretary for Local Government told the Deputy Ombudsman that it was decided to exempt professional services from the tendering provisions of Ordinance 23 primarily because professional services were offered at set scales of fees.

Acting upon Queen's Counsel's advice as to the meaning of "contract" (provided to another council in 1979), and upon the exemption of professional services from the need to tender, Narrabri Shire Council at various times engaged project managers to conduct a preliminary study on the need for a new administration building, to draw up plans and specifications, and to manage the construction of the building.

Stating provisional conclusions, the Deputy Ombudsman said that the Council had acted contrary to law, and in any event unreasonably, in adopting the procedures that it had. The Deputy Ombudsman concluded that the council should have tendered for plans and specifications (which cost much more than $22,000), and that professional services did not, in any sensible meaning of the term, include project management. Other conclusions were that the use of a "project control group" to oversee the project had not given the council effective power of direction, and that several procedural errors had occurred. The council and its advisers will have the opportunity to discuss these provisional conclusions at the forthcoming inquiry under Section 19.

The Deputy Ombudsman's statement of provisional findings and recommendations has been circulated widely throughout local government, contrary to the advice in the accompanying correspondence and on the cover of the statement. A similar matter has been the subject of legal proceedings in the Supreme Court against Bega Shire Council. As a consequence, there has been an increasing number of complaints about the use of project management, without tender, by other councils. It now appears that large amounts of money are involved, and that there are widely differing opinions as to the ultimate efficiency of project management as a method for constructing substantial projects. The extent to which these views are properly a matter for findings by this Office will emerge as investigation continues.

New Matters

40. Dismissal of Warringah Shire Council

On 4 December 1985 the Governor by proclamation in the Government Gazette removed from office all members of the Warringah Shire Council and appointed an administrator. According to a press release by the former Minister for Local Government, the Government resolved to take this action following consideration

by State Cabinet of a report by an inspector of the Department of Local Government, who had investigated the way in which some major development and building applications had been handled by the council.

In February 1986 the Secretary of the Local Government and Shires Associations, Mr W A Henningham, complained to the Ombudsman that the former Councillors had not been given notice of any adverse findings, nor opportunity to respond before their dismissal. The complainant argued that this constituted a denial of natural justice. It was further alleged that the Councillors were not given proper notice of their dismissal and were not told the reasons for it.

Shortly before the complaint was received, preliminary enquiries had been made of the Department of Local Government concerning a similar complaint about the inspection of another council. The former Secretary of the Department, Mr Howard Fox, had questioned the Ombudsman's jurisdiction to investigate the conduct of local government inspectors and had sought an opinion from the Crown Solicitor.

Action on both complaints was deferred until the Department supplied a copy of the Crown Solicitor's legal opinion; this it did in June 1986. Two of the Ombudsman's officers then interviewed the Chief Local Government Inspector and the Department's Senior Legal Officer for the purposes of making preliminary enquiries. At that meeting the Department's representatives adopted the position that the conduct of local government inspectors was not within the Ombudsman's jurisdiction, that the Crown Solicitor's opinion supported this view, and that the Department would not co-operate with this Office if it attempted to investigate the conduct of any local government inspector.

Neither the Ombudsman nor his officers agreed with the position adopted by the Department. The Ombudsman accordingly sought a further opinion from senior counsel. Mr Roger Giles, QC, in a lengthy opinion, expressed the view that all aspects of Mr Henningham's complaint were within the Ombudsman's jurisdiction.

Formal notice of the Ombudsman's investigation into the matter was issued on 19 August 1986, the conduct the subject of investigation being:

(a) The alleged failure to give notice of any proposed findings adverse to Warringah Shire Council arising from the inspection of the Council by the inspector of local government accounts or from any other investigation conducted by the Department of Local Government prior to the dismissal of the Councillors on 4 December 1985.

(b) The alleged failure to provide the Councillors with an opportunity to respond to any proposed adverse findings arising from the inspection of Council by the inspector of local government accounts or from any other investigation conducted by the Department of Local Government prior to the dismissal of the Councillors on 4 December 1985.

(c) The alleged provision to the Minister of the said report of the inspector of local government accounts and other material and advice relating to the matters the subject thereof without having provided the Councillors with notice thereof or with an opportunity to respond thereto.

(d) The action of the Department of Local Government in issuing, or arranging to be issued, to the Councillors of Warringah Shire, notification of their dismissal.

(e) The alleged failure of the Department of Local Government to provide or arrange to be provided or to advise the responsible body to provide to the former Councillors of Warringah Shire, reasons for their dismissal in writing.

The Acting Secretary of the Department of Local Government was required to produce certain documents to the Office of the Ombudsman and provide answers to a series of questions. The investigation is proceeding.

41. Use of public reserves

From time to time the Ombudsman receives complaints about decisions of local councils in approving uses of, or constructing buildings on, public reserves. The term "public reserve" is defined in the Local Government Act to include land vested in councils and declared to be public reserve, and land dedicated or reserved from sale by the Crown for public health, recreation, enjoyment or similar public purposes. In general, a council owns

certain land, reserved for public use, or holds Crown land under a deed of trust, on condition that the land is used for public recreation.

Complainants often raise legal questions which can best be dealt with by a court, but because complaints sometimes involve questions of exclusive use of public land, this Office has carefully considered the public interest aspect of the complaints.

The Ombudsman has sought the advice of Queen's Counsel about some issues in the use of public reserves. Part XIII of the Local Government Act deals with councils' powers in regulating the use of public reserves. Cases on the meaning of "public reserve" have established that land used for public recreation and enjoyment must be open to the public generally as of right, although this does not rule out some controls upon use. For example, it has been held that at appropriate times the public may be excluded from a public park. The significant factor in many cases is whether members of a club enjoy special privileges in the use of the land and whether those privileges differ from any enjoyed by the general public.

The "Bronte Splashers" case, as it is called, was determined by the New South Wales Court of Appeal in 1979. The case crystallised two important general principles:

1. Land used for public recreation and enjoyment must be open to the public generally as of right.

2. Generally speaking, a council has no power to erect upon a park any buildings which are not for the purpose of the use of the land as a public park or for public recreation. A council's power to improve the land is confined to improvements whose purpose is to promote, or is ancillary to, the use and enjoyment of a park for public recreation. There must be a nexus between the general purpose of the park and the use of a building within the park. It is not sufficient that a building is used for community purposes, if there is no connection between its use and the use of the public reserve on which it is built.

Several complaints considered by this Office in the last year have involved the principles set out above. Two examples are:

1. The Warringah Aquatic Centre is built on Crown land and is dedicated for use for public recreation. The Warringah Shire Council, trustees of the land, were empowered to lease the land on such conditions as were considered reasonable, subject to the Minister for Lands' written approval. The Centre had the only indoor diving tower in New South Wales. On 19 July 1983 the council gave exclusive approval to a diving instructor to conduct diving classes at certain times of the week. When other coaches applied to conduct classes at other times, the council resolved that all coaching would be conducted by the one coach, except where a parent wished to coach his or her child, or the Centre management had approved other coaching during a set period before a major championship.

Council's decision was challenged by members of a diving club and by other users of the Aquatic Club, but the council did not properly investigate the legal questions surrounding the exclusive licence. The Ombudsman found that the council had acted wrongly in granting the licence to the coach, without seeking appropriate legal advice and without the Minister's written consent, as required by the terms of the dedication and by Section 37RR of the Crown Lands Consolidation Act.

The council subsequently obtained legal advice from its solicitors to the effect that the facts of this case differed from the facts of the "Bronte Splashers" case. The solicitors said the "Bronte Splashers" case dealt with a proposal to grant permanent use of a building on the public reserve to a private club. This case dealt with the exclusive use of one facility in the pool for a limited period of time, by way of the grant of a licence. The solicitors said that, had the council obtained the Minister's consent, it would have acted legally.

Following the Ombudsman's report, the council rescinded its resolution giving exclusive coaching use of the diving facility and resolved instead that any coach could, for a fee, book the facilities for a maximum period of two hours.

2. The second case involved Lane Cove Municipal Council's proposal to provide five tennis courts, and ancillary facilities, on council-owned land. The land had been given to the council upon trust for the purposes of a "public park, public reserve, or public recreation area". The council decided not to construct the courts itself, but to invite applications from persons "interested in tendering for the financing, construction and management" of the courts. The invitation required details of proposed financing, design and construction of the tennis courts, shelter sheds, toilets, showers and so on and of the management of the courts, including their maintenance and supervision. The remuneration for all of these services would be a share of the profits from the courts.

The successful tenderer entered into two very detailed and carefully worded deeds of agreement with the council, covering the construction and subsequent management of the courts. Queen's Counsel advised the Ombudsman that, under the Deed of Agreement for the management of the courts, the tenderer was not given any exclusive possession of the site, nor was any particular class of members of the public given rights of use to the exclusion of the public generally. The tennis courts were to be managed by the tenderer, and permanent bookings could be made for some of the tennis courts, which would also be used at particular times for coaching or club competitions. The Queen's Counsel's advice was that the permanent bookings for club competitions did not mean that the land was not being put to public use. Moreover, since the management agreement did not confer any right to exclusive possession of the site, the Minister's consent was not required under Section 519A of the Local Government Act.

The council acknowledged that the site would be the "source of some commercial gain". The judgment in the "Bronte Splashers" case cited an earlier judgment which said that, for land to be used for public recreation and enjoyment as well as being open to the public generally, as of right, it also "must not be a source of private profit". The advice obtained by the Ombudsman was as follows:

> The position of the [courts manager] is in my view no different in principle to the position of a person employed by the Council to tend the gardens in a public park. Such a person would make a profit from the existence of the park and his work within it, being remunerated by a wage or salary. The [manager] may make a profit from fulfilling the terms of the Deeds, being remunerated by keeping the excess of hiring fees over various expenses plus the payment which it must make to the Council. It does not seem to me that such a profit falls within the embargo upon making a private profit which would infringe the "public" character of the site.

The legal advice to the Ombudsman concluded that the tennis courts to be constructed on the public reserve in the Lane Cove Municipality were legal.

It is clear from a consideration of these and other cases that a "permitted use" depends very much upon the facts: it is necessary to consider Part XIII of the Local Government Act, in some cases Part XXIII of that Act, Part III of the Crown Lands Consolidation Act and, where applicable, the terms of the particular declaration of trust or restrictive covenant affecting the land. Notwithstanding this, the information and legal advisings collected thus far will be of great assistance in the handling of future complaints about alleged improper use of land set aside for public recreation.

42. Conversion of sub-standard buildings to Strata Title

In March 1983 the Ombudsman issued a report about difficulties in converting older buildings to Strata Title. He noted that, provided the strata plan did not contravene zoning and town planning requirements or interfere with the amenity of an area, the council had no discretion in issuing a certificate of approval. Defects in a building apparently had no bearing on a council's consideration of its statutory requirements under the Strata Titles Act. In certain circumstances, however, a council might use its powers under Sections 281, 317B and 317D, and Ordinance 70 of the Local Government Act, to have a building repaired. In such circumstances, the Ombudsman said, councils could not be expected to accept liability for the cost of

repairing such buildings. The Ombudsman saw two areas of concern: the first, that faulty buildings could be so easily "strata-ed"; the second, that developers could submit plans for registration, with scant regard to the Local Government Act or Ordinances.

The Ombudsman recommended that section 8 of the Strata Titles Act be amended so that a Certificate of Compliance would have to accompany any strata plan lodged for registration. The then Minister for Local Government, Mr Gordon, responded that the Minister for Planning and Environment had established a committee to investigate a range of issues relating to Strata Titles.

In November 1983 Mr Gordon advised the Ombudsman that a "new" committee was to be established shortly, to examine and report on four alternative proposals that had been suggested as methods the Government might employ to prevent the conversion of substandard buildings to Strata Title. Further advice was to be forwarded when an acceptable recommendation had been received from the "new" committee. This Office then decided that, given the intended establishment of the committee, action on the matter would be discontinued.

A committee of several interested Departments was set up in March 1984 to look at the issue of conversion of older buildings to Strata Title. The then Minister for Natural Resources, the Hon J A Crosio, advised that a working group, under the control of the Department of Local Government, was to be set up to deal with this matter, but that no report had been received from the working group.

In September 1985 enquiries were made of the Department of Local Government as to the progress of the working group. In November 1985 the then Secretary of the Department, Mr H Fox, advised that essential correspondence was missing from the files, and that information would be sent as soon as it was located. No further letter was received from the Department, but oral advice indicated that no work had been carried out on this issue by the Department.

In March 1986 the Department was notified that its conduct in this matter would be investigated under the Ombudsman Act. Mr Fox responded:

> The lack of adequate staff resources has precluded any action on the part of this Department to convene the proposed working group. However, each of the matters referred to above has been the subject of examination and review within this Department, resulting in agreement that the need to convene a working group to further consider the matters was not apparent. In reaching this agreement account was taken of relevant provisions existing within the Local Government Act, 1919, and events which occurred subsequent to the proposal to formulate the working group in 1983.
>
> While the provisions of appropriate powers for councils to require, in conjunction with a conversion, upgrading of an existing building and its curtilage to comply with modern planning requirements is a matter more appropriate to the Department of Environment and Planning, such a course of action was seen to be onerous. To require compliance of existing buildings in this manner would, in many instances, necessitate the undertaking of demolition and/or reconstruction works which may result in the conversion proposal being uneconomical ...
>
> In addition, the view was held that in respect of an existing building presently being used for rental residential accommodation which does not comply with modern planning requirements, the conversion of that building to Strata Title would not necessarily result in a significant change to the use of the building and its curtilage. It was also noted that if the existing rental residential use remained, requirements to upgrade in respect of planning considerations would not be applicable ...
>
> The Local Government Act, 1919, pursuant to sections 281, 317B and 317D provides councils with wide powers to require the upgrading of existing buildings, with respect to many of the services provided to and within a building, the appearance and adequacy of the structure and the safety of building occupants. Additionally, Ordinance No. 70 under the Act provides pursuant to clause 6.6(6) the power for councils to require the upgrading of an existing building, where a change of use resulting in a change of classification occurs, e.g. boarding house to residential flat building. The aforementioned provisions were considered, collectively, to provide councils with adequate powers to require the attainment of a reasonable level of adequacy in the areas considered to pose problems.
>
> While accepting that appropriate and adequate powers presently exist for councils, it was noted that councils lack the power to withhold approval of a conversion proposal pending rectification of any matters identified through the application of those powers; resolution of this matter being within the ambit of the Registrar General's Office.

> As a consequence of the foregoing I remain of the opinion that there is no apparent need to convene the proposed working group ...

The statutory powers available to a council to require the upgrading of existing buildings are as follows:

A. Local Government Act, 1919:

(i) Section 281:

Subsection (1) says that the Council may control and regulate -

(a) the sanitation of premises; and

(b) the use and occupation of premises so as to avoid any insanitary condition thereon or any interference therefrom with the healthiness of the vicinity.

Subsection (2) sets out various actions a council can take for the purposes of sanitation and the preservation of the public health, including such things as the control and regulation of ventilation, plumbing, drainage and the provision of privy accommodation. Subsection (3) empowers a council to "require the renewal or repair of any roof, guttering, down pipe or spouting on a dwelling".

(ii) Section 317B:

Under this section, councils are empowered to order the demolition or rectification of buildings:

(a) which are "in such a dilapidated or unsightly condition as to be prejudicial to the property in or inhabitants of the neighbourhood of such building"; or

(b) which were erected or altered after 1958 without council's approval having been obtained beforehand (provided no Certificate of Compliance has been issued for the building under section 317A of the Act).

(iii) Section 317D:

For the purpose of ensuring that adequate provision for fire safety is made in or in connection with a building, the Council may, by notice in writing, order the owner ...

> (a) to carry out within the period specified in the notice, such work as may be so specified ....
>
> (Note: It is not uncommon for councils to specify in such notices periods of 6 to 9 months, a much longer period than that involved in the approval of a Strata Title application).

B. Ordinance 70, Local Government Act, Clause 6.6:

Under the provisions of clause 6.1(1) of Ordinance 70, buildings and portions of buildings are classified into 10 major classes. For the purposes of this discussion, the relevant classes are as follows:

> Class I: Single dwelling houses.
> Class II: Buildings containing two or more flats.
> Class III: Residential buildings being common places of abode for a number of unrelated persons, including -
> (i) boarding-houses, guest houses, hostels and lodging-houses ...
> Class VII: Buildings that are -
> (i) warehouses ....

Where there is a change in the use of a building resulting in a change of classification under the Ordinance, under clause 6.6 (2) and (3), the council can require that the change of use be approved by the council and that the building comply with the requirements of the Act and Ordinances applicable to the new class into which the building is classified.

However, under clause 6.6 (6):

> The use of a building or a portion of a building, may be changed from that of one class to that of another class without the entire building, or portion, being made to comply with the Act and the Ordinances applicable to the new class, Part 27 excepted, if the Council ... resolves that in its opinion the building, or portion, with such alterations as it may require -
>
> (a) will be structurally sound and capable of withstanding the loadings likely to arise from the new use; and
>
> (b) will contain reasonable provision for -
>
> (i) the safety of persons proposed to be accommodated in the building, or portion, in the event of fire, particularly in relation to egress;
>
> (ii) the prevention of fire;
>
> (iii) the suppression of fire; and
>
> (iv) the prevention of the spread of fire.

C. Public Health Act, 1902

i) Section 5

Under this section a Council may declare a building unfit for habitation and direct that the building no longer be inhabited or occupied by any person, unless specified repairs or alterations are made to the building so as to render it fit for human habitation.

ii) Section 61

Where a closing order has been made under section 58, and the building has not been rendered fit for habitation (and no steps are being taken to accomplish this), councils may pass a resolution that it is expedient to order the demolition of the building.

Apart from clause 6.6 of Ordinance 70 and the second part of section 317B of the Local Government Act, the powers listed above are only available to a council in relation to buildings which are: "insanitary"; in "such a dilapidated and unsightly condition as to be prejudicial to the property in or inhabitants of the

neighbourhood of such building"; "unfit for habitation"; without "adequate provision for fire safety"; or, in such a condition as to "interfere ... with the healthiness of the vicinity".

The second part of section 317B relates only to buildings erected after 1958 without council approval (where no Certificate of Compliance has been issued), and clause 6.6 of Ordinance 70 is only relevant when the use of a building is changed in a way that results in a change in its classification under the Ordinance.

In the complaint which led to this investigation, the building was none of these things. Further, the building was erected in 1928 and the classification of the building under Ordinance 70 was not changed. The main problem which the Ombudsman's 1983 report addressed was the conversion to Strata Title of existing residential flat buildings, which are generally structurally sound, but not necessarily in good condition.

This Office believed that the powers of councils were not adequate, as the Department claimed. The conduct of the Department, in not establishing a working group to report on the issue of the conversion of sub-standard buildings to Strata Title, was found, by the Deputy Ombudsman, to be wrong.

The then Acting Secretary of the Department advised on 4 June 1986 that arrangements had been made to convene the working group as initially proposed.

43. Permanent residence in caravan parks

During the past two years the Ombudsman has received a number of complaints which have raised various issues about permanent residence in caravan parks. In July 1985 it was estimated that 150,000 people were permanent residents in caravan parks. Most of the complaints received by this Office raised questions about the status of these residents.

Section 288A of the Local Government Act remains the law regulating movable dwellings and basically was intended to apply

to caravans used for vacationing. The section does not apply to any "structure to which a building ordinance ... applies" and provides that the maximum period people can stay in a park is sixty days in a twelve month period.

Since the 1970s the availability of larger, more elaborate movable dwellings and pre-fabricated annexes and other attachments has made Section 288A largely irrelevant for general regulation. In April 1984 the Local Government and Shires Associations obtained legal advice that certain mobile homes could not be classified as "movable dwellings" in terms of Section 288A but were more properly described as single dwelling houses and, therefore, were subject to the stricter building provisions of Ordinance 70 of the Local Government Act.

After receiving a complaint concerning the location of one such mobile home, the Ombudsman obtained Counsel's opinion on the legal status of the unit. Counsel said, in part:

> I am of the opinion that the Council was not entitled to give approval to the erection of the building without a proper building application ... the dwelling the subject of complaint is a building for the purposes of part XI of the Local Government Act ....

In 1979 the Maher Committee report to Parliament noted that "the caravan structure itself has now assumed the identity of a widely used form of alternative permanent housing in replacement of the conventional cottage or residential flat". The Committee recognised that permanent caravan park dwellers, without access to social services and amenities, would constitute a growing problem, and recommended that permanent residency be gradually eliminated. Nevertheless, the demand for such accommodation has increased and the numbers of permanent residents have continued to grow.

Local councils, many operating their own parks and all charged with licensing private parks, have responded in a variety of ways. Some, recognising that the existing law is out-dated, have developed their own codes of standards which acknowledge permanent residence. Others have attempted to restrict the

places in parks to caravans which can be registered with the Department of Motor Transport as capable of travelling on public roads. While the intent is to comply with the existing law by excluding "immobile" dwellings, park managers, faced with public demand, have found such policies difficult to enforce. Few councils, if any, have sought to apply the building regulations of the Local Government Act to large vans and associated structures.

Since August 1984 the Department of Local Government has been working to produce an acceptable code of standards, for both vans and parks, that will meet the needs of permanent residency. On 2 May 1986 the Local Government (Movable Dwellings) Amendment Act was assented to but, at the date of writing, the Act had not been proclaimed. The intention is to repeal Section 288A of the Local Government Act and provide a uniform code of regulation which will legalise permanent residency and provide councils with a basis for approving permanent dwellings. Associated problems such as provision of services, amenities and rights of tenure are not covered by the new Act, but it is proposed that a special task force will examine those areas once the new legislation is in force.

The need for action was demonstrated by a telephone enquiry to the Ombudsman's office. A woman, four years resident in a Sydney suburban caravan park, found herself in dispute with the park manager. She was threatened with immediate eviction and the manager, on legal advice, told her that she could be evicted without the legal protection afforded to tenants. Although the woman had sought legal advice and had been to her Member of Parliament, she was referred to the Ombudsman as a last resort. Because the caravan park was privately owned, the Ombudsman had no jurisdiction to investigate the matter.

Those complaints which were within the Ombudsman's jurisdiction showed that the approaches of local councils to the problem were marked by inconsistency. One complaint from a resident who lived opposite a caravan park alleged that a large mobile home which blocked her view had been illegally approved and should be removed. Others, from residents in caravan parks, alleged that,

although siting and residence had been permitted by park managers, councils had moved to evict or re-site the vans because the original permission was contrary to council policy.

As the law in the area appears inadequate to provide responsible authorities with clear guidelines on which to base their decisions, the Ombudsman's Office has dealt with each complaint on the basis of what is reasonable in the circumstances.

The Office is keeping itself informed of developments in the proposed uniform regulation of caravan parks and will continue to deal with specific complaints.

Matters Followed Up

44. Mosman and the Dog Act

Last year's Annual Report referred in item 67 to a complaint by an Alderman of Mosman Municipal Council about a council resolution to enforce the Dog Act only in limited circumstances. The Dog 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. If it is not, the owner is guilty of an offence and is liable to prosecution.

Mosman Council resolved, however, that dogs in residential streets be impounded only on complaint, or if found to be strays, or causing a nuisance. It also resolved that existing prosecutions over the impounding of dogs in residential areas be withdrawn. Effectively, the council resolved that it would not take action over certain breaches of the law: it had a public policy which condoned certain acts which the New South Wales legislature had determined to be breaches of the law.

A regulatory agency such as a council, has a discretion whether to prosecute an offender. Yet in exercising that discretion a council must, among other things, "not seek to promote purposes alien to the letter or to the spirit of the legislation that

gives it power to act" (de Smith, Judicial Review of Administrative Action, (4th ed), p285).

The investigation of the complaint has now been concluded and the Ombudsman has sent a draft report to the Minister for Local Government, who may consult with the Ombudsman about the matter, if she wishes. In the draft report the Ombudsman concluded that the council has a policy which acts against the letter and spirit of the Dog Act. He said that the council's policy was not in accordance with the intention of the legislation and he found council's policy to be wrong in terms of the Ombudsman Act. He recommended that the council rescind its current policy and, in its place, establish a procedure which does not fetter the council's discretion to take action with respect to any breach of the Dog Act.

45. Council employees and the Ombudsman Act: still no amendment

Last year's Annual Report noted that the Government had apparently decided to amend the Ombudsman Act, in order to place beyond doubt the Ombudsman's power to investigate the conduct of employees of local government authorities.

In April this year the Ombudsman made a second report to Parliament on this matter, pointing out that no amendment had been made. The second report again drew attention to the difficulty ordinary citizens have in understanding why the Ombudsman is unable to deal with complaints about the alleged conduct of individual council employees, as distinct from the conduct of a council as a corporate body.

The Ombudsman, in his April 1986 report, again recommended that the necessary amendment be made as soon as possible, in the public interest.

At the time of writing, no amendment has been made. Both Government and Opposition originally intended that individual council employees should be within jurisdiction, and the Ombudsman sees no good reason why there should be such a long delay in effecting a simple amendment to the Act.

46. Councils and existing buildings: light at the end of the tunnel?

The last four Annual Reports have referred to problems which arise out of shortcomings in Section 317A of the Local Government Act and the inability of local councils to approve existing buildings. Former Ministers for Local Government had been asked to include certain recommendations made by the Ombudsman in an examination of the possible amendment of section 317A. Last year's Annual Report recorded that the amendment of section 317A had been first recommended by this Office in August 1982 but, after three years of deliberation, the proposed amendment of the section had only reached the stage of a draft Cabinet Minute.

On 10 June 1986 the Minister for Local Government, the Hon J A Crosio, told this Office that a draft Cabinet Minute had been sent to the Cabinet Secretariat on 20 May 1986. If the proposed amendment is approved by Cabinet and is placed before Parliament this year, four years will have elapsed since this Office first recommended that the section should be amended.

47. Denial of liability by councils

An end in sight?

The State-wide investigation of the procedures used by local councils when dealing with claims involving insurers, commenced by the Ombudsman in 1981, this year entered a new, and possibly final, stage.

Review by this Office of the procedures of individual councils, and advice from the Local Government and Shires Associations, indicated that a significant number of councils had voluntarily adopted the procedures circulated by the Associations in June 1983 after discussions with this Office.

In December 1985, 104 councils were asked by letter whether they had adopted the recommended procedures. Ninety councils have replied in the affirmative and investigation of those councils has been discontinued. A further 6 councils have received so few claims over the last 5 years as to render further investigation unnecessary.

In the meantime, six investigations of individual councils, commenced prior to December 1985, were continued and resulted in reports of wrong conduct being made. A further nine investigations were discontinued when the councils involved indicated that they had adopted and were using the recommended procedures. At the time of writing, the procedures of eleven councils were the subject of investigation. Full details are shown in the tables below.

Energy Association

County councils are members of the Local Government Energy Association of New South Wales. The Chairman of the North West County Council informed this Office that his council, at the 1985 Annual Conference of the Association, had successfully moved the following resolution:

> That the Executive be requested to examine the Ombudsman's attitude to handling Public Liability Insurance claims by councils, and to produce a policy statement following the examination.

In May 1986 the Secretary of the Energy Association forwarded to this Office details of recommended procedures for dealing with claims involving insurers which had been approved by the Association Executive. The Secretary said that the procedures had been circulated to all member councils "seeking their support and subsequent implementation". A copy of the recommended procedures is reproduced below; they substantially accord with the recommended procedures developed as a result of discussions between this Office and the Local Government and Shires Associations; to the extent that they differ, this Office remains of the view that the latter represent a reasonable standard of

conduct to be applied to local and county councils. Any complaint which might in future be made to this Office about the way in which a county council has dealt with a claim will be assessed on that basis.

Government Insurance Office

The 1982-83 Annual Report recorded that the Government Insurance Office (which underwrites a significant amount of public liability cover for local authorities) had informed this Office that it would in future give to claimants brief reasons for rejection of their claims, where to do so would not prejudice the rights of either that Office or its client councils.

During the year, a case arose which drew attention to the fact that the undertaking given to this Office by the Government Insurance Office was not being honoured. Both the council involved and this Office took the matter up with the GIO. As a result, in January 1986 a circular was issued to all GIO Regional Managers reminding them of the undertaking given to this Office, and of the need to give to claimants brief reasons for rejection of their claims.

This Office appreciated the GIO's prompt response to the problem once it had been brought to attention.

An interesting twist

During the year, Kogarah Municipal Council wrote to the Ombudsman about a claim in which the insurance company had denied idemnity to council. The Town Clerk described the problem thus:

> The claim arose when it was necessary to renew a sewer line serving a household which had been allegedly damaged by a tree on council's road reserve. Due to the predicament that the household was placed in and in the interests of public health and safety the council proceeded to rectify the problem at council's costs but recoverable from the owners if indemnity was denied. The insurance company responsible at the time, although kept informed of the council's actions, has since denied indemnity to council on a ground,

> amongst others, that council proceed without written consent. The council disputes the reasons for refusal and has continued to press for payment.

The Town Clerk said that council had resolved to inform the Ombudsman of the situation and seek his comments and assistance. He added that he appreciated that the matter might not be within the Ombudsman's jurisdiction.

The reply from this Office confirmed the Ombudsman's lack of jurisdiction in the matter, because the insurance company involved was not a "public authority" in terms of the Ombudsman Act. The Town Clerk's attention was drawn to the recommended procedures circulated in June 1983 and, in particular, to clause 5(b) of those procedures. The letter concluded:

> Ultimately, council may have to test the insurer's position in the courts.

DENIAL OF LIABILITY BY COUNCILS

RESULTS ACHIEVED

(This Table includes results published in the 1982-83, 1983-84 and 1984-85 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

COUNCIL	Acknowledge Claims	Monitor Processing	Ensure claimant receives reasons if claim denied
Blacktown	Existed	Existed	Introduced
Broken Hill	Introduced	Introduced	Introduced
Burwood	Existed	Existed	Introduced
Coffs Harbour	Introduced	Introduced	Introduced
Concord	Existed	Introduced	Introduced
Cowra	Introduced	Introduced	Introduced
Drummoyne	Existed	Introduced	Introduced
Dumaresq	Existed	Existed	Introduced
Gilgandra	Introduced	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
Kuring-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	Introduced	Introduced
Nambucca	Introduced	Existed	Introduced
Newcastle	Existed	Introduced	Introduced
North Sydney	Existed	Introduced	Introduced
North West County	Existed	Introduced	Introduced
Parramatta	Existed	Existed	Introduced
Port Stephens	*Recommended	*Recommended	*Recommended
Queanbeyan	Introduced	Introduced	Introduced
Ryde	Existed	Existed	Introduced
Sutherland	Existed	Introduced	Introduced
Sydney	Existed	Existed	Introduced

COUNCIL	Acknowledge Claims	Monitor Processing	Ensure claimant receives reasons if claim denied
Tamworth	Introduced	Existed	Introduced
Warringah	Existed	Introduced	Introduced
Waverley	Introduced	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

(This table includes results published in the 1984-85 Annual Report)

Bathurst City
Bega Valley Shire
Bellingen Shire
Berrigan Shire
Bingara Shire
Bland Shire
Blayney Shire
Bogan Shire
Bombala Shire
Boorawa Shire
Botany Municipal
Bourke Shire
Brewarrina Shire
Byron Shire

Cabonne Shire
Carrathool Shire
Camden Municipal
Casino Municipal
Central Darling Shire
Cessnock City
Cobar Shire
Coolah Shire
Coolamon Shire
Cooma-Monaro Shire
Coonamble Shire
Cootamundra Shire
Copmanhurst Shire
Corowa Shire
Culcairn Shire

Dubbo Municipal
Dungog Shire

Eurobodalla Shire
Evans Shire

Forbes Shire

Glen Innes Municipal
Gloucester Shire
Greater Lithgow City
Gundagai Shire
Gunnedah Shire
Gunning Shire
Guyra Shire

Harden Shire
Hawkesbury Shire
Hay Shire
Holbrook Shire
Hume Shire
Hurstville Municipal

Jerilderie Shire
Junee Shire

Kiama Municipal
Kogarah Municipal
Kyogle Shire

Lachlan Shire
Leeton Shire
Leichhardt Municipal

Lockhart Shire
Lismore City
Liverpool City

Manilla Shire
Moree Plains Shire
Murray Shire
Murrurundi Shire
Muswellbrook Shire

Narrabri Shire
Narrandera Shire
Narromine Shire
Nymboida Shire

Oberon Shire
Orange City

Parkes Shire
Parry Shire
Prospect County

Quirindi Shire

Scone Shire
Severn Shire
Shellharbour Municipal
Shoalhaven City
Singleton Shire
Snowy River Shire
Southern Tablelands County

Tallaganda Shire
Temora Shire
Tenterfield Shire
Tumbarumba Shire
Tumut Shire

Ulmarra Shire
Urana Shire

Wagga Wagga City
Wakool Shire
Walcha Shire
Weddin Shire
Wentworth Shire
Windouran Shire
Wollondilly Shire

Yallaroi Shire
Yarrowlumla Shire
Yass Shire
Young Shire

INVESTIGATIONS DISCONTINUED - LACK OF UTILITY - VERY FEW OR NO CLAIMS RECEIVED

Balranald Shire

Conargo Shire
Crookwell Shire

Nundle Shire

Walgett Shire
Warren Shire

DENIAL OF LIABILITY BY COUNCILS
INVESTIGATION CURRENT

COUNCIL	STAGE	
	Enquiries proceeding	Wrong conduct report in progress
Campbelltown	X	
Coonabarabran		X
Deniliquin		X
Goulburn	X	
Griffith	X	
Mulwaree		X
Richmond River		X
Rylstone	X	
Strathfield		X
Uralla	X	
Wellington	X	

Procedures recommended by Office of the Ombudsman and Local Government and Shires Associations

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

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

detailing the results of the investigation of the incident by council.

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

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

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

(a) If the insurer acknowledges that a liability exists to the claimant and also that indemnity will be provided to the council under the policy, the council should inform the claimant by letter that the matter has been reported to 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 the council to ensure that this is done.

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

Procedures approved and circulated by Local Government Energy Association of New South Wales

Recommended Procedures for Claims Against Council 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 results and if liability is denied the reasons for such denial. It shall be the responsibility of the council to ensure that this is done.

The main aspects of these complaints were that councils:

1. failed to notify those persons who could reasonably be considered as being affected by the proposed building;

2. refused to allow "properly interested persons" to inspect the relevant building application plans;

3. failed to take into consideration valid objections lodged by "properly interested persons".

Since 1979 three surveys have been conducted by this Office into whether local councils notify adjoining owners or "properly interested persons" and allow them to peruse building application plans. The results of the 1979 and 1982 surveys are outlined in the Ombudsman's 1981-82 Annual Report at page 24.

In the 1985 survey, the Ombudsman wrote to a total of 175 councils (29 City Councils, 33 Municipalities and 113 Shires) requesting replies to several questions about these issues. Of the 173 responses received, 38 were from councils within the greater Sydney metropolitan region and 22 were from country councils having at least one sizeable urban area.

It was decided to include questions on the notification and perusal of development applications in the 1985 survey, for comparison, and because a number of complaints had been received about this issue. It was found that notification and perusal of development applications is a far more common practice than notification and perusal of building applications. However, this could be explained by the requirements of section 84 of the Environmental Planning and Assessment Act, 1979 (designated development), and of the former section 342ZA of the Local Government Act, 1919 (residential flat buildings).

The results of the 1985 survey can be summarised as follows:

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.

Note: Where cover is not available under councils' insurance policy because of excesses applying similar procedures should apply to the handling of claims.

48. Notifying adjoining owners

The 1981-82 Annual Report said that, in the opinion of the Ombudsman, the failure to allow the inspection of building application plans by "properly interested persons" was unreasonable and unjust. The report went on to list certain recommendations, about notifying adjoining owners and their inspecting building application plans, which had been made to the then Minister for Local Government.

In each Annual Report since then the Ombudsman has emphasised the importance of councils notifying adjoining owners about building applications and allowing inspection of building application plans, and has noted the slow progress in implementing his recommendations.

This Office has found that local councils, when considering building applications for the erection or substantial extension of dwellings, usually consider the likely effects of proposed buildings or extensions on the amenity of the immediate neighbourhood. Yet more than 30 complaints have alleged that councils did not notify affected persons and/or allow inspection of building application plans. The complaints have usually claimed that new buildings, or extensions or alterations to existing buildings, have adversely affected the complainants' property, causing such things as loss of views, light, amenity or privacy, drainage problems, or environmental or geological hazards.

Table 1

Questions			All NSW Councils (% Yes)	Metropolitan NSW Councils (% Yes)	Rural (Urban Centre) Councils (% Yes)
1. Notification	(a) Adjoining Owners	i) Always	3	16	0
		ii) If amenity affected	57	61	45
	(b) Properly interested persons	i) In general	34	53	27
		ii) If amenity affected	45	50	23
	(c) Never		37	16	41
2. Perusal	(a) Adjoining Owners	i) In general	32	34	9
		ii) If amenity affected	46	58	41
	(b) Properly interested persons	i) In general	50	61	23
		ii) If amenity affected	43	47	27
	(c) Never		28	18	50

Councils were also asked the following question:

> Before making a decision to approve a building application or development application does the council consider objections from:
>
> (a) Any member of the general public?
> (b) No one?
> (c) Adjoining owners?

(d) Only adjoining owners the amenity of whose land may be affected?
(e) "Properly interested" people?

The following answers were received:

Table 2

Question	All NSW Councils (% Yes)	Metropolitan NSW Councils (% Yes)	Rural (Urban Centre) Councils (% Yes)
(a) Any member of the general public?	60	82	36
(b) No one?	6	3	0
(c) Adjoining owners?	64	84	50
(d) Only adjoining owners the amenity of whose land may be affected?	37	34	32
(d) "Properly interested" people?	61	74	50

The survey results show that 64% of councils (including 84% of metropolitan councils) notify adjoining owners or "properly interested" persons, at least in some situations. Further, 69% of councils (including 79% of metropolitan councils) allow perusal of plans held by council, at least in some situations.

It also appears that it is the standard practice of 57% of councils in this State (including 61% of metropolitan councils) to notify adjoining owners, whose amenity may be affected, that a building application has been received. In such circumstances it is the standard practice of 46% of councils (including 58% of metropolitan councils) to allow these adjoining owners to peruse the plans.

Table 2 shows that 60% of councils replied that they would consider objections from a member of the general public when considering building applications, and only 6% said that they

applications for approval to carry out internal alterations, or alterations which do not affect the external configuration or height of a building.

In response, the then Minister, Mr Gordon, advised the Ombudsman that he was only prepared to support the amendment of the Local Government Act in relation to recommendations (a) and (b). He said that appropriate amendments would be recommended to Cabinet.

As to recommendations (c) and (d), Mr Gordon said:

> After careful consideration of the various issues involved I have concluded that your proposals relevant to a system of notification ... would have significant cost implications for councils and building applicants and in many cases add substantially to the time involved in obtaining building approval. They would therefore run counter to the Government's policy objectives of reducing delays in the building and development approval process and of reducing housing costs. In the circumstances, I am not prepared to recommend that amendments be made to the Local Government Act regarding your abovementioned proposals.

In April 1984 the Ombudsman wrote to the then Minister for Local Government, Mr Stewart, asking about the present position, and whether any progress had been made towards amendment of the legislation. The Minister replied that it was proposed to include the amendments in the next Local Government Amendment Bill which, it was then expected, would be introduced into Parliament during the 1984 Budget Session.

In reply to further enquiries, the Minister advised the Ombudsman in October 1984 that, although a draft Cabinet Minute had been prepared, it had not at that time been submitted to Cabinet. No further advice was received, and in March 1986 the Ombudsman wrote to the Hon J A Crosio, Minister for Local Government, asking for her views on the recommendations in the 1983 report.

In April 1986 the Minister informed the Ombudsman that provisions designed to give effect to recommendations (a) and (b) had been included in the Local Government (Miscellaneous Provisions) Amendment Act, 1985, assented to on 10 December 1985. The provisions based on recommendation (b) commenced on 10 December

would not consider any objections at all. The comparable figures for metropolitan councils were 82% and 3%. As to objections from adjoining owners, 64% of all councils (including 84% of metropolitan councils) replied that these would be considered.

Overall, the pattern of responses to this survey was much as was expected, with the notification of adjoining owners being a more common practice among metropolitan than country councils.

On the basis of the results of the three surveys and advice received from various council officers, it appears that there is a general trend towards allowing greater participation by "properly interested persons" in the consideration of building applications.

In March 1983 a report by the Ombudsman recommended that the Local Government Act be amended by:

(a) Removing any possible restrictions on the inspection of building application plans showing the external configuration of a building in relation to the boundaries of the site, by "properly interested persons".

(b) Including a requirement under section 313 of the Act for councils to consider the likely effect of a proposed building or alteration on adjoining properties.

(c) Including 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.

(d) Including 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

1985; those based on recommendation (a) are to commence on a date to be proclaimed.

In June 1986 the Ombudsman wrote to ten selected councils, drawing their attention to these amendments to the Act and asking whether they proposed to change their practices to bring them into line with recommendations (c) and (d) in the 1983 report. Letters were sent to another eight selected councils, asking whether they intended to adopt recommendation (d).

Five councils responded that they had adopted a policy of notifying properly interested persons, a further three said that they would notify such people in circumstances where a proposed building was out of the ordinary and not in accordance with the Act and Ordinances, two advised that in future the views and opinions of properly interested persons would be considered, and a further four councils said that this would be done where a proposed building was out of the ordinary and not in accordance with the Act and Ordinances. The percentage of metropolitan councils now notifying "properly interested persons" is over 60%. This figure is much higher for buildings which are out of the ordinary or not in accordance with the Act and Ordinances.

The Ombudsman still believes that, in the public interest and consistent with the principles of natural justice, all councils should be required to:

- notify adjoining owners and other possibly affected persons of any building applications for approval to carry out works which may affect the amenity of an area.

- consider the views of properly interested persons before determining building applications for approval to erect buildings which could affect the amenity of an area;

The fact is that a significant number of councils already do these things. The Ombudsman believes that all citizens should, wherever possible, enjoy the same rights. The availability to citizens of the right to be notified of proposed building work which may affect the amenity of the area in which they reside,

and to have their views and objections considered, should not be a lottery dependent on the policy of the council in whose area they happen to live.

PRISONS AREA

Broader Issues

49. Prison statistics

Visits to prisons

The programme of visits to prisons continued during the year, although at a slightly reduced rate. In all, 30 visits were made to 18 prisons and 380 oral complaints were discussed and dealt with.

The reduction in visits was primarily due to the limited resources available to the Office, to the reduced number of complaints received from prisoners, and to the operation for a full year of the Official Visitors Scheme at a number of the major gaols.

Since her appointment in May 1986, Priscilla Adey, Assistant Ombudsman, has visited several of the major prisons and is dealing personally with the more serious and important complaints received in the prisons area.

John Pinnock, Assistant Ombudsman, is now primarily engaged in the reinvestigation of complaints about police and has relinquished the senior co-ordinating role in the prisons area; this has been taken over by the Principal Investigation Officer, Gordon Smith.

VISITS TO PRISONS and ORAL COMPLAINTS DEALT WITH
1 July 1985 to 30 June 1986

Prison	Number of Visits made	Number of Oral Complaints Discussed
Bathurst Gaol	1	14
Berrima Gaol	1	Nil
Brookfield Afforestation Camp	2	14
Central Industrial Prison	2	19
Cessnock Corrective Centre	2	43
Cooma Gaol	1	15
Glen Innes Afforestation Camp	2	3
Goulburn Gaol	3	51
Grafton Gaol	2	13
Maitland Gaol	2	26
Metropolitan Reception Prison	2	22
Metropolitan Remand Centre	2	57
Metropolitan Training Centre	2	43
Mulawa Training and Detention Centre	2	20
Norma Parker Centre	1	3
Oberon Afforestation Camp	1	6
Parklea Prison	1	19
Parramatta Gaol	1	12
Totals	30	380

Complaints dealt with

Categories of written complaints against the Department of Corrective Services dealt with during the year ended 30 June 1986 are set out below, together with comparative figures for the previous year.

	1986	1985
No Jurisdiction	5	21
Declined at Outset	108	128
Declined after Preliminary Enquiries	52	54
Resolved after Preliminary Enquiries	44	54
No prima facie evidence of wrong conduct after preliminary enquiries	90	175
Discontinued after Investigation	21	10
No Wrong Conduct after Investigation	8	1
Wrong Conduct after Investigation	4	35
Under Investigation as at 30 June	73	149
Totals	405	627

Investigating complaints from prisoners

The system whereby complaints from prisoners are allocated throughout the Office and dealt with by the majority of Investigation Officers has continued. Investigation Officers responsible for particular prisons are set out below:

Prison	Responsible Officers	Back-up Officers
Goulburn Berrima Parklea	Greg Andrews Allan Hartigan	Julia Hall
Emu Plains Parramatta (excluding women prisoners)	Kieran Pehm Chris Wheeler	David Chie
Broken Hill Special Care Unit, Long Bay	Sue Bullock Mary Bolt	Yvon Piga
Cooma Brookfield	Allan Hartigan Julia Hall	Brian Seelin
Bathurst (including X wing) Oberon	Andrew Paton Priscilla Adey	Margaret Tung
Metropolitan Reception Prison Metropolitan Remand Centre Metropolitan Training Centre	Claudia Douglas Sue Bullock	Mary Bolt
Central Industrial Prison Silverwater	Priscilla Adey Jane Deamer	Brian Seelin
Mulawa Norma Parker Parramatta (women prisoners only)	Gillian Scoular Andrew Paton	Claudia Douglas
Grafton Glen Innes	Gillian Scoular Gordon Smith	Julia Hall
Cessnock Maitland	Gordon Smith Bruce Barbour	Gillian Scoular

50. Section 27 reports to Parliament

Since the previous Annual Report the Ombudsman has made two reports to Parliament about the failure of the Department of Corrective Services to accept recommendations made by the Ombudsman in wrong conduct reports. Section 27 of the Ombudsman Act provides that, where the Ombudsman is not satisfied that sufficient steps have been taken in due time in consequence of a report under section 26, he may make a report to the Minister for presentation to Parliament.

Failure to establish a command structure and guidelines for the control of prisons during strikes by prison officers

On 6 February 1983 Mr B, a prisoner at Parramatta Gaol, complained that he was assaulted by police officers who were on duty in the prison during a strike by prison officers and that the Department of Corrective Services, through its responsible Executive Officers, failed to intervene to prevent the assaults and failed to investigate and take appropriate action.

The Ombudsman conducted an investigation of the conduct of the Department of Corrective Services. The investigation revealed that on 31 January 1983 prison officers at Parramatta Gaol and other gaols were on strike. Police officers were on duty in the gaols to carry out some of the duties normally carried out by prison officers. The only officers of the Department of Corrective Services who were on duty in the gaols were the Senior Executive Officers. The usual procedure at Parramatta Gaol during strikes by prison officers was as follows:

(i) A Chief Superintendent and Inspector of Police entered the gaol and all records were handed over to them.

(ii) Executive Officers returned to the gate of the gaol where all keys are held. The keys were booked out as necessary by a police sergeant, who was in charge of them.

(iii) Executive Officers remained in the gaol in an advisory capacity only, having no authority whatsoever while the police

were in charge.

(iv) Police would not enter the gaol unless they were informed they were in control.

The investigation disclosed no evidence of directions or circulars from the Department to Executive Officers as to their responsibilities during strikes by prison officers.

In his report of April 1985 the Ombudsman concluded that Mr B had complained about alleged assaults by police officers, including the use of mace gas, initially to an Executive Officer who was on duty at the time, and subsequently to the Superintendent of the gaol. Neither of these officers had taken any action on the complaints. The Ombudsman concluded that the inaction of these officers, which was contrary to their respective duties under the Prisons Act and Prison Rules, was in accordance with the view of their responsibilities during strikes by prison officers, fostered and approved by the Department of Corrective Services. The Department considered that police were in complete control of the gaol, to the exclusion of its Executive Officers.

The Ombudsman found the conduct of the Department of Corrective Services, in failing to give proper directions to its Senior Executive Officers as to their duties during strikes by prison officers, wrong in terms of the Ombudsman Act.

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 gaols 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 publish, for the benefit of Senior Executive Officers, circulars setting out the command structure and guidelines;

(iv) the Department report to the Ombudsman within three months as to progress with the implementation of the recommendations.

In July 1985 the Chairman of the Corrective Services Commission wrote:

> ... at a meeting attended by representatives of the Police Department and this Department on 2 July 1985 agreement was reached that a recommendation be made to amend the Prisons Act which would provide for the control of prisons to be handed over to the police authorities during strikes by prison officers.

In August 1985 the Chairman advised that, following further discussions, the views of the Commissioner of Police had been sought about the proposal to amend the Prisons Act.

In September 1985 the Ombudsman wrote to the Chairman of the Corrective Services Commission and said, in relation to the first two recommendations:

> I regard these recommendations as being of central importance. In particular, Recommendation (ii) is of crucial significance. It quite clearly seeks to preserve the legal responsibilities of the Department, Superintendents and Senior Executive Officers, cast on them under the Prisons Act, Regulations and Prison Rules. Your advice of 8 July and 30 August 1985 refers to a proposal to amend the Prisons Act to provide for control of prisons to be handed over to police during strikes by prison officers. Whilst no detailed advice concerning this proposal has been provided, it would appear to conflict with Recommendation (ii) in the Final Report.

The Ombudsman requested the Chairman to advise him how the proposal to amend the Prisons Act represented a "sufficient step" in consequence of the report under Section 26. The Chairman replied:

> Any amendment to the Prisons Act to provide for the control of prisons during periods of strikes by prison officers will, of course, be a matter for Parliament. Such amendment, if enacted, would need to recognise the role of the Corrective Services Commission and Superintendents during those periods when police authorities are involved in the management of prisons.
>
> Accordingly, I will advise the Minister that the recommendations contained in your Final Report, as well as the further comments contained in your letter under

> reference, be incorporated in any Cabinet Minute which may arise from the present negotiations with officers of the Police Department.

In February 1986 the Chairman again wrote to the Ombudsman, saying that the Commission had concluded that it had an obligation to retain responsibility for the management and operation of prisons while officers were available. The Commission resolved that the manning and control of prisons should be left to the Prison Superintendent, in consultation with the local senior police officer. The Chairman also said:

> Because of the different management strategies which operate in the various institutions, both in normal circumstances and in times of industrial dispute, it is not practical to draw up guidelines which would have universal application when police officers are manning the prison establishments.

As the Ombudsman was not satisfied that sufficient steps had been taken in consequence of his report, he decided to report to Parliament. The Ombudsman noted that there is no basis upon which the Department of Corrective Services or its Senior Executive Officers can delegate or relinquish their statutory responsibilities. The legislation makes no provision for the presence of police officers in gaols during strikes by prison officers. Indeed, it seems clear that when the Prisons Act was proclaimed, no consideration had been given to the likelihood of such strikes or the consequences which would flow from them. The Ombudsman said that he was extremely concerned at the failure of the Department to implement the recommendations. He said:

> The Department of Corrective Services has an obligation to retain responsibility for the operation and management of prisons. The decision to continue negotiations with the Police Department following the report under Section 26 was a recognition that a problem existed and needed to be corrected. The failure of the Department, for whatever reason, to establish a formal command structure and guidelines for the control of gaols during strikes by prison officers leaves the problem unresolved.

The Ombudsman noted that, while it was true that different management strategies operated in various gaols both in normal circumstances and during industrial disputes, this did not relieve the Department of its responsibilities during strikes.

Further, it had never previously been suggested that different management strategies were a bar to establishing the effective command structure and guidelines recommended by the Ombudsman.

The Ombudsman recommended to Parliament that the Department of Corrective Services establish a command structure and guidelines as set out in the wrong conduct report.

Failure to pay compensation for unlawful detention

Mr C, a prisoner at Long Bay Gaol, complained that he had been held at Parramatta Gaol between 28 December 1983 and 4 January 1984 without a remand warrant, after gaol authorities had failed to escort him to Waverley Court of Petty Sessions on 28 December 1983.

The Ombudsman conducted an investigation which revealed that officers in the gaol administration had:

(i) omitted Mr C's name from a list of prisoners to be escorted to court;

(ii) failed to escort Mr C to court on the date specified on his remand warrant;

(iii) failed to make any note of a subsequent telephone conversation with the court when the mistake was discovered;

(iv) failed to check that a further remand warrant was received from the court when proceedings were adjourned in the absence of Mr C;

(v) failed to check Mr C's remand warrant to confirm that he was lawfully detained and failed to release Mr C once his remand warrant had expired.

The investigation disclosed that the main reason for these administrative errors was a lack of any formal mechanism designed to check regularly the basis on which remand prisoners are held. The Ombudsman found the conduct of the Department of Corrective Services, in detaining Mr C between 28 December 1983 and 4

January 1984, wrong in terms of the Ombudsman Act in that it was contrary to law and unreasonable. The Ombudsman recommended that the Department pay $400 compensation to Mr C and immediately institute a number of strict administrative procedures to prevent a repetition of such an incident.

In response to a preliminary statement, which included the recommendation for payment of compensation, the Chairman of the Corrective Services Commission said:

> I have examined the draft report in this matter and have no objection to the report in its present form.

The Ombudsman made a final report, and the Chairman of the Commission later advised that recommended administrative procedures had been implemented, providing the Ombudsman with a copy of an instruction which had been issued on 4 December 1985. The Chairman also said that the Department of Corrective Services did not propose to accept the Ombudsman's recommendation to pay compensation to Mr C. The Ombudsman was not satisfied with this response, and decided to make a report to Parliament.

In his report to Parliament on 17 April 1986, the Ombudsman noted the contrast between the advice of the Chairman of the Corrective Services Commission in response to the provisional document and the final report. The Ombudsman said that the Department had failed to ensure that procedures laid down by the Justices Act were complied with. These procedures are part of numerous safeguards designed to ensure that a citizen is not arbitrarily deprived of his or her liberty. The fact that such deprivation of liberty is due to inadvertence and is not wilful does not relieve the Department of responsibility for its officers' mistakes.

The Ombudsman said:

> The assessment of a sum by way of ex gratia payment is rarely precise and always involves elements of discretion. Traditionally, recommendations for ex gratia payments are well accepted as part of the true role of the Ombudsman. In the present case the Office of the Ombudsman calculated the suggested payment of $400 on the basis of a payment of $50 per day for eight days of illegal detention. While in part

> compensatory the payment by a Department of an ex gratia payment provides not only a recognition of past, not insignificant error, but also some sanction against its repetition.

The Ombudsman said the Department of Corrective Services was to be commended for its recognition of the validity of the criticisms in the wrong conduct report and the prompt issuing of the remedial circular of 4 December 1985. It was not to be commended for its refusal to pay compensation to Mr C.

In his report to Parliament, the Ombudsman again recommended that the Department of Corrective Services pay compensation of $400 to Mr C.

New Matters

51. Witness protection scheme in the prison system

The Ombudsman often receives complaints from prisoners who require protection from other prisoners, either because of the offence they have committed (such as a sexual assault on a minor) or because of things that have happened in gaol. The complaints usually allege that the Department of Corrective Services has not taken adequate precautions to ensure their safety or is insensitive to the nature of the threat that they believe to exist. Over the last few years there has been a dramatic rise in the number of prisoners on protection in the prison system, and the secure placement of these prisoners is straining the limited resources of the gaols. The rise in the number of prisoners on protection is attributed to the influx of drugs into prisons and to the extensive trafficking between inmates and, often, between inmates and outsiders.

The problem of a special type of protection prisoner has come to light following a complaint to the Ombudsman from a prisoner who perhaps represents a growing class of protection prisoners. The complainant alleges that his safety in gaol is affected by the assistance he has given to police and prison authorities about the activities of police, prison officers and other prisoners.

Much of the information he gave resulted in or assisted in criminal prosecutions, and the prisoner claims that there is nowhere in the prison system where he is safe from people against whom he has given evidence, and their associates. The main concern of the police and prison authorities is to keep the prisoner-witness safe while he is required to give evidence in court.

There are already 8 to 10 prisoners in this special category. Their numbers will probably increase with the improvement in internal investigation procedures within the Police Force and the Department of Corrective Services. If informants are properly protected, their numbers are likely to increase even more.

The prisoner who complained to the Ombudsman said that the only place in which he would be completely safe and free from psychological pressures would be in a special institution with other prisoners in this category. He suggested that such an institution would have to be carefully selected for its security and location. It would have to be staffed by specially trained officers, sensitive to the problems of such prisoners and able to counsel them, and would have to cater for prisoners of different security classifications who would be able to earn privileges consistent with their classifications. Any visits to the unit, even by professional staff, would have to be carefully screened, perhaps by a management committee comprising staff and inmates.

The complainant also suggested that the protection of family members of prisoners would have to be considered, because they are often harassed by associates of those who see themselves threatened by actions of the prisoner-witness. Prisoners who feel that they will suffer a disadvantage by co-operating with authorities will be equally concerned about any disadvantage likely to be suffered by their families, and this seems to point to a need to have attached to the unit trained liaison officers who could assist the families.

The Ombudsman understands that the Department is looking into the proposal to have a special institution built or an existing goal refurbished for the placement of prisoner-witnesses. The

Ombudsman is satisfied that is is not possible to accommodate such sensitive prisoners within the present gaol system and, for that reason, has commenced a formal investigation into the prisoner's complaint.

52. Prisoners and the Mental Health Act

During the year the Ombudsman received complaints from prisoners who had been detained for long periods in psychiatric hospitals. The complaints gave rise to concern about the administration of the provisions of the Mental Health Act relating to persons under detention. The Ombudsman's view, generally, is that it is unreasonable to use mental hospitals as a form of preventive detention and that some mechanism needs to be established that fairly balances the medical interests of patients, the interests of the community and the patients' civil rights. The Ombudsman understands that the Mental Health Act 1983 was proclaimed in August 1986. Many of the problems identified in the investigations being conducted by this Office might now be addressed. The following cases illustrate some of the problems:

Case 1 - Mr A

In August 1985 Mr A, a remanded prisoner who was being detained in Morisset Psychiatric Hospital, complained to the Ombudsman that he had been prevented from going to trial because he had been certified as mentally ill in terms of the Mental Health Act.

Part VII of the Mental Health Act 1958 dealt with persons under detention. Section 24(1) provided that, when any prisoner awaiting trial was certified as mentally ill by two medical practitioners, the Minister for Health might authorise the prisoner's removal to a mental hospital until he or she was found to be no longer mentally ill. Section 26 of the Act empowered the Attorney-General to remove such patients from hospital to gaol so that their "fitness to plead" could be determined by a jury. Section 26(9) required that any prisoner found by a jury to be fit to plead was to be returned to gaol to await trial.

In January 1984 Mr A had been remanded to Long Bay Gaol on charges of "common assault" and "break enter and steal". He was alleged to have taken some clothing from a boarding house at Rushcutters Bay and to have assaulted one of the occupants. In May 1984 two psychiatrists of the Prison Medical Service, Dr Reid and Dr Fischer, issued certificates under Section 24(1) of the Act in respect of him and, by the authority of the Minister for Health, Mr A was removed to Ward 21 of the Morisset Psychiatric Hospital. Ward 21 is used for the detention of the criminally insane. In October 1984 officers of the Department of Health reviewed Mr A's case and considered him fit to plead, even though they believed that he was still mentally ill. The Attorney-General was asked to issue an order under Section 26 so that a jury could consider the matter. The Attorney-General issued the order and in December 1984 Mr A was transferred to Long Bay gaol.

On 4 April 1985 a District Court jury found that Mr A was fit to plead and he was returned to gaol to await trial. However, on 30 May 1985, the same two psychiatrists again determined that Mr A was mentally ill under the Act and decided to certify him again. In accordance with established procedures, the psychiatrists' certificates under Schedule 3 of the Act were sent to Dr M Sainsbury, Senior Specialist, Mental Health Services in the Department of Health. Dr Sainsbury believed that the certificates were sound and, in a submission to the Minister for Health, recommended that Mr A should be again transferred to Morisset Psychiatric Hospital. The Prison Medical Service failed to tell Dr Sainsbury of the District Court jury's decision; nor was he told that the date for Mr A's trial had been fixed for 15 July 1985. The Minister signed the order for Mr A's removal to Morisset on 7 July 1985.

By the date of Mr A's trial the Minister's order had not been executed. Mr A was escorted to the Court on that day but spent the day in the cells. The prosecutor tendered to the Court a letter from the Prison Medical Service, which said that Mr A had been "certified under Section 24(1) of the Act (unfit to plead)". The prosecutor told the Court that, in view of the notification from the Prison Medical Service, she would not present an indictment. In these circumstances, the Judge had no choice but

to remand the case to a date to be fixed. Four days after the hearing, Mr A was removed to Morisset.

The mistake was discovered in September 1985 when Dr Sainsbury visited Morisset Hospital. He saw Mr A who told him that a jury had found him fit to plead. Mr A said that he wanted to return to gaol to face his trial. Mr A's medical records included notes that he was distressed about his transfer and that he had made repeated requests to see the Official Visitor. A date for mention of his case was arranged for 5 November 1985, but the Department took the view that Mr A was unable to be brought to the Court until the Minister's order under Section 24(1) had been revoked. Therefore, steps had to be taken to have Mr A returned, legally, to gaol.

To resolve the problem, Dr Sainsbury recommended that the Minister for Health ask the Attorney-General to issue a further order under Section 26. The Attorney-General issued his order in December 1985, but he was not told that he had issued an earlier order, nor that a jury had already found Mr A fit to plead pursuant to that order. Consequently, the terms of the order issued by the Attorney-General again required that a fitness to plead hearing be held. When Mr A was returned to Long Bay Gaol, he applied for bail before Mr Justice Enderby, but His Honour said that the matter was out of his jurisdiction and refused the application.

Dr Reid said that in February 1986 he received a telephone call from the Solicitor-General's Office, asking whether he would agree to certify Mr A if the charges against Mr A were dropped. Dr Reid agreed to the request. His file note of the discussion said:

> I understand that [Mr A] is charged with an indictable offence but the Prosecution would be very happy if he could be scheduled in a Schedule 3 to a psych hospital. This of course, is an ideal way of doing a short circumventing all the tedious processes of the law. I am not, however, convinced that scheduling him without judicial backing is strictly legal and lawful. However, it seems reasonable knowing the case that he should be dealt with under a Schedule 3, as it simplifies things.

When this Office reported the matter to him, Dr Sainsbury agreed that issuing a third certificate would not be in Mr A's interests, because he would not be entitled to have his case reviewed by a magistrate, a process available to patients scheduled under the civil provisions of the Act. He agreed to discuss the matter with Dr Reid.

In March 1986 the Attorney-General entered a "no-bill" in relation to the charges against Mr A, who was immediately discharged from gaol. Before Mr A's discharge, a psychiatrist at the gaol certified him under the civil provisions of the Act. Mr A was transferred to Rozelle Psychiatric Hospital under police escort, but escaped two days later.

The investigation conducted by this Office did not seek to question the clinical judgments made about Mr A's mental condition. Rather, this Office was concerned that Mr A had been detained in the criminal system for two and a half years, without trial, on charges of common assault and a minor theft. The Ombudsman believed that, prima facie, there had been a significant miscarriage of justice in Mr A's case.

The Ombudsman was also concerned about the fact that, because Mr A's release under Section 24(1) was possible only when he was considered to be no longer mentally ill, under that legislation he would have been detained indefinitely in Morisset Hospital.

A revised statement of provisional findings and recommendations has been issued in the case of Mr A and further submissions from the parties involved will be considered. The doctors concerned deny any wrong conduct on their part.

Case 2 - Miss W

Miss W has been a patient in psychiatric hospitals for nearly 40 years. In 1948, when she was a patient at Morisset Hospital, she was charged with the murder of another patient and was detained under Section 66 of the Lunacy Act, the precursor of the 1958 Mental Health Act. For reasons which from the records are not clear, she was never brought to trial on the murder charge. In

1986 she was still being treated as a "person under detention". In effect, she has been detained for 38 years.

A complaint on behalf of Miss W was made by a solicitor from the Mental Health Advocacy Branch of the Legal Aid Commission. The solicitor claimed that Miss W had on a number of occasions been recommended for placement in a nursing home. Such placement would require release from her status as a "person under detention" in terms of the Lunacy Act. So far the responsible authorities have not acted on the recommendations. Enquiries are proceeding in this matter.

Case 3 - Mr P

The Legal Aid Commission complained to the Ombudsman about the failure of officers at Morisset Psychiatric Hospital to have Mr P brought to trial after he had been assessed fit to plead in April 1985 by the former Superintendent of Morisset Hospital and a hospital psychologist. Mr P, who had been charged with murder, was detained after being found unfit to plead by a Supreme Court jury in April 1984. He was to remain in custody until he became fit to plead. However, nothing was done to have Mr P transferred to gaol to face another fitness to plead hearing. In April 1986, after the report from the previous Medical Superintendent was discovered on Mr P's file, a solicitor from the Legal Aid Commission brought the matter to the attention of the authorities. If the omission had not been detected, Mr P might have been "lost in the system" forever.

The Ombudsman understands that, under the recently proclaimed Mental Health Act, the Mental Health Review Tribunal will every six months review patients who are in custody, having been found unfit to plead.

Case 4 - Mr G

Mr G, a former Governor's Pleasure detainee, was released from gaol on licence in February 1985, on the condition that he admit himself to Morisset Hospital as a "voluntary" patient. Mr G complained to the Ombudsman that he had been in maximum security

in Ward 21 for seven of his eleven months at the Hospital. The ward, which was designed for patients regarded as criminally insane and highly dangerous, had much tighter security than the minimum security gaol from which he had been released on licence. He complained that his "rehabilitation" was adversely affected by placement in the Ward.

The Department of Health was asked for information about the admission of "voluntary" patients to wards designed for "persons under detention". The Acting Director of Clinical Services of the Hunter Region Mental Health Service said of prisoners released to licence:

> ... It is no longer the hospital's policy to place these patients or indeed any other voluntary patient in Ward 21 ....
>
> In view of the change of policy in the hospital, so that no voluntary or civilian patients are admitted to Ward 21, it can be seen that the hospital has recognised some of the difficulties and frustration of patients who are classified as voluntary but are confined to the forensic ward.

Because of the frustration he felt, Mr G eventually gave the Superintendent of the hospital the necessary seven days notice of his intention to leave. Because it was a condition of his licence that he admit himself to Morisset, his decision to leave amounted to a breach of his licence. His licence was revoked and he was returned to gaol. The investigation of this complaint is continuing.

53. The Prisoners (Interstate Transfer) Act

Under the New South Wales Prisoners (Interstate Transfer) Act and similar legislation in other participating States, prisoners in gaol in one State can apply for transfer to another State. Applications can be made on two grounds: for the purpose of facing trial, or for the welfare of the prisoner.

Prisoners must make written requests for transfer. The regulations under the Act provide that an application for transfer on welfare grounds must include statements about:

(a) family or near family support in the participating State, including the availability of accommodation upon release from prison;

(b) family or other social circumstances that may benefit the welfare of the prisoner either during imprisonment or following release from prison;

(c) medical reasons (if any) in support of the request;

(d) prospects of employment following release from prison;

(e) any other matters which the prisoner wishes to put forward in support of the request.

The intent of the legislation was described by the then Attorney-General in the following terms:

> The humanitarian arguments for prisoners being transferred to other States to serve sentences are obvious. If a prisoner is in an institution located a great distance from his family, visits are difficult and links may eventually break under the strain of separation. This lack of contact with families brings hardship to family members who have done no wrong, and is extremely unsettling for prisoners. If stable family and other social relationships can be maintained throughout a prison sentence, behaviour may be better and the chances of successful rehabilitation after release are enhanced if prisoners are able to rely on the support and assistance that family members provide.

In October 1985 the Ombudsman received a complaint from a Queensland prisoner, Mr P, who could not understand why his application for transfer to a New South Wales prison had been rejected by the New South Wales Minister for Corrective Services. Mr P had been told that his application did not have sufficient grounds to support it, but he believed that the grounds he had submitted, which were based on the welfare of himself and his family, had been strong enough to warrant approval of his application.

The complaint concerned a decision by a Minister of the Crown, and this conduct is excluded from investigation by the Ombudsman. However, the Ombudsman is able to investigate the conduct of a

public authority in making a recommendation to a Minister, and Mr P's complaint was taken up on that basis with the Department of Corrective Services. Examination of the Department's file showed that the submission made to the Minister about Mr P's application was not an accurate account of all of the material available at the time. The rejection of Mr P's application appeared to have had little to do with welfare considerations. The submission sent to the Minister said that Mr P's de facto wife had five children and that Mr P had been twice convicted of seriously assaulting very young children; in fact, Mr P's present gaol sentence had resulted from such an offence. In his submission to the Minister, the Chairman of the Corrective Services Commission referred to reports from the Queensland authorities, and concluded:

> Both Dr Edwards, Psychiatrist-in-Charge, City Psychiatric Clinic, Brisbane, and Mr V J A Petralia, Welfare Officer, Brisbane Prison Complex, have expressed deep concern over the health and safety of young children living under the same roof as P. Accordingly, it is considered that it would be irresponsible to encourage the prisoner's continued relationship with his present de facto wife and her five children. It is therefore RECOMMENDED that the Minister not consent to P's transfer to this State under the provisions of the Prisoners (Interstate Transfer) Act.

However, both the Queensland Minister for Prisons and the Department's Probation and Parole Service had supported Mr P's transfer because the application was based on welfare grounds and met all the criteria under the regulations. These expressions of support for the transfer were not mentioned in the written submission; nor was mention made of a statement by an officer of the Department of Youth and Community Services that Mr P had been living in "apparent harmony" with the children for almost a year. Indeed, the officer later told this Office that the children "appeared to adore" Mr P.

In a draft report the Ombudsman concluded that the Department's submission to the Minister did not fairly represent the diversity of views of the various authorities concerned in the case and the facts on which those views were based; the demands on the time of a busy Minister place a high duty on a Department to give to the Minister advice representing a comprehensive and balanced summary

of the facts. The Department had not done this. As well, the Ombudsman concluded that the Department had failed to submit for the Minister's signature correspondence which accurately reflected the reasons for the rejection of Mr P's application.

Because Mr P's de facto wife and her children had moved to Queensland shortly before the Ombudsman's report was issued, no recommendation was made about Mr P's case. Nevertheless, the Ombudsman recommended that all staff involved in the processing of applications be counselled as to their responsibilities to prepare submissions which fairly represent the facts available on the file.

In this case the Department had asked the Minister to exercise his discretion about matters apart from those specifically provided for in the legislation, namely Mr P's prior convictions. The Ombudsman recommended that the Department advise prisoners of any additional areas in which the Minister's discretion might be exercised, so that they could address such matters in their applications.

54. Classification decisions - reasons should be given

Classification within the prison system is a matter of great importance to prisoners. A vastly different lifestyle is available to a prisoner on a low security rating, compared to that of a prisoner confined in a maximum security gaol.

The Ombudsman receives a number of complaints each year from prisoners about the operation of the classification system. The theory of the system seems to be that long term prisoners should have the opportunity of working their way through the various security gradings, so that they are able to spend some time at a minimum security prison before their release. Prisoners believe, rightly or wrongly, that the quicker they are able to obtain a minimum security rating, the greater the likelihood of their early release. Prisoners classified to minimum security gaols may also be allowed to attend educational courses outside of the prison for short periods of time.

To obtain a low security rating, a prisoner submits an application and attends a Programme Review Committee meeting, at the prison in which he is confined, for assessment. A Programme Review Committee usually comprises prison officers, education and welfare officers, a psychologist and, perhaps, other officers who have spent time with the prisoner. The Superintendent of the gaol, or one of his assistants, also takes part in the assessment. The Committee's assessment and recommendation are recorded on a classification sheet, a copy of which is given to the prisoner. The classification sheet is then sent to the Department's Head Office for consideration by a Classification Sub-Committee. A final decision about the prisoner's security rating is usually made by either the Director or Deputy Director of Classifications. In some cases, where a low security rating has been recommended for a long term prisoner, the matter is referred to the Chairman or the Deputy Chairman of the Commission for decision. The final decision is noted on the classification sheet, with the signature of the officer making the decision, and a copy is returned to the Superintendent of the prison, who informs the prisoner of the final decision.

A prisoner complained that, although both the Programme Review Committee and the Classification Sub-Committee had recommended that he be given a low security rating, this had been rejected by the Deputy Chairman of the Commission, who had directed that the matter be reviewed in 2 months time. No reasons were given for this decision. When he was told of the decision, the prisoner wrote to the Ombudsman and said that he could not understand why a low security rating had not been approved. He claimed that his application was being "interfered with" and that he was being discriminated against. He said in his letter that an officer of the Classification Committee had approved his low rating but that three days later, "someone decided to override his decision - why?"

This Office investigated the failure of the Department to provide the prisoner with reasons for the decision. The prisoner's classification file was examined and the Chairman was asked to explain the Department's procedures for giving reasons for its decisions. The Chairman said:

There is no specific requirement that reasons be given for not approving Programme Review Committee recommendations. However, reasons are given in some cases.

The Ombudsman concluded that it was self defeating for a prisoner to be given a copy of the report and recommendations of the Programme Review Committee, but, when those recommendations were not approved, for neither the prisoner nor the Superintendent responsible for him to be given reasons for the decision. The Ombudsman found that the failure of the Department to give reasons for its decision in this case was unreasonable.

In March 1986 a draft report was forwarded to the Minister for Corrective Services. At about that time, the New South Wales Government appointed Mr T J Martin, QC to conduct an inquiry into the classification system. The Minister said that he wished to defer his final consideration of the Ombudsman's draft report until after he had received Mr Martin's report. The Ombudsman agreed to the Minister's proposal. It is understood that Mr Martin's report will be completed soon.

In the meantime, the Chairman of the Corrective Services Commission told the Ombudsman that reasons were being given to prisoners in all cases where the Classification Sub-Committee's decision differed from the recommendation of the Programme Review Committee, except where there were security reasons for not doing so. This was in accordance with one of the Ombudsman's recommendations. Some time later, this Office received another complaint from a prisoner where reasons had not been given. The Department said that, in this case, there had been an oversight.

The Ombudsman also recommended that prisoner classification sheets be amended so that, where the final decision differed from the Programme Review Committee's recommendations, a space be provided on the sheet for reasons. The Chairman of the Commission, Mr V J Dalton, has not accepted that the prisoner classification sheet requires amendment. The Ombudsman will defer consideration of this issue until the Minister has decided whether he wishes to consult with the Ombudsman about the draft report.

Matters Followed Up

55. Compensation for prisoners injured while working

The last two Annual Reports have referred to the problem of adequate compensation for prisoners injured while engaged in gaol industry. The issue came to light as the result of a complaint from a solicitor acting for Mr T, who had been permanently incapacitated in an accident at Glen Innes Afforestation Camp. The Department of Corrective Services offered an ex gratia payment of two thousand dollars, on top of medical expenses which were then over five thousand dollars. The offer was said to be based "on advice from the Crown Solicitor", but when that advice was studied, it was clear that the Crown Solicitor did not purport to assess the amount of compensation. He simply suggested a "sympathy payment" in the region of two thousand dollars.

The Ombudsman concluded that the Department had not attempted to apply appropriate criteria to assess the prisoner's claim for compensation. Another opinion, obtained by this Office from an independent barrister experienced in the workers' compensation field, was that an appropriate assessment would have been in the range of $63,200 to $77,200.

The Ombudsman's draft report recommended amendments to the Prisons Act to enable compensation assessments to be made by reference to earning capacity, whereupon the Minister for Corrective Services asked the Treasurer to pay the complainant an advance sum of $10,000 pending further enquiries. The Department has now referred the claim to the Government Insurance Office for assessment, having obtained further details from the complainant's solicitors.

On 9 April 1986 the Minister for Corrective Services advised the Ombudsman that an interdepartmental committee had been set up to examine the question of compensation to prisoners. The Minister has since been asked when the committee's report will be available. Meanwhile, the Ombudsman will monitor the Department's handling of the assessment of Mr T's claim.


HOW DO I GO REGARDING COMPENSATION?
GOOD QUESTION...

56. Searching of visitors to prisoners

The 1984-85 Annual Report described the problems associated with Prison Regulation 96B, which authorised a prison officer to require a visitor to a gaol to submit to "being searched personally". Following a complaint from a prisoner at Bathurst Gaol that his wife and six year old daughter had been strip-searched during a visit, the Assistant Ombudsman discovered that there were no guidelines for prison officers conducting such searches. The scope of the powers conferred by the regulation was also unclear. Individual prison officers were left to determine whether "being searched personally" meant searching only a visitor's clothing and possessions or whether it extended to strip-searching or even to searching body-cavities.

After the complaint was made to the Ombudsman, the Department of Corrective Services appointed its own officer to investigate the incident; he recommended that a legal opinion on the regulation be obtained, because he felt that it was ambiguous. The Department acted on that recommendation and in October 1985 a new version of Regulation 96B was enacted, effectively removing the uncertainty surrounding the old regulation. In its new form, the regulation authorises a prison officer to require a visitor to "submit to a search of personal possessions or to a search from head to foot by the use of hand held scanning devices or to both of those searches". If the visitor refuses to submit to such a search, or if the prison officer has reasonable cause to believe that the visitor is in possession of contraband, then the visit shall proceed only as a "box" visit, that is, one where the parties are separated by screens. In the event of a contact visit being refused, the details are to be notified to the Commission.

57. Prison Visitors Scheme

Last year's Annual Report expressed the hope that the Prison Visitors Scheme would prove to be effective and be extended to cover all prisons in New South Wales.

In April 1986, following evaluation of the pilot programme commenced twelve months previously, the Minister for Corrective Services advertised in the press for applications for appointment as Official Visitors, so that the Scheme could be extended to all prisons within the State.

A new policy on the operation of the Prison Visitors Scheme was prepared. The Chairman of the Corrective Services Commission provided a copy of the policy document to this Office; it is reproduced below. The Chairman said that the policy will be regularly reviewed, and amended in the light of experience.

The Ombudsman applauds the extension of the Prison Visitors Scheme to all gaols and believes that its continued effective operation should further reduce the number of occasions on which prisoners find it necessary to approach the Ombudsman's office.

Official Visitors - Policy Statement

It is the belief of the Commission that the introduction of the Official Visitors Scheme will be of considerable benefit and value both to institutional staff and inmates.

It is intended that within the institutions there will be developed productive relationships which will facilitate the resolution of problems quickly and effectively so that only those issues which are unable to be resolved locally will have to be referred on.

As a general principle, Official Visitors should not do anything someone else can do and should do. It follows, therefore, that much of an Official Visitor's work will be that of problem-solving, mainly by appropriate referral (with any necessary follow-up to confirm resolution).

Although Official Visitors will always have direct access not only to the Commission but to the Minister, it is envisaged that except in the most unusual circumstances, all complaints will initially be discussed with the Superintendent.

Aims

1. To address inadequacies and injustices affecting prisoners and staff.

2. To deal with complaints at a local level wherever

3. To provide an additional avenue of communication with the Commission and the Minister through the regular reporting of the nature of complaints/inquiries and the success or otherwise of resolution.

4. To identify those areas where, prima facie, complaints may be more appropriately dealt with by Official Visitors than by the Ombudsman.

5. To keep appropriate statistics for the effective evaluation of the scheme.

Official Visitors

1. Official Visitors can visit the institution at any time except where in the opinion of the Superintendent a visit would be inappropriate for reasons of security.

2. Official Visitors are required to visit the institution at least once per month and to make themselves available for interview by staff and inmates.

3. Official Visitors as a matter of courtesy and practicality will notify the Superintendent of the date and time of their intended visit.

4. All complaints made to Official Visitors shall be supported by full details including the full name of the complainant. The name of the complainant shall appear on the relevant reporting document Form B.

5. When a complaint/inquiry is received the Official Visitors should:

   a. immediately record it in his or her official diary;

   b. clarify the facts of the matter;

   c. ascertain what action the complainant or inquirer has already taken;

   d. advise the complainant or inquirer of other possible action which may be taken;

   e. or take up the matter on behalf of the complainant or inquirer;

   f. an Official Visitors's Record Form will be completed in connection with each complaint.

6. The Official Visitors should discuss complaints with the Superintendent so that quick resolution of each can be attempted at a local level. Reference of complaints to the Superintendent will also assist in clarifying complaints and providing information as to what institutional action, if any, has been taken by the Superintendent or other staff.

7. As a general rule, no problem capable of being dealt with at the local level should be taken further unless it becomes clear that it has not been or cannot be resolved at that level.

8. Official Visitors should meet regularly with representatives of the Unions but not become involved in complaints from staff which fall within the scope of procedures agreed to between the Commission and Public Service Association of NSW for the settlement of Prison Officer grievances and disputes (the Dey agreement) unless it appears that the industrial issue being dealt with in accordance with the procedures is not being handled properly.

9. The Official Visitors must deal with enquiries and complaints without interfering with the management or discipline of an institution.

10. Official Visitors must not give, or purport to give, any instructions to any officer or to any prisoner.

11. Where more than one Official Visitor is appointed to an institution each must inform the other of persons they have interviewed and the substance of the inquiries/complaints, to ensure that duplication does not occur. They may attend the institution separately if they so wish.

12. Official Visitors are required to report by way of a quarterly report to the Commission and the Minister.

13. Quarterly Statistical Summaries based on the "Official Visitor's Record of Matters Raised" will be prepared by the Research and Statistics Division.

    The quarterly report to the Chief Administrative Officer will be submitted by 21st day of January, April, July and October. Statistical Summaries are to be submitted by the Research and Statistics Division to the Chief Administrative Officer for transmission to the Commission and the Minister.

    This does not preclude earlier Commission or Ministerial attention being drawn to specific cases which the Visitor deems necessary for the resolution of a problem.

14. Official Visitors should advise the complainant to refer to the Office of the Ombudsman any matter which they feel should be dealt with by that office.

15. The Official Visitors should be prepared to deal with any matter referred to them by the Ombudsman.

16. Official Visitors' Remuneration:

    Claims for remuneration from Official Visitors will be approved only for actual visits to gaols to which they are appointed and for attendance at meetings when requested by the Minister or the Commission. Claims for incidental

expenses incurred in visiting gaols or attending meetings will be paid if supported by receipts. Rates as determined from time to time can be obtained from the Chief Administrative Officer.

Commission

1. The Corrective Services Commission will receive the quarterly reports and the quarterly statistical summaries.

2. The Commission will promptly initiate enquiries into matters which have been directed to it.

3. The Commission will provide quarterly reports to the Minister summarizing the results of the Official Visitors' activities.

4. The Commission will provide regular reports to the Official Visitors re the progress made in the resolution of the problems referred to it. The Commission will cause a register to be kept of all unresolved matters referred to it by Official Visitors.

Superintendent

1. The Superintendent will notify all staff and prisoners of the date and time the Official Visitor(s) will be in attendance.

2. The Superintendent will advise that if problems have arisen and they have not been able to have these problems dealt with satisfactorily by institutional staff, they should generally refer them to the Official Visitors rather than to the Ombudsman. For example:

    Social welfare problems
    Delays in responding to applications and requests
    Problems regarding private property
    Transfers
    Classification
    Gaol Earnings
    Remissions and Sentence Calculations
    Dissatisfaction with decisions and desire for review

    This does not preclude prisoners bringing a matter to the attention of the Ombudsman.

3. As a matter of courtesy the Superintendent will inform the Official Visitor on his or her next visit of action taken to resolve the problems brought to his or her attention on the previous visit.

4. The Superintendent will afford the Official Visitor access to necessary documents and information.

58. Peter Schneidas

Previous Annual Reports have referred to investigations into complaints by Mr Schneidas and his wife, most of which related to his placement on protection at the Metropolitan Reception Prison. Many of the complaints alleged consistent harassment of Mr Schneidas and his visitors by prison officers.

In January 1986 a fire in Mr Schneidas' cell destroyed much of his property. The fire was detected some time after he had been escorted from the cell and at the time of his removal the door of his cell was locked by prison officers. Mr Schneidas complained to this Office about the incident. Following an investigation by Arson Squad detectives, a report on the fire was sent to the Coroner, who decided to hold a coronial inquiry into the fire. Because of this development, the Ombudsman's investigation into this complaint will not continue.

On 30 May 1986 Judge Graham of the District Court heard an appeal by Mr Schneidas against the adjudication of the Visiting Justice in relation to a charge of "failing to treat a prison officer with respect and courtesy". The Visiting Justice had found the offence proved and had ordered that Mr Schneidas be confined to his cell for three days. Mr Schneidas challenged the validity of Rule 4 of the Prison Conduct Rules under which the charge was laid. Rule 4 provides:

> Prisoners shall at all times treat prison officers and other persons at the prison with respect and courtesy and shall not use any insulting or threatening language to them.

The basis of the challenge was that Rule 4 was outside the rule-making power contained in section 49 of the Prisons Act which provides:

> The Commission may with the approval of the Minister make rules not inconsistent with this Act for the management, control, good government, supervision and inspection of prisons.

His Honour found that Rule 4 is invalid to the extent that it requires a prisoner at all times to treat prison officers and other persons at the prison with respect and courtesy. Before upholding the appeal, he adjourned the matter generally to enable the Department of Corrective Services to consider whether it would ask him to state a case to the Court of Criminal Appeal. In delivering his judgement, His Honour said:

> The requirement of treating prison officers at all times with respect and courtesy is, in my view, an attempt to legislate for good manners rather than a measure calculated to enforce prisoner discipline. I acknowledge that it is capable of being applied by those charged with its administration so as to deal only with departures of standards of respect and courtesy which might have a real bearing on the maintenance of prison discipline. On the other hand, on its face, the rule simply legislates for good manners. Whilst good manners are desirable not only within prisons but throughout the community, it is, in my view, beyond the intended delegation of any legislative power to create an offence requiring simply the observance of good manners.

Elsewhere in this report, the plans of the Department to deal with the question of prison disciplinary rules are mentioned and this case is of interest in the light of the proposed legislative changes.

59. Gaol Superintendents' disciplinary powers: Rule 5(b)

This matter was covered in detail in the 1983-84 Annual Report, and it was noted in the 1984-85 Annual Report that the Minister for Corrective Services had repealed Prison Rule 5(b) on 18 December 1984.

In the Ombudsman's October 1984 wrong conduct report on the use of the rule for disciplinary purposes, he recommended that section 49 of the Prisons Act be repealed, that the rules made under section 49 be reviewed and that necessary measures in those rules be made regulations.

In early 1986 the Chairman of the Corrective Services Commission

said that Cabinet had approved an amendment to the Prisons Act to enable the Government to make regulations for the conduct of prison officers and for the management, control, good government, supervision and inspection of prisons. The amendment is contained in Clause 8 of Schedule 1 of the Prisons Amendment Bill, which is expected to be introduced in the Budget Session of Parliament.

The Ombudsman will follow the passage of the amending legislation with interest.

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT

Broader Issues

60. Introduction

Since 1978 the Office of the Ombudsman has been a civilian review body overseeing complaints made against police. However, until 1983 the Ombudsman's powers were limited to a mere paper review of police investigations. As last year's Annual Report noted, this process "could only deceive the public into believing that there was an effective watchdog body when there was not".

In 1983 the Ombudsman was given power, at his discretion, to reinvestigate complaints made against police and to use Royal Commission powers, if he wished, to assist him in finding the truth.

In an impromptu address in 1985 to an International Conference on civilian oversight of law enforcement, former US Attorney-General Ramsey Clark made the following case for vigorous civilian oversight of police complaints:

> What I want to say is pretty hard to communicate ... but how timid it is, that we talk about civilian oversight of law enforcement ... Dare we permit the people to have some say about how they are policed? ...

> For all your constitutions and all your beautiful concepts it's what happens on the street between the police and the people that determines how free and equal your people are ...
>
> ... when it comes to the police, isolated and segregated enforcers, we create a political firestorm by merely suggesting in many places, where fear runs high, that perhaps, just perhaps, we should be so bold as to permit police conduct - to tentatively and in a very limited fashion be reviewed be we the people.

Despite some continuing problems, which are dealt with elsewhere in this Report, the Ombudsman believes that the present system of dealing with complaints against police in New South Wales represents a valuable and effective safeguard of the rights of citizens.

61. Legislative foul-up resolved

In the 1984-85 Annual Report the Ombudsman described how a drafting error in an amendment to the Ombudsman Act, prepared by the Premier's Department, had had the unintentional effect of raising serious doubts about the ability of the Deputy Ombudsman to conduct reinvestigations of complaints against police. The Deputy Ombudsman stepped down, and there were delays in conducting reinvestigations; some police had allegations hanging over their heads for long periods.

The Ombudsman asked for urgent remedial legislation, and in September 1985 the Premier informed him that Cabinet was considering legislative amendments which would empower both the Deputy Ombudsman and Assistant Ombudsmen to conduct inquiries into police complaints.

These amendments were finally assented to on 10 December 1985, and on 12 March 1986 the Premier agreed to the appointment of a second Assistant Ombudsman to assist in dealing with the considerable backlog of matters. Priscilla Adey was appointed to this position and took up duty on 19 May 1986.

The backlog of cases is being steadily reduced.

62. Reinvestigation by Ombudsman using Royal Commission powers

Section 19 of the Ombudsman Act gives the Ombudsman the powers of a Royal Commissioner. In reinvestigating complaints against police, the Ombudsman often uses his Royal Commission powers. The Ombudsman Act also provides for the Deputy Ombudsman and Assistant Ombudsmen to conduct hearings. The powers available to the Ombudsman's Office, in the course of reinvestigation, include the power to summons witnesses, to search premises and to require the production of documents and other information.

During the twelve months ended 30 June 1986, thirty four reinvestigations were commenced and twenty seven hearings were held. The numbers of reinvestigations and hearings were significantly fewer than last year. This was a direct result of the "legislative foul-up", described in last year's Annual Report, which prevented the Deputy Ombudsman conducting reinvestigations. The problem with the legislation meant that only the Ombudsman could conduct hearings, and few hearings were conducted between June and December 1985. After the legislation was amended the Deputy Ombudsman and Assistant Ombudsmen were able to conduct hearings, and the number of reinvestigation hearings is expected to increase in the coming year.

The results of the completed reinvestigations in the year ended 30 June 1986 are set out in the topic dealing with statistics in the police reinvestigation and investigation area.

There are approximately sixty matters presently under reinvestigation. The twenty-seven hearings in the past twelve months included the reinvestigation of:

1. Complaints arising from the "Redfern riots", where police clashed with Aboriginals and significant numbers of arrests were made. Evidence was taken from 27 witnesses over six days of hearings.

2. Allegations that police officers allegedly tendered false traffic conviction records in Local Courts. It was alleged that, for the payment of approximately $1,500, people could have

their traffic conviction records altered, and receive a lesser penalty in court. The hearing in this matter is continuing; so far some 14 witnesses have given evidence over seven hearing days, and an extensive search of court records is taking place.

3. A complaint by a police officer that, while present at a party, he overheard a senior police officer, formerly attached to the Police Internal Affairs Branch, boast that he had gone to Bathurst and Orange to investigate a complaint and that he had told the police concerned "what to say and what not to say", to enable them to "beat the blue". The hearing in this matter is complete. Evidence was taken from 16 witnesses over six days.

4. An allegation by an Alderman that police unlawfully interfered with a council meeting, causing an Alderman to leave the meeting because he believed he might be arrested or forcibly removed.

5. A complaint by the Western Aboriginal Legal Service on behalf of an Aboriginal who alleged that he had been assaulted, abused, threatened and sworn at by police. The Ombudsman held a hearing in Bourke and took evidence from twelve witnesses.

6. Allegations from a complainant who lived in a small country town that he was assaulted by a senior constable and that, after the assault, he was harassed by a sergeant from the local police station. The Deputy Ombudsman held a Section 19 hearing, twice visiting the town and taking evidence from eight witnesses over a period of three days.

7. Allegations by Mrs T that a senior constable failed to respond to her telephone call for help, and to claims that her husband had threatened to shoot her. Mr T had removed a settee from the family home and set alight to it, apparently because he thought Mrs T had destroyed his first pair of baby booties.

8. An allegation that police officers used excessive force when taking the complainant to a hearing at Manly Court. The officers, it was claimed, forcefully removed t e complainant's watch and would not return it to him, even though he required it

to accurately time the medication which, as a diabetic, he needed to take regularly. The hearing was held over a four day period by the Deputy Ombudsman.

Twenty-eight reports, draft reports or statements of provisional findings and recommendations have been prepared in Section 19 matters. Those documents have been sent to complainants, the Commissioner of Police, the police officers concerned and, where complaints have been sustained, to the Minister for Police, in accordance with the Police Regulation (Allegations of Misconduct) Act.

63. Police complaints - statistics

Some complaints about police involve both the Police Regulation (Allegations of Misconduct) Act and the Ombudsman Act. A common example of this is a complaint about the issuing and review of a Traffic Infringement Notice: the actions of a police officer in issuing the Notice involve the Police Regulation (Allegations of Misconduct) Act; the actions of public servants in the Traffic Branch in reviewing the Notice involve the Ombudsman Act.

Complaints received

Complaints about the New South Wales Police Department in the year to 30 June 1986 were:

Complaints outside jurisdiction	13
Complaints involving Ombudsman Act only	42
Complaints involving the Police Regulation (Allegations of Misconduct) Act only	1670
Complaints involving both Acts	6
Total complaints received	1731

This was the first year since the introduction of the Police Regulation (Allegations of Misconduct) Act in which the number of complaints about police declined. The largest number of complaints received in any month was in May 1985, when 203 complaints were received. Thereafter, for some months, the number of complaints received declined steadily. Lately, that decline seems to have levelled off. The table below demonstrates the changes.

Year	Complaints Received	% Change
1978-79*	244	-
1979-80	741	-
1980-81	830	+12
1981-82	1121	+35
1982-83	1349	+20
1983-84	1550	+15
1984-85**	1798	+16
1985-86	1731	-4

* jurisdiction commenced on 19 February 1979
** corrected figure

The initial increase in the number of complaints probably occurred as the public became increasingly aware of the role of the Ombudsman. Part of the recent fall in the total number of complaints stems from the reduced number of complaints about the administration of the Police Traffic Branch, where administrative improvements are evidently having an effect. (See item 117 in the 1984-85 Annual Report).

There is now a police campaign, in which senior officers of the Internal Affairs Branch visit all Police Districts in the State to instruct police in their responsibilities and in their manner of dealing with members of the public.

Complaints dealt with under the Police Regulation (Allegations of Misconduct) Act, 1978

Action was completed in 1230 complaints in the year ended 30 June 1986, with the following results:

Not - or not fully - investigated

Declined	656	53.33%
Conciliated	175	14.22%
Investigation discontinued	133	10.81
Total	964	78.37

Not sustained findings

Finding on undisputed facts (no reinvestigation undertaken)	51	
Unable to determine, not	19.17	police [illegible] 266 21.62%

reinvestigated - deemed not sustained		
- no request for reinvestigation	121	60.15%
- reinvestigation requested but refused	39	
Following reinvestigation by Ombudsman	12	4.51%
Total	223	83.83%
Sustained findings		
Finding on undisputed facts (no reinvestigation undertaken)	18	6.76%
Following reinvestigation by Ombudsman	9	3.38%
Total	27	
Discontinued during reinvestigation	16	6.01%
Total	1230	

A total of 1397 complaints was dealt with in the previous year; the present total represents an 11% reduction. There was a 32% increase in the number of matters declined, a 30% decrease in the number of matters conciliated, a 57% decrease in the number discontinued and a 38% decrease in the number found unable to be determined and deemed to be not sustained (no reinvestigation undertaken). Figures for the other categories of results are small, and variations in percentages have little meaning.

In each of the areas where a reduction has been noted, the Ombudsman cannot take action to complete the matter until a report has been submitted by investigating police. An increase in the time taken by police in submitting their reports reduces the number of matters completed by the Ombudsman's Office.

Declined complaints

Section 18(1) of the Police Regulation (Allegations of Misconduct) Act allows the Ombudsman to decline a complaint, having regard to "such matters as he thinks fit", including whether the complaint is "frivolous, vexatious or not in good faith" or "trivial". He may also have regard to remoteness in time, the availability of an alternative and satisfactory means of redress, and the complainant's interest in the matter.

Many complaints concern the issue of Traffic or Parking Infringement Notices. It is usual for such complaints to be declined on the ground that the question of whether an offence has been committed is generally one for the courts to determine. Where the complaint is both about the issue of an Infringement Notice and other, relatively minor, misconduct of the officer at the time (such as rudeness), the matter is usually declined, but the complainant is invited to make, if he or she so wishes, a further complaint once the infringement matter has been finalized. Other complaints are usually declined where the subject matter of the complaint is to be determined by courts. Of 656 complaints declined, 280 (43%) concerned Traffic or Parking Infringement Notices.

Other complaints are now being declined where they are made directly to the Police Department and it appears that simple action by that Department (such as clearing up a misunderstanding about procedure) is likely to result in a resolution of the matter; the complainants are invited to write again to the Ombudsman if they are dissatisfied with the actions taken by the Department.

Anonymous complaints

Of the 1731 complaints received during the year, 38 (2.2%) were made anonymously. This represents a small increase on the previous year.

Year	Received	Finalised
1983-84*	15	8
1984-85	31	20
1985-86	38	31

* Jurisdiction over anonymous complaints commenced 31 December 1983

The following determinations were made in anonymous complaints

Declined	17
Discontinued	1
Not sustained finding*	12
Sustained finding	1
Total	31
Reinvestigation commenced	1

* A relatively large proportion of anonymous complaints is found not sustained because the Ombudsman believes that information provided anonymously and not corroborated cannot be considered evidence for the purposes of making decisions as to fact.

Matters reinvestigated

A complaint under the Police Regulation (Allegations of Misconduct) Act must be investigated by members of the Police Force in the first instance. If, after that investigation, the Ombudsman, largely by reason of conflicting evidence, is not able to be satisfied that the complaint is either sustained or not sustained, he may decide to re-investigate the complaint under the provisions of the Ombudsman Act. (If he decides not to do so the complaint is deemed not sustained.)

19.07%

In the year ended 30 June 1986, there were 194 cases in which, on the basis of the initial police investigation, the Ombudsman or his officers were not able to be satisfied that the complaint was sustained or not sustained. In these matters, 34 reinvestigations were commenced and the remainder were deemed not sustained.

18.78%
of 197

During a reinvestigation the Ombudsman has the power to hold inquiries and to conduct hearings. Since December 1985 the Deputy Ombudsman and Assistant Ombudsmen have also been able to exercise that power. Most reinvestigations include hearings, which may last from a few hours to several days. Twenty-seven of these hearings were held during the year.

The results of reinvestigations conducted during the year were:

Sustained (or part sustained) findings	9
Not sustained findings	12
Reinvestigation discontinued	16
Total	37

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, Section 33 of the Police Regulation (Allegations of Misconduct) Act requires him to report this to the Minister for Police and the Commissioner of Police. As a result of his reinvestigations, the Ombudsman made one such report during the year.

64. Exclusion of civilian investigation officers from police complaint reinvestigations: need to end restrictions: further report to Parliament

In the previous Annual Report the Ombudsman referred to a report to Parliament on 11 April 1985, in which he recommended that the Ombudsman Act be amended to allow civilian investigation officers to participate in the reinvestigation of complaints against police. In the report to Parliament the Ombudsman recommended that, if the Government was not prepared to take that step, then as a second best course of action, the Act be amended to enable any Assistant Ombudsman to participate in the reinvestigation of police conduct.

Since the last Annual Report an amendment has been made to the Ombudsman Act confirming the power of the Deputy Ombudsman to participate in such reinvestigations and also enabling any Assistant Ombudsman to be so involved. There are now two Assistant Ombudsmen.

The Ombudsman, however, remains concerned that the Act, in its present form, still excludes civilian investigation officers in this Office from reinvestigating complaints against police. The restrictive provisions are contained in Section 10(2)(e) and Section 32(5) of the Ombudsman Act, which provide:

10. (2) The Ombudsman may not delegate the exercise of -

(e) any of the Ombudsman's powers, authorities, duties and functions with respect to an investigation of prescribed conduct, otherwise than to an Assistant Ombudsman or to a special officer of the Ombudsman who is a member of the investigative staff of the Internal Affairs Branch with the Police Force.

32. (5) An officer of the Ombudsman (other than an acting Ombudsman, the Deputy Ombudsman or an Assistant Ombudsman) may not be concerned in the investigation under this Act of prescribed conduct unless the officer is a member of the investigative staff of the Internal Affairs Branch within the Police Force.

The Ombudsman's concern has been heightened by recent developments which he set out in a further report to Parliament on 24 April 1986:

> The purpose of this further Report is to inform the Parliament of the experience of the Ombudsman over the last twelve months which, in his view, makes it imperative that the original primary recommendation be adopted. It should be emphasised that it is not sought to exclude from the staff of the Office of the Ombudsman those able and dedicated New South Wales police officers seconded there, but to permit the participation of other investigators, including civilians and, in particular, police officers from other states, territories, and other countries, in reinvestigating complaints about police.

The report to Parliament identified the following problems posed by the legislation:

1. Difficulties in recruitment of suitable New South Wales police officers to the Office of the Ombudsman.

The Ombudsman noted that when a circular calling for volunteers for secondment to the Office of the Ombudsman was distributed in January 1984, at the commencement of the new police complaints system, some 30 police officers applied, six of whom were inspectors. A similar circular in the New South Wales Police

Personnel Notices on 7 February 1986 drew a response from only 10 officers, none of whom held a rank higher than that of Sergeant 1st Class. One reason for the fall in the number of applicants would seem to be the recent significant increase in recruitment and seniority of positions in the Internal Affairs Branch and Internal Security Unit.

The Ombudsman noted that there was a perception among several seconded police officers that they might lose promotion opportunities by coming to the Office. Whether correct or not, this perception might be widespread in the Police Force.

2. Need for more women police investigators.

At one time there were three women among the ten seconded officers. All of these officers have now left the Office of the Ombudsman. One has been promoted to the rank of Detective Inspector in the Internal Affairs Branch, becoming the second highest ranking woman police officer in New South Wales. No police women responded to the circular of 7 February 1986. Only after very considerable effort by this Office did two young women constables agree to secondment.

Nevertheless, the essential problem remains. For instance, in specialist cases such as complaints alleging a failure properly to investigate sexual assault, the Office of the Ombudsman cannot utilise its resources to the best effect, as women civilian investigation officers, who make up half the investigation staff, are precluded from being involved. This situation could lead to justified criticism from female complainants.

3. The exclusion extends to interstate and overseas police.

Recent applicants for civilian positions in the Office have included serving or former police officers from other States and Territories and overseas; such people would bring a great deal of experience to the reinvestigation of complaints against police. The Ombudsman said in the report to Parliament:

> Overseas civilian agencies charged with investigating complaints against police frequently have on their staff persons who have had police experience elsewhere but not with the police force the subject of scrutiny. One example of this is the Toronto Office of the Public Complaints Commissioner which has very effectively utilised investigators with previous experience in other jurisdictions.

4. Double handling.

In a recent case a complainant provided to a civilian investigator, during the initial stage of the police investigation, tapes of telephone conversations which he had recorded. It was considered that the tapes could not be used because of the provisions of the Telecommunications (Interception) Act. A file note to this effect was made. The file was later handed over to a seconded officer for reinvestigation. The knowledge that the civilian investigator had of the substance of the conversations, remembered by the complainant independently of the tapes and told to the civilian investigator, was lost when the file was handed over. Fortunately the "lost" information came to light before the conclusion of the reinvestigation.

The Ombudsman is strongly of the view that the restrictions in the Act should now be lifted. The proposal suggested by the Ombudsman will not require any increased funds, and will lead to increased efficiency, effectiveness and independence of the re-investigation process.

In his report to Parliament, the Ombudsman said:

> The argument for abolition of the restrictions on recruitment can be simply stated. In the difficult and important area of investigating police misconduct in New South Wales, the Ombudsman should be entitled to recruit and utilise the best investigators he can obtain. He should not be limited to using serving officers of the New South Wales Police Force.

Following the tabling of the report to Parliament, the Ombudsman wrote to the Minister for Police, the Hon G Paciullo, on 27 May 1986 and raised further matters with him. One of these concerned an application from a very able and experienced Northern Territory police officer who had applied to join this Office and had been interviewed by the Ombudsman. The restrictions in the Act prevent the use of this officer's experience and talent where they could be best applied - reinvestigating police conduct. The Ombudsman also referred to the fact that two of the most senior and experienced seconded officers were seeking promotion elsewhere. The Ombudsman asked the Minister to consider his request urgently and, if he agreed with it, to put a proposal to Cabinet as soon as possible.

On 18 July 1986 the Ombudsman again wrote to the Minister for Police. The Ombudsman advised the Minister that he had recently viewed applications for appointment as general Investigation Officers in this Office. Among the 105 applicants were several persons, of high ability and qualifications, who had previous police experience in Australia, the United Kingdom or other countries. The Ombudsman reiterated the fact that these people would be excluded from using their obvious abilities in the reinvestigation of complaints against police. The Ombudsman asked whether the Minister might be able to indicate his decision in time for inclusion in the Annual Report.

In his reply dated 8 August, the Minister said that he could not complete his full examination of the matter until he received submissions from the Police Association and the Commissioned Officers' Association.

On 5 September 1986 the Ombudsman wrote to the Minister:

> I trust by now that you have the submissions of the Police Association of New South Wales and the Commissioned Police Officers' Association.
>
> From what I know of the submissions they seem to me to completely miss the main point. In Australia, apart from this Office, there are three civilian bodies which have powers of direct investigation or reinvestigation of complaints against Police. These are the Western Australian Parliamentary Commissioner for Administrative Investigations

(Ombudsman), the Police Complaints Authority of Victoria and the Police Complaints Authority of South Australia. None of these agencies is required by legislation to utilise seconded police from the Police Force they are charged with investigating. They, and indeed overseas agencies that I have spoken to, such as the Toronto Commission for Public Complaints, are bemused by the provisions in the New South Wales legislation and would be opposed to it if it were to be applied to their agencies.

What is special about New South Wales? Some would say perhaps of all States of the Commonwealth this State should have a civilian agency not tied to recruiting investigators solely from the ranks of the Police Force it is required to investigate.

Equally as important, in the present economic circumstances, I consider the additional expense in double handling the files referred to in my first report to Parliament is wasteful and unjustified.

I would appreciate learning of your decision in relation to my request for the repeal of Sections 10(2)(e) and 32(5) of the Ombudsman Act.

The issue is of considerable importance and concern to the effective work of the police complaints system. The Ombudsman can do no more than await the decision of the Minister, and ultimately Cabinet, on the issue.

65. Proceedings against police: who should decide?

Last year's Annual Report raised the difficult question: when should police officers be prosecuted? After reinvestigation of a complaint against police, the Ombudsman (or one of his delegates) may find the complaint sustained and conclude that a police officer may be guilty of serious misconduct. In such cases the Office recommends that the Commissioner of Police obtain competent legal advice, independent of the Police Department, as to whether criminal and/or disciplinary proceedings should be commenced. A recommendation is also made that any consequent proceedings should be prosecuted by the Solicitor for Public Prosecutions or independent counsel.

In a number of cases the Commissioner and his delegates have refused to follow the Ombudsman's recommendations, and have sought advice from the Legal Services Branch of the Police

Department. The Ombudsman believes that this course is unacceptable, for the following reasons:

1. The Legal Services Branch has already considered almost all of these cases, at the conclusion of the police investigation, and recommended that no action be taken. No matter how scrupulous or fair officers of the Legal Services Branch may be in reaching a decision, a suspicion of bias is unavoidable in cases where the Branch recommends against bringing proceedings.

2. The Ombudsman believes that there are inherent problems in asking officers of the Police Force to decide whether their fellow officers should be charged, especially when findings of the Ombudsman's Office are contrary to those of initial police investigations. Officers of any police force identify closely with each other, and are likely to find it hard to offer disinterested legal advice involving their colleagues.

3. Many of the officers of the Legal Services Branch, including its present head, do not have legal qualifications.

4. Legal opinions given by members of the Legal Services Branch are subject to comment and criticism by senior police officers.

In one instance a prisoner made very serious allegations about police officers. The investigating officer from the Internal Affairs Branch concluded that there was sufficient evidence for disciplinary charges against a police officer, and sought an opinion from the Legal Services Branch. The Branch recommended disciplinary charges before the Police Tribunal. The then Assistant Commissioner, Mr Perrin, made critical comments about the legal opinion, and recommended to the Commissioner that it be ignored. The Commissioner asked the Branch to reconsider its advice. The Branch then agreed with Mr Perrin's criticism of its advice, and recommended that no action be taken in the matter.

In another case a schoolteacher in a country town complained that a local police officer, while in uniform, had visited the

Catholic school where the complainant taught and had falsely told the school principal that the complainant was having a homosexual affair with a student. The investigating police found the complaint not sustained, on the ground that the police officer was acting purely in a private capacity. After reinvestigation the Ombudsman found the complaint sustained and recommended that independent legal advice be sought as to the likely success of a disciplinary charge against the police officer before the Police Tribunal. Executive Chief Superintendent Pry, on behalf of Assistant Commissioner Shepherd, replied:

> I do not believe that there is any aspect of [the] complaint which can be regarded as sustained and, despite the confirmation of your finding, I remain firmly of that view.

Mr Pry refused to seek any advice about the matters examined in great detail in the Ombudsman's report.

Another complainant alleged that he had been assaulted by police on the Harbour Bridge and charged with assaulting police and resisting arrest. The police investigation found the complaint not sustained. The Legal Services Branch recommended that no action be taken. After reinvestigation, the Ombudsman found the complaint sustained and recommended that independent legal advice be sought on the question of whether disciplinary proceedings should be taken. Mr Pry, on behalf of Assistant Commissioner Shepherd, informed the Ombudsman that the Legal Services Branch had again said that further action was not warranted.

In a fourth case a country solicitor complained that, in the course of negotiating with police on behalf of his clients, he was wrongfully detained as an intoxicated person. The police investigation found his complaint not sustained. After reinvestigation, the Ombudsman found the complaint sustained and recommended that the Commissioner obtain independent legal advice on the question of whether to charge a police officer with misconduct. Assistant Commissioner Shepherd replied:

> After perusing your final report in this matter and in particular your various recommendations, I have initiated the following actions: -

> 1. The officer in charge, Legal Services Branch, will advise as to whether or not sufficient evidence is disclosed to support the institution of departmental proceedings against [police officers]. I can see no reason to seek legal advice independent of this Department in this matter, nor do I agree that any subsequent charges which may be preferred against [a police officer] should be prosecuted by the Solicitor for Public Prosecutions or independent counsel ....

When a reinvestigation by the Ombudsman recommends that independent legal advice should be obtained as to proceedings against a police officer, this should be complied with. That is the best way to ensure that justice is done and is seen to be done. The Ombudsman does not believe that the Police Department's Legal Services Branch is the appropriate body to provide such vital legal opinion.

66. Role of Solicitor for Public Prosecutions: prosecution of police

Prosecution of police officers for criminal offences is a serious matter and involves considerations which do not apply to the prosecution of other citizens. The Solicitor for Public Prosecutions has established a Police Prosecution Unit consisting of four solicitors, under the direction of the Deputy (Legal) Solicitor for Public Prosecutions. The Unit has responsibility in two areas:

> (i) the prosecution of any police officer, charged with any offence, appearing before any court;
>
> (ii) investigations, and prosecutions, involving allegations of corruption on the part of police.

In the first area, the Unit becomes involved, generally, only after criminal charges have been laid against a police officer by other police. The consent of the Commissioner of Police is required before a police officer is charged. The Unit prosecutes all police officers appearing before a court, whether the charge is a summary one or of an indictable nature. Normally, of course, prosecutions of other citizens at the level of Local

Courts are conducted by Police Prosecutors. In complex or serious matters the Unit will brief a Crown Prosecutor to appear for the prosecution.

In the second area, the Unit becomes involved at an early stage. Usually the Police Internal Security Unit seeks the Police Prosecution Unit's advice during investigations. The advice covers such areas as evidence, procedure, substantive law and appropriate charges. When the Internal Security Unit has finished its investigation the papers are referred to the Solicitor for Public Prosecutions for consideration. Advice is then given as to whether charges should be preferred or whether further inquiries should be made. The Police Prosecution Unit drafts the charges and then prosecutes the matter.

In carrying out this second function, the Police Prosecution Unit always obtains the advice of a Crown Prosecutor. If the Crown Prosecutor is of the opinion that police officers should be charged, he advises the Commissioner of Police accordingly. If, however, the Crown Prosecutor does not recommend that charges be laid, the matter is referred to the Crown Advocate for a final opinion. The Crown Advocate then gives his advice to the Commissioner of Police. If there is any difference of opinion between the Solicitor for Public Prosecutions and the Commissioner of Police the matter is again referred to the Crown Advocate.

It is anticipated that the duties of the Police Prosecution Unit will soon be expanded. Under new guidelines, drawn up but not yet implemented, where the Internal Affairs Branch requires advice as to whether a police officer should be charged, the papers will be referred to the Unit. At present, Internal Affairs forwards the papers in such cases to the Police Prosecuting Branch.

67. Police complaints against Internal Affairs Branch and Internal Security Unit

In the Annual Report for 1984-85 the Ombudsman noted a recent development of police complaining about police, a development which showed that police were becoming aware of the advantages of having an independent body of review such as the Office of the Ombudsman. The Ombudsman also referred to harassment of police officers who complained about the actions of their colleagues. The Ombudsman said:

> 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 limitation on this Office's ability to protect them from retribution.

In the last twelve months there have been further developments which are of equal concern to the Ombudsman. A number of complaints have been received about the conduct of police officers, some of them quite senior, attached to the Internal Affairs Branch and the Internal Security Unit. Five of these complaints have been made by members or former members of the New South Wales Police Force. All of the complainant police officers were under suspension or the subject of investigation. Three of these officers were charged with criminal offences and a fourth appeared before the New South Wales Police Tribunal on charges of misconduct, following investigations by the Internal Affairs Branch or the Internal Security Unit.

The complaints included allegations that officers of the Internal Security Unit had improperly released confidential information to the media, victimised police officers, and had withheld and failed to act on evidence. Other complaints were received, some anonymously, alleging that the Internal Security Unit fabricated evidence, forged a document and entrapped a complainant.

There have been media reports that disaffected and corrupt numbers of the Police Force started a campaign against the Internal Security Unit in an attempt to undermine investigations being carried out by that Unit. The Ombudsman is conscious of the fact that police officers who are themselves the subject of investigation may seek to hamper the investigation by complaining to the Ombudsman about the conduct of investigating police. On the other hand, police the subject of investigation are entitled to complain to an independent authority, the Ombudsman, about any use by investigating police of illegal or grossly unfair methods.

In these circumstances, the complaints concerning the Internal Affairs Branch and the Internal Security Unit have been closely monitored by this Office and treated on their merits. In one instance the Ombudsman has declined to require that an investigation be conducted because the complaint was judged to be premature. In such cases the Ombudsman must comply with Section 19(4) of the Police Regulation (Allegations of Misconduct) Act, which provides:

> Where the Ombudsman determines that a complaint should not be investigated, he shall, if the complainant is identified, notify the complainant accordingly, giving his reasons, and shall send to the Commissioner a copy of the notification and of the document incorporating the complaint to which it relates.

In other instances the Ombudsman has requested the Commissioner of Police to provide him with information about the matters raised by the complaint, so that the Ombudsman can decide whether the complaint should be investigated. This procedure is provided for by Section 52 of the Police Regulation (Allegations of Misconduct) Act, and is frequently used when there is doubt as to whether an investigation should be conducted.

In other instances the Ombudsman has required that investigations be conducted, and those investigations are now proceeding.

68. "Classes" of conduct and the Internal Affairs Branch

Section 19 of the Police Regulation (Allegations of Misconduct) Act provides that the investigation of complaints against police should be carried out by the Internal Affairs Branch, except when the officer subject of complaint is an IAB member, or is senior to all IAB officers, or where the Ombudsman and the Commissioner of Police have agreed that the "class or kind" of conduct should be investigated by other police. Until the Ombudsman and the Commissioner have reached an agreement of this kind, virtually all complaints must be investigated by the IAB. The Ombudsman's independent legal advice confirmed this view.

Early in 1985 it became clear that the IAB was not capable of handling the number of complaints received. Delays in investigations increased and the Assistant Commissioner (Internal Affairs) began writing to the Ombudsman complaining about the Ombudsman's "insistence" on the IAB investigating even "minor" matters. He said that, unless the Ombudsman consented to some complaints being investigated by police from outside the IAB, delays would continue to increase.

The Ombudsman was sympathetic to this view, but said that he, like everyone else, was bound to obey the law. He wrote to the Commissioner in March 1985, proposing an agreement, in terms of Section 19, on "classes or kinds" of conduct that should be investigated by police outside the IAB. No reply was received. Delays in investigations grew even longer.

Eventually, after further, futile correspondence, the Ombudsman approached the then Minister for Police and the Chairman of the Police Board, seeking their intervention in the matter. No doubt as a result of this, action was finally taken within the Police Department to propose an agreement as to "classes or kinds" of conduct to be investigated outside the IAB.

On 10 January 1986 the Commissioner of Police proposed to the Ombudsman that the IAB should investigate only complaints about assault (except when minor or technical in nature), corruption, dishonesty or other criminal behaviour.

The Ombudsman immediately agreed to this proposal and began implementing the agreement.

In May 1986 the Ombudsman proposed an amendment to the agreement in the interest of further reducing the workload on the IAB. He suggested that IAB investigation of assault complaints be restricted to complaints of "serious assault". The Commissioner agreed to this.

It now appears that investigations by the IAB are progressing much more rapidly, although there is still room for improvement. Where previously IAB investigators were each handling some thirty complaints per pair of investigators, they now have between fourteen and twenty.

Had the Police Department been willing to accept the plain meaning of the legislation, an agreement under Section 19 as to "classes or kinds" of conduct might have been reached as early as March, 1985.

69. Immediate statements should be taken from police

It seems that police are not following the best investigating techniques when gathering evidence in complaints against their colleagues, in that they do not, as a matter of course, take immediate statements from police against whom complaints have been made.

It appears that an Internal Affairs Branch investigator is often called to the police station where a complaint has been made, in order to take a statement from the complainant. Even though officers the subject of complaint might still be on duty and readily accessible, statements are often not taken from them by the investigator.

Most investigations take a long time to complete, often more than 12 months. If an investigator does not interview a police officer immediately after interviewing the complainant, a

considerable time may elapse before that part of the investigation is carried out. Such a delay is unfair to the complainant and to the police officers concerned. It is in the officers' best interests to make a statement as soon as possible after the alleged conduct has taken place, because their memory of events is clearer. This would also limit suspicion that police officers could discuss a complaint while it was under investigation. This suspicion particularly arises when statements by different police, made several months after an alleged incident, are strikingly similar.

It has been argued that, if police are interviewed at the end of an investigation, all matters which have been raised up to that time can be put to them. Yet police officers, like other people, are often unable to recollect clearly what occurred, when asked to recount an incident at a later date. In any event, it is sensible to interview everyone as close to the time of the alleged incident as possible and then, if necessary, to conduct a second interview at a later time.

The Internal Affairs Branch should, as a matter of course, take statements from police officers as soon as possible after any incident which has been the subject of a complaint; that is simply good investigative technique.

70. Failure of Police Department to provide useful comments on provisional findings and recommendations

The Ombudsman prepares a statement of provisional findings and recommendations after each investigation of complaints against police. Each statement sets out provisional views of the evidence obtained, and is sent to complainants, police officers the subject of complaint and the Commissioner of Police. This practice satisfies the requirements of fairness and is used to obtain any submissions, comments, or additional evidence which may assist the investigation.

Many public authorities, when afforded this opportunity, make detailed and valuable responses. Consequently, the Ombudsman's

final report can differ markedly from the statement of provisional findings and recommendations. Unfortunately, the Police Department does not respond in this way. The Ombudsman has informed the Commissioner:

> Rarely have I received submissions that have assisted me to carry out my task and the exercise has been productive of delay and additional expense.

In one case, a statement of provisional findings and recommendations was issued on 8 August 1985. On 26 August 1985 the delegate of the Commissioner asked that the Ombudsman's final report not be published until the Commissioner's comments had been received; advice was awaited from the Police Prosecuting Branch.

On 20 September 1985 Assistant Commissioner Shepherd again asked that the final report be withheld until comments had been made. He asked for copies of the transcripts of the Ombudsman's Section 19 hearing into the matter, and tape-recordings of the hearing were sent on 30 September 1985.

Ultimately, on 29 November 1985, Assistant Commissioner Shepherd wrote:

> I do not agree with the entire contents of your report and have sought legal advice on certain aspects. However, I do not at this stage wish to offer comment and will await the issue of a final report by you.

This example of the Department's response, although particularly bad, is not untypical.

Further, the Ombudsman has described as "startling" the fact that he has not received a single written comment by the Commissioner or his delegate on the 177-page statement of provisional findings and recommendations in a serious and complex complaint on behalf of Messrs Ainsworth and Vibert.

The Ombudsman has notified the Commissioner:

> I will ... forward a copy of the Statement of Provisional Findings and Recommendations, or relevant extracts, to you

> when there is any criticism of the Department as a whole or of its procedures .... In other cases I will exercise my discretion as to whether I believe you are likely to give me any meaningful assistance in relation to the particular matters under consideration.

71. Requests for information

The Ombudsman has power under Section 52 of the Police Regulation (Allegations of Misconduct) Act to seek from the Commissioner of Police information about a complaint, before deciding whether to require that the complaint be investigated. The Ombudsman believes that this section, properly used, is a valuable aid in assisting him and his officers in determining when, in the public interest, the time and resources of the Police Department and the Office of the Ombudsman should be expended. During the last year increasing use has been made of this procedure to streamline the investigation of complaints.

The Ombudsman believed that the practice of requesting information was generally appreciated by the Police Department. In August 1986, however, Assistant Commissioner Shepherd outlined legal advice that he had received about a complaint:

> ... the powers conferred upon your Office by Section 52 of the Act do not include the power to request that documents be provided and I do not propose to provide any reports, notes or statements in response to your request of 1 May 1985 re-iterated in your subsequent communications.
>
> I am also advised that Section 52 does not empower you to request answers by way of "explanation, comment or information" or otherwise to the questions (1) to (4) inclusive set out in your letter of 1 May 1985.

Believing that an important matter of policy was involved, the Ombudsman replied directly to the Commissioner of Police:

> The second general issue raised by Mr Shepherd's letter, and the history of this particular matter, is the purpose and use of Section 52 of the Police Regulation (Allegations of Misconduct) Act 1978. One object of that Section, in my opinion, is to enable the Ombudsman to be provided by the Commissioner of Police with information which will assist the Ombudsman in determining whether to require an investigation of the complaint pursuant to Section 18, with

its attendant extensive utilisation of scarce resources by the Police and the Office of the Ombudsman. It would seem to me to follow that the more forthcoming the Commissioner of Police or his representatives are in providing comment and information in response to a Section 52 request, the less need there will be for a full investigation under the provisions of the Act. For instance, where the complaint is, as here, that a matter was inadequately investigated, the more information the Commissioner provides in respect to a Section 52 request, other things being equal, the more readily will the Ombudsman be able to determine on the basis of the information provided that no investigation is required.

The converse would also appear to apply. Where, as here, the information provided in response to a Section 52 request has been inordinately delayed and cramped in extent, the Ombudsman may be led more readily to the conclusion that the complaint of original inadequate investigation ought to be investigated.

In more recent times, at my direction, more use has been made by this Office of Section 52 requests, and we had believed that this was playing some part in alleviating the burden of the Internal Affairs Branch and that it was welcomed by you and your responsible officers. Indeed, in a recent personal letter to me, Chief Superintendent Strong of the Police Internal Affairs Branch wrote:

> I also thank you for the use being made of Section 52 of the Police Regulation (Allegations of Misconduct) Act, which has also provided relief to our Branch.

The attitude expressed by Assistant Commissioner Shepherd in his letter and the limited amount of information provided, if applied more generally, will make our use of Section 52 a waste of time, and will lead inevitably to our requiring more investigations than we are currently doing.

New Matters

72. Allegations of corruption about suppression of previous convictions

On 15 January 1984 the Ombudsman received a written complaint in the following terms:

> I wish to bring to your notice a matter for which I believe only your department can take action in.
>
> [X] ... has for many years collected bribes for the police. Whilst this is fairly common knowledge in [Y] few people

> would be willing to confirm same.
>
> However I have a case for which a check on the transcript of the hearing would prove.

The letter of complaint alleged that a person with previous convictions for driving with a prescribed concentration of alcohol paid $1,500 to the police to ensure that:

> .... when the matter came before the court and the magistrate asks if there is any [prior convictions] the police say NO and [the person] is then fined as a first offender.

The complainant also alleged that the person collecting bribes for the police "would 'handle' at least two of these matters a week".

In accordance with usual procedures, the matter was first investigated by an officer of the Internal Affairs Branch. The investigating officer concentrated on the specific case referred to in the letter of complaint and identified Acting Sergeant D J Wood as the police prosecutor who had appeared in the matter. In his report the investigating officer concluded that an inaccurate traffic conviction computer printout had been presented to the court by Sergeant Wood, but made no finding as to the author of the printout.

The investigating officer's superior commented:

> The circumstantial evidence is overwhelming to suggest that Sergeant Wood ... by untruthful means ... arranged to be the police prosecutor at Glebe Court of Petty Sessions on the 28th July 1983 so as to mislead the Court about [the offender's] prior antecedents.

Disciplinary proceedings were taken in the Police Tribunal against Sergeant Wood on two charges. The first was that he lied to superior officers about being required to attend at Glebe Court on 28 July 1983 in a part-heard matter. The second was that he improperly tendered a false traffic record to the Magistrate on that day.

The Tribunal found both charges proved and recommended that Acting Sergeant Wood be dismissed from the police force. The judgement said:

> I see no other reasonable explanation but that the defendent tendered the print out ... knowing it to be a false document.
>
> As I have stated above I am also satisfied that the defendent made an incorrect statement to [an officer] of the Prosecuting Branch that he was part-heard at Glebe on the 28th July 1983 ....
>
> The act committed by the defendent was a serious breach of the criminal law and was of course a breach of his position of trust.

The Ombudsman, on the material provided by the Police Department, was unable to determine either that the complaint in its terms was sustained or not sustained and decided to reinvestigate the following conduct:

> 1. The alleged wrong conduct of Acting Sergeant J D Wood as set out in [the letter of complaint].
>
> 2. The alleged wrong conduct of public authorities not presently identified as set out in [the letter of complaint].

Advice obtained by the Ombudsman from Mr R D Giles QC for the purpose of reinvestigation was:

> ... No narrow scope should be given to the concept of that to which the complaint relates, for that would unduly limit the Ombudsman and defeat the object of enabling complainants who may not express themselves clearly or fully to have their complaints deal with ....
>
> Although the letter does not so state, the charge can be identified as that heard on 28 July 1983 and Wood can be identified as the police officer concerned to inform the Magistrate upon [the offender's] prior convictions. That suffices to enable the identification of Wood and conduct of Wood in relation to the said matter so delineated, and to identify Wood's conduct as conduct to which the complaint relates ....

On the wider question of whether the Ombudsman had jurisdiction to investigate the conduct of public authorities not yet identified, Mr Giles advised:

> ... The allegations in [the complainant's] letter revolve around bribery of police through [X] to suppress or do away with police records, and it is that - not limited to the [charge against the offender], not necessarily limited to [Y] and not necessarily limited to driving offences - which is the essence of the conduct to which the complaint relates ....

He concluded that the Ombudsman, although perhaps not able to investigate directly the conduct of a clerk employed in a local court, nevertheless had jurisdiction to undertake the investigation in question.

Two seconded officers have spent considerable time investigating these allegations and have examined numerous court records. A number of police prosecutors and other police have given evidence in Section 19 hearings and all have denied any impropriety or knowledge of any wrongdoing. Needless to say, the mere fact that an investigation is being conducted does not imply that there is any truth in the allegations. Inquiries are proceeding.

73. Alleged assault by police on blind people

In October 1984 the then member for Gloucester, Mr Leon Punch, made a complaint on behalf of Mr Peter Stewart, alleging that Mr Stewart's two blind sons and two of their friends were assaulted and abused by police and that a guide-dog belonging to one of Mr Stewart's sons was mistreated by police. One of the Stewarts' friends is totally blind, the other is partially sighted.

On 7 April 1986 the Ombudsman made a Special Report to Parliament about the delay by police in investigating the complaint. The issue of delay is dealt with elsewhere in this Annual Report.

On the evening of 15 January 1982 the four people concerned were at an RSL club in Sydney. Two of them, one with a guide-dog, attempted unsuccessfully to gain entry to the disco in the club. A dispute between them and club staff ensued. It was alleged that two off-duty police officers were at the club, and were

called by staff to assist to settle the dispute. The complainants alleged that the guide-dog was illegally refused admission to the disco, and that the police refused to examine the pass for the dog. At the request of the club, a number of police officers on duty in the vicinity were called in to assist to remove the four people and to calm the fracas that developed. The complainants alleged that police and club staff tried wrongfully to remove them from the club, that one of them was assaulted by police and that they were told that they were to be charged with trespass.

The four people eventually left the club and took a taxi to Central Police Station. They alleged that, when they arrived, they were told by a police officer that they were at the wrong police station, the female member of the group was threatened with rape, they were assaulted by police in the Charge Room and the cells, they had their white canes removed and kept from them, one of them was refused medication for epilepsy, and the guide-dog was mistreated. The police investigation was concluded at the end of March 1986 and the police found that none of the complaints was sustained.

The Ombudsman examined the evidence obtained through the police investigation and found it to be conflicting. He was unable to determine whether or not the complaint was sustained, and he decided to reinvestigate the matter under the Ombudsman Act.

The Ombudsman has determined to hold an inquiry into the complaint under section 19 of the Ombudsman Act, with approximately 40 witnesses. Mr Stewart, the four complainants and three civilian witnesses have so far given evidence. It is anticipated that the majority of the witnesses will be heard in November 1986.

74. Alleged pressure to withdraw complaints against police

Complainants to this Office have alleged at various times that police officers attempting to conciliate complaints, or to persuade complainants to withdraw their complaints, have used a variety of approaches, including:

1. Threats of violence, persecution or harassment by the police investigation officer. Such allegations have usually been made by people in custody or by those about to appear in court, generally on serious charges. These allegations have been fewer in recent years, although there have been some alleged threats to charge complainants with "public mischief" or "attempting to pervert the course of justice".

2. Telling complainants that an investigation could have an adverse effect on the careers of the police officers the subject of complaint, including demotion or dismissal from the Force; these officers are allegedly said to have only recently been married, or had children, or bought a house.

3. Agreeing to take no further action against the complainant over, say, Traffic Infringement Notices.

4. Apologising to the complainant for any problems that may have been experienced.

5. Telling the complainant that there is no need to take the matter any further, because it has been taken seriously by the Department and has been brought to the attention of persons in authority.

6. Promising to rectify the problem: for example, by having a traffic matter reviewed, or by requiring proper records to be kept of some incident, or by organising for the police officers the subject of complaint to be counselled by their senior officers.

In one case where a complainant wrote to this Office objecting to the approach used by the investigating police officer, the reply from the Assistant Commissioner (Internal Affairs) included the following paragraph:

> Inspector S agrees that when speaking with Mr G he mentioned the adverse effects a formal investigation could have on the careers of the Police concerned. Whilst there are no specific instructions given to investigators in matters of this nature I do not believe that this aspect is a factor which should be put to complainants and I will be advising the Inspector accordingly.

The Ombudsman then suggested to the Commissioner of Police that instructions about acceptable approaches to conciliation should be issued for the guidance of officers attempting conciliation. The Ombudsman set out the alleged approaches to conciliation and withdrawal which are outlined above, saying that the first and second were totally inappropriate.

Three weeks later, in response to another allegation that police investigators were exerting pressure on citizens to have them withdraw their complaints, the Ombudsman suggested to the Commissioner that it might be appropriate to draw up a general code of conduct for police investigating officers. The Assistant Commissioner (Internal Affairs) replied:

> Whilst there may have been isolated complaints in the past regarding these matters, I do not believe that we are confronted with any substantial or on-going problem. In fact, I would suggest that any complaints in the past, if justified, would probably be more the result of the personality of the individual officer concerned than the lack of formal written guidelines.
>
> As you are aware, complaints against Police are attended to by senior non-commissioned or Commissioned Officers. Such Police have many years of service, often in varying branches of the Force. Broadly speaking, they are experienced, intelligent officers capable of handling the very wide variety of tasks that arise in Police operations.
>
> I am not suggesting that there is never any room for improvement - that would be a short-sighted attitude indeed. As you would know, considerable emphasis is being placed here on prompt, efficient and ethical attention to complaints against Police. The points you have raised were covered in the series of education seminars conducted for Police throughout the State last year and will similarly be emphasised in the next series, which is now in the planning stage. I am sure the current campaign is having results and that investigations and associated action are being conducted ethically by Police generally.
>
> In the circumstances, I do not believe that formal, written instructions are necessary in this case. However, the door is not closed and I will certainly keep the matter under review. We should liaise on this subject and I would be grateful if you would relay any future complaints coming to your notice so that appropriate inquiry can be made.

In view of the Assistant Commissioner's assurance that the matters raised by the Ombudsman were being dealt with in education seminars, it was decided that no further action would be taken in the matter.

75. Withdrawal of charges by police officers

During the year consideration has been given to the withdrawal of charges by police, in circumstances where the Police Prosecuting Branch has recommended that the prosecution continue.

This matter arose out of an anonymous complaint which was originally sent to Mr M Knight, MP, Chairman of the Staysafe Standing Committee on Road Safety, and received in this Office on 6 September 1985. The complaint concerned a doctor found driving at 126 kph along Victoria Road, Ermington (a 60 kph area) and charged with driving at a dangerous speed and exceeding the speed limit. The complaint alleged that, contrary to the advice of the Police Prosecuting Branch, the former Assistant Commissioner (Crime), Mr E Day, withdrew the charge of driving at a dangerous speed, giving no reason or explanation.

The anonymous complainant helpfully supplied a copy of the Police Department file, which included a memorandum signed by the former Assistant Commissioner:

> The circumstances of this matter have been carefully considered and I agree with the recommendation of Chief Superintendent Sweeny that a prima facie case can be established. However, having in mind the circumstances of the incident, I give approval for the permission of the Presiding Magistrate to be sought to withdraw the proceedings of "Speed Dangerous" when reset for hearing.

In response to an enquiry from this Office, the Assistant Commissioner (Internal Affairs), Mr R Shepherd, wrote:

> I have now taken the opportunity of examining those papers which are available. Frankly, with the great benefit of hindsight, I do not think I would have reached the same conclusion as Mr Day. Nevertheless, the fact remains that a discretion was vested in him, with whatever weight he attached to any particular aspect purely a matter for him. To this extent, therefore, I would accept the decision actually made as a reasonable exercise by Mr Day of his discretion and the authority vested in him.

Following further enquiries from this Office the Commissioner of Police, Mr J K Avery, advised:

> I note your query in respect of whether Police Officers exercising a discretion to withdraw a charge, where the recommendation from the Prosecuting Branch is that the prosecution continue, should set out in detail the reasons for their decision.
>
> I am firmly of the view that reasons in such circumstances should be set out on the papers being dealt with, and this date I have directed the Assistant Commissioners (Crime) and (Traffic) who deal with such matters, that a procedure should be initiated to cover such circumstances.

In view of the action taken by the Commissioner and the fact that the former Assistant Commissioner had retired from the Police Force, the Ombudsman decided not to require a formal investigation of the anonymous complaint.

76. Discriminatory and draconian bail conditions "usual" for young Aboriginal people in Bourke

A complaint made on behalf of an Aboriginal youth, K, who lived in Bourke, alleged assault, threats and racist abuse by a police officer when arresting six young Aboriginal people who had been "hanging around" a park and "looking into" cars. A statement of provisional findings and recommendations has been distributed by the Ombudsman.

During the course of the hearing of this matter, evidence was presented to the Ombudsman about bail conditions imposed on the two young people, K and P, who were charged with attempting to steal from a car.

For such an offence the usual presumption is in favour of bail being granted. In this case, bail was granted to the two young men by the Sergeant at the police station, but it was subject to the condition that neither left home during the hours of darkness unless accompanied by, in K's case, his mother, and in P's case, his grandmother. During the course of the hearing, evidence about bail determinations for young people in Bourke was given by the Sergeant involved in this incident; he had been stationed in Bourke for 17 years.

The Sergeant said that this was a "usual" bail condition for Aboriginal youths in Bourke and that its imposition would be of a "routine" nature. The Ombudsman asked the Sergeant if he had ever applied such a bail condition to a white youth. The Sergeant replied that he couldn't recall, but that "there hadn't been a lot of white youths charged".

The transcript goes on:

> Ombudsman: So it would be normal or routine for Aborigines of any age? What is the age parameter?
>
> Sergeant: Up to 18.
>
> Ombudsman: Have you ever applied it to any Aborigine over 18?
>
> Sergeant: Not to my knowledge.

The Sergeant explained that such conditions were imposed in an attempt to reflect what "a normal parent would do, it is trying to force control on the children".

The Sergeant was asked whether, if any white youths were arrested, the same conditions would be imposed on them. The Sergeant replied that they would "if the circumstances were the same". The Ombudsman asked if he could be sent some information as to the names of any white youths who had been subjected to similar conditions. The Sergeant answered that this would be "very difficult". He explained that there weren't many white youths charged and that "it wasn't racist, it was just a fact".

In his statement of provisional findings and recommendations, the Ombudsman wrote, "This means that a young man who was 16 years of age, for example, could not go out during winter, after 5.30 pm, unless accompanied by his mother. I consider such a bail determination to be draconian."

This Office is not aware of any instances of similar bail conditions being placed on white offenders, nor could police provide any examples. Nevertheless, the Sergeant acknowledged that such conditions were standard for young Aboriginal people.

The Ombudsman regards this situation as being unsatisfactory and discriminatory. In the statement of provisional findings and recommendations, the Ombudsman recommended that the Police Department carry out an immediate re-evaluation of the system of bail determinations applicable to Aboriginal youths in Bourke, and in other centres which have a significant Aboriginal population.

77. Possible fraudulent conduct - traffic infringement notice

In December 1984 the Ombudsman received a complaint that a traffic sergeant in the Wollongong district had allegedly retrieved traffic infringement notices, for favoured trucking companies in his district, after Highway Patrolmen had issued traffic notices to them. It was also alleged that the sergeant directed his junior officers to pay less attention to certain trucking companies; Highway Patrolmen who continued to report these favoured trucking companies were allegedly reprimanded. The complaint alleged that many police in the district were frustrated because of these events, but were reluctant to report them, lest the sergeant had them transferred from the district.

The police investigation was conducted by a police officer who worked in the same branch as the police sergeant the subject of the allegation. The Ombudsman decided to reinvestigate the matter.

During the reinvestigation the Ombudsman found that:

1. A Highway Patrol police officer had reported to his superiors a number of suspicious obliterations in a traffic infringement notice.

2. A management and statistical return in the Wollongong Traffic Office had been altered.

3. A senior police officer, now retired, had directed another senior officer not to continue an investigation into these matters.

4. The police officer carrying out the investigation allowed a number of relevant documents to be destroyed.

These matters were outside the original complaint, and so the Ombudsman prepared a report under Section 33 of the Police Regulation (Allegations of Misconduct) Act. The report was then sent to the Minister for Police and to the Commissioner, who has instructed members of the Internal Affairs Branch to carry out a full and comprehensive investigation; this is in progress. The Ombudsman is closely monitoring this investigation.

78. Records to be kept of police subject of minor complaints

Many complaints received in this Office express concern about the conduct of individual police officers. However, where the complaint concerns the officer's conduct while issuing a traffic infringement notice, the matter is rarely investigated, because the complainant can have the matter determined by a court and the complaint is relatively minor.

For example, a European ski instructor alleged that he had been harassed by a particular police officer after being issued with three infringement notices, each for $90, for "driving outside separating lines". He had three witnesses in his car to support his claim that he had overtaken within the broken white lines. When issued with the notices, he asked the officer why he had not been stopped after the first alleged infringement. He was told that the officer could not catch him, because he was too far away. The complainant believed that, if this were true, the officer could not have been in a position to see the line marking on the road at the time of the alleged offence. The complainant maintained that the police officer disliked foreign ski instructors because he believed that they took jobs away from Australians. The complaint was declined by this Office, but a copy was sent to the Internal Affairs Branch for its information.

The ski instructor contacted this Office some twelve months later and said that warrants had been issued, even though he had never

received a summons. As well, he did not know what action the police had taken about his complaint. The complaint was again declined because the complainant could apply for a rehearing under Section 100A of the Justices Act. However, in October 1985 this Office sought from the Police Department details of the action taken by it, as well as details of the procedure for handling such matters. A reply was eventually received, but only after a special letter from the Ombudsman to the Minister in June 1986.

It was evident that the Police Department kept no record of police officers the subject of minor complaints. In fact, no records are kept unless the matter proceeds to formal investigation. This means that when complaints are declined, conciliated or made the subject of preliminary enquiries only (some 75 per cent of all complaints), no record is kept of the officer the subject of complaint. An officer who had been the subject of several minor complaints, the combined circumstances of which might suggest that the officer would benefit from counselling, would remain unidentified. The Ombudsman believes that this is a deficiency; the Internal Affairs Branch apparently agrees, for in July 1986 the Assistant Commissioner (Internal Affairs), Mr Shepherd, wrote:

> As part of the Branch's move to a more pro-active role in the prevention of complaints against Police, I would like to see action commenced along the lines indicated. Unfortunately, the present manual recording systems in use do not easily lend themselves to this. However, we are now fairly well advanced with planning for a computerised records and statistical information system within the Branch. The input of additional information regarding complaints which do not proceed to formal investigation will be included in this system, and I plan that some form of follow-up action will be introduced once this system becomes operational, probably some time in the New Year.

This Office will be monitoring the implementation of this system. Great care must be taken, however, to ensure that no inference is drawn merely from the number of complaints against a particular police officer; in some cases such complaints might only mean that the officer was doing his job effectively and well.

79. High speed police pursuits

The Ombudsman has noted increased public awareness of the dangers of police involvement in high speed pursuits. Complaints received by the Office have included allegations of breaches of the traffic regulations and dangerous driving; causing death and injury by "pushing" the pursued person to the limit, resulting in an eventual crash; forcing the pursued person off the road; crashing of police vehicles; and many "near misses" of vehicles and persons.

One complaint described how a marked police Falcon sedan was driven at high speed along Parramatta Road. The vehicle's revolving blue light was the only means of warning, even though it proceeded through a double intersection when the traffic light was red against it. A collision did not occur, mainly because the noise of the harsh braking of the police car alerted the driver of a vehicle crossing Parramatta Road and caused him to stop to allow the police car to proceed.

It appears that the police car was on the way to premises some two kilometres away. Police believed there were persons they wished to apprehend at the premises and the siren was not used in case those persons heard it and left before the police arrived. This complaint was found to be sustained.

A father, whose son was killed in a police chase in a country area, complained that his son was "pushed to his death" by the pursuing police officer. After an investigation, the Ombudsman found this complaint not sustained. The police had chased the car for six kilometres to obtain the registration number. When the vehicle being pursued eventually collided with a tree, the police car was a considerable distance away.

Another young man was killed during a chase by police in a truck when his vehicle mounted the median strip, hit a traffic light and overturned. The car was unregistered and unroadworthy. Allegations were made to the Coroner that the action of the police in driving close to the rear of the young man's car was inappropriate. The coroner said that he did not think that any

blame could be passed on to the police. This matter is still under investigation.

Another complainant wrote that, every year, numerous people are killed on the roads by speeding police cars. He considered that appeals by police for safe driving were empty if the police did not observe their own warnings. The complainant gave details of two occasions where police had driven through a stop sign, at speed, in pursuit of motorists. On one of those occasions a serious crash resulted, but investigation revealed that the police officer involved in the crash had been reported for disobeying the stop sign. On the other occasion the offending police officer had not been identified.

These and similar complaints have been investigated by the Police Department and some have been reinvestigated by this Office. The number and nature of such complaints has prompted the Assistant Commissioner (Traffic) to issue the following instruction:

> There has been an increase in the number of crashes of police vehicles engaged in pursuits or whilst proceeding on urgent duty, some resulting in death or serious injury to police and the public.
>
> High speed pursuit driving is to be considered an option of last resort and is to be engaged in only where there are no other means of apprehension available and the gravity and seriousness of the circumstances warrant such action.
>
> No member will be criticised for terminating a pursuit in circumstances where he or she believed there was unreasonable danger to the officer or to the public.
>
> Police instruction 26(25) outlines the circumstances under which police proceeding on urgent duty may travel in excess of the speed limit. Emphasis is on 'urgent duty' and undue risk must not be taken, as it is preferable that offenders escape or an arrest be delayed rather than the lives of police and members of the public be endangered. To further emphasise this instruction it is directed that:
>
> > The driver of a police vehicle when engaging on pursuit/urgent duty must forthwith notify the radio operator of VKG who will in turn notify the duty operations inspector. In cases where the inspector is not established, the supervising sergeant should be advised of the circumstances.
> >
> > The duty operations inspector or the supervising

sergeant should closely monitor the situation and should circumstances warrant direct that the pursuit/ urgent duty be discontinued. These instructions do not in any way inhibit the crew of the motor vehicles themselves terminating the pursuit/urgent duty.

If pursuits are discontinued consideration should be given to other alternative methods to apprehend the offender.

In all circumstances police engaged in pursuit/urgent duty when proceeding through intersections controlled by traffic control signals, 'Stop' or 'Give Way' signs shall, in addition to providing the best practicable warning, reduce speed or stop momentarily as the devices require so as to ensure that all motorists are fully aware of their presence and the risk of collision minimised.

The services of the police air wing are to be utilised where practicable particularly in prolonged pursuit/ urgent duty situations.

As a general rule probationary constables should not engage in pursuits/urgent duty. Supervising sergeants should keep this carefully in mind when arranging rostering of personnel.

As a general rule F100 departmental trucks should not be used in pursuit/urgent duty.

In any situation where contact cannot for any reason be made with the duty operations inspector/supervising sergeant then all police are reminded that it is their duty to comply with police instruction 26(25) and as far as possible ensure the safety of other road users.

80. Problems with warrants

A number of people have complained that they have had warrants executed on them where they were not the person in question, or had paid the fine but not kept records.

In one case, two police officers attempted in July 1983 to execute a warrant resulting from a 1977 parking fine. The complainant had resided at the same address, and owned a car, for five years. The delay in contacting her could not be explained because there was no record of the movement of the warrant prior to June 1983; it had presumably remained filed at the Warrant Index Unit until it was discovered in June 1983.

In another matter, the complainant spent three days in gaol at Silverwater in April 1982 for what was supposed to be full "atonement" for a number of parking offences, yet in 1985 he was served four warrants for convictions sustained in 1980 and April 1981. The complainant considered it "a gross outrage that old warrants can be dug up at will and served on me on the pretext that the computer didn't show them up at the time".

In another case, which became the subject of a wrong conduct report, the complainant was aware that his wife, following their separation, had incurred a number of parking fines in a car registered in his name. He wrote to the Department in 1981 to ask whether there were fines outstanding; he received a letter signed on behalf of the Secretary saying that there were not. In February 1984 he satisfied three outstanding warrants. A month later an attempt was made to serve upon him additional outstanding warrants, relating to offences allegedly committed between 1975 and 1979. He then complained to the Ombudsman, having written to the Secretary of the Department and received no response. The complainant had lived at the same address for eight years and could not understand why, if the warrants existed, he had not been informed sooner.

It was established that in eight years the 1975 warrant had left the Central Warrant Index on only one occasion, in 1976. As for the 1979 offence, an unsuccessful address search had been done in 1982 and the warrant re-filed until 1984. The Ombudsman considered that a delay of eight years before a warrant was recycled was excessive and that, since the Department retained no records of service past two years, it was unreasonable to expect offenders to keep payment records up to twelve years (the length of time an unexecuted warrant remains "alive").

The problems associated with the warrant system were recognised by the Police Department, and in March 1986 a fully computerised warrant system was introduced. The new system enables complete records of warrant transactions to be permanently maintained. It has an improved searching function and direct access to Department of Motor Transport records, and this will enable warrants to be recycled every twelve months.

Police have also been told that, before charging a person on information from the computer records, they should ensure that the warrant is still available for execution, and that at the same time a thorough search of the system should be made to try and finalise all outstanding warrants.

This Office is pleased with the response by the Department to the recommendations made as the result of the wrong conduct report.

81. Need for interpreters when commitment warrants executed on migrants

The Police Department has recognised the need for interpreters and has implemented procedures to ensure that the unfortunate experience of Mr L and the problems highlighted by his complaint do not recur.

Mr L was an unemployed pensioner who spoke and read Greek, but understood little English. On 13 July 1983 he received an infringement notice which he did not pay. A summons was issued and, because he did not attend court, the matter was dealt with in his absence in March 1984. He was fined $100 plus costs of $38. Because the penalty was not paid, a warrant for Mr L's arrest was issued in May 1984.

In June 1984 two police officers called at Mr L's home and told his wife that he had to pay $138. Mr L sent his wife to the court house, not realising that it was too late for the court to accept the money. At the court, his wife was told to pay the money at Police Headquarters in College Street, Sydney. On 4 July 1984 Mr L went to Police Headquarters to pay the money, but the cashier's office was closed. He was directed by an attendant to place $90 (the amount of the original infringement notice), together with the notice, in an envelope in the security box. The money was processed the next morning and the fact that the infringement notice was over eleven months old was not detected by the cashier.

On 7 August 1984 the police again called at Mr L's home and left with his wife a message that he should go to the local police station. Mr L did so. He was fingerprinted and detained, and later was taken to Silverwater Prison, where he stayed for four days. Mr L was adamant that he had informed the arresting police that he had satisfied the infringement notice. However, both police officers said that he had made no such protest, but had "just shrugged his shoulders".

It seemed clear that, because of language problems, the police officers had not understood what Mr L was trying to tell them. The police should have obtained an interpreter; had this been done, the matter might have been clarified.

A circular has now been issued to all police saying that, if communication problems exist, an interpreter should be engaged when commitment warrants are served.

Police have also been told that, where a person validly questions a warrant, the officer has a duty to clarify the matter. When valid objections or representations have been made, police are to withhold execution of the warrant and, where possible, attach a copy of the representations to the warrant for future reference. When people are unable to satisfy commitment warrants, they are to be informed of their right to apply to a Chamber Magistrate for time to pay, and be allowed a few days in which to apply.

Such procedures should go a long way towards ensuring that, where a warrant is in dispute, no-one is unnecessarily detained or suffers undue hardship or inconvenience.

82. Police Hurt on Duty Unit

During the year three complaints were received about the Police Pensions and Hurt on Duty Unit. The Unit's duties include assessing claims made by police officers for medical expenses and working time lost through injuries suffered at work or in travelling to or from work. The Unit operates under procedures similar to those followed by workers compensation insurers.

All three complaints alleged delay by the Unit in assessing claims. One was from a chemist who, in filling prescriptions, had given credit to a police officer on the understanding that the Police Department would pay the claims in due course. The Police Department paid some of the accounts, but eventually denied liability for others totalling over $500; this was after a delay of approximately one year.

During the investigation of the complaints, the Police Department revised the procedures of the Hurt on Duty Unit. The new procedures were designed to eliminate delays and provide greater information on the status and assessment of claims to interested parties. Having reviewed the new procedures of the Hurt on Duty Unit, this Office believed that many of the problems had been overcome. All three complaints were resolved during investigation. In a letter to the Ombudsman, one of the complainants said:

> Our complaint is no longer one of an unpaid debt, rather a request for an improvement in internal administrative procedures to ensure a repetition of our frustrating experience will not so readily occur.

This Office was satisfied that the Unit's procedures had been significantly improved and, consequently, the investigation was discontinued.

83. Breath-testing locomotive drivers

Both the Labor Council of New South Wales and the Australian Federated Union of Locomotive Enginemen (New South Wales Division) made complaints to the Ombudsman under the Police Regulation (Allegations of Misconduct) Act about the police administration of breathalyser tests to the drivers of locomotives involved in fatal level crossing accidents.

The complainants argued that the breathalyser test should not be used in the railways, but restricted to matters arising under the Motor Traffic Act: the State Rail Authority had its own rules

about alcohol consumption by its employees, and so it was both unnecessary and unfair to add to the distress of enginemen involved in fatal accidents by subjecting them to the breathalyser.

Clearly, enginemen in charge of locomotives pulling huge loads towards a level crossing at speed are in a different position from motorists approaching intersections under the provisions of the Motor Traffic Act and Regulations. In the accounts of two fatal accidents cited in the complaints, there appeared to be no way that the enginemen could have avoided the tragedies that occurred. Whatever the outcome of these matters, there is no doubt that accidents occur in which enginemen are blameless, and that their distress, in any circumstances, can be profound.

Similarly, motorists may find themselves in tragic circumstances, beyond their control, in which others have been killed or seriously injured, and their distress can be no less profound than that suffered by locomotive drivers. The Motor Traffic Act nevertheless says that all motorists are subject to the breathalyser when driving a motor vehicle on a public street.

Commenting upon the investigation of these complaints to the Ombudsman, the Assistant Commissioner of Police made the point that police attending fatal accidents are obliged to give full and accurate information to the Coroner; in such circumstances a breath test can only benefit a person who has not been drinking.

Nevertheless, the definition of "motor vehicle" in the Motor Traffic Act specifically excludes any vehicle used on a railway, and the definition of "public street" does not mention a railway line. The Assistant Commissioner thus concluded that members of the Police Force have no statutory power to require train drivers to undergo a breathtest or breath analysis if their engines have been involved in accidents.

The Assistant Commissioner issued a circular advising police that train drivers involved in collisions at railway level crossings are not to be subjected to breath tests and undertook to review the procedures and legislative provisions regarding accidents of this nature.

The Ombudsman found the complaints by the Labor Council and the Union sustained, because the police had administered breath tests to locomotive enginemen without clearly established authority. The Ombudsman concurred in the decision of the Assistant Commissioner to review the procedures and legislation, and made that his recommendation.

At the time of the preparation of the Annual Report the Minister for Police and Emergency Services was awaiting advice from the Minister for Transport on the role of police at level crossing accidents.

84. Police raid on "Club 80"

During the early hours of 29 January 1983 police raided premises known as "Club 80" at 19 Oxford Street, Paddington. These premises, frequented mainly by men, provided on one floor facilities to watch television and have refreshments. Special facilities on another floor were available for homosexual activity. At the time of the raid some 150 to 300 men were on the premises.

During the raid police arrested four men for illegal homosexual offences. Police detained other patrons while they obtained their personal particulars. As a result, fourteen patrons were conveyed in custody to Darlinghurst Police Station to determine whether they were wanted on warrant.

The raid generated some 50 complaints from the Privacy Committee, the Council for Civil Liberties, the Gay counselling Service, the Sydney University Students Representative Council, the Gay Teachers and Students Groups, six Members of Parliament and numerous patrons of the club. The complaints, directed at the police who carried out the raid, concerned such things as unauthorised and illegal entry to the club, unlawful arrest, illegal detention, assault, rudeness and illegal demands for the personal particulars of patrons. The main complaints related to illegal arrest and detention.

The police investigation of the complaints, carried out by the Internal Affairs Branch, concluded that none of the complaints could be sustained. This view was accepted by senior police officers, who could find no evidence of wrong conduct on the part of the police.

The complainants to the Ombudsman were not satisfied that the findings of the Internal Affairs Branch were correct, and asked the Ombudsman to reinvestigate the matter. During May and June 1985 an inquiry was conducted by the Ombudsman, pursuant to Section 19 of the Ombudsman Act, into the allegations against the police; 22 patrons and 12 police officers were called as witnesses.

During the inquiry the police investigation of the complaints, and the subsequent assessment of it by senior police officers, came under close scrutiny.

The Ombudsman issued his final report on 19 September 1986. The principal finding was that Detective Sergeant Parkinson, the officer in charge of the raid, had acted improperly and unlawfully in directing his officers to detain within the confines of the club the owner, staff and patrons of the club other than those four persons who were arrested on a charge of conduct which was then illegal. The Ombudsman found the conduct of the police contravened Police Rule No 31(7)(1), which provides:

> Prior to arrest, police have no authority to exercise any restraint whatever upon a person being questioned or to detain him in any way, whether upon police premises or elsewhere, and such person is free to come and go as he pleases.

The Ombudsman also found that police had illegally arrested and taken to Darlinghurst Police Station a number of patrons who were subsequently found not to be the subject of existing warrants. The Ombudsman had no difficulty in rejecting the police case that these persons had gone voluntarily to the police station. The Ombudsman also found sustained a number of allegations by patrons

of the club that police had treated them in a rude and aggressive manner, linked in some cases to the police perception that the persons concerned were homosexual.

The Ombudsman recommended that the police records of persons unlawfully detained at "Club 80" be destroyed under the supervision of representatives of the Privacy Committee of New South Wales. The Ombudsman also recommended that the Solicitor for Public Prosecutions be requested by the Commissioner to advise on the question of whether or not the police required a warrant to enter premises such as "Club 80", and that this advice be promulgated for the benefit of members of the New South Wales Police Force in dealing with similar situations in the future.

The Ombudsman was critical of the manner in which the initial investigation of the complaint was carried out by Inspector Toms of the Internal Affairs Branch, and also of the supporting opinion given by Chief Inspector Sweeny of the Police Prosecuting Branch, that police were justified in forming the impression of voluntary co-operation by patrons. As the Ombudsman stated:

> This conclusion was reached despite, one would have thought, abundant evidence suggesting the contrary.

The Ombudsman was impressed by the frankness of some of the junior police officers who gave evidence, in particular Constable R A Longford and Constable K L Willott. In his report, the Ombudsman set out his criticism of the Internal Affairs Branch investigation of the complaint and the Police administration's review of the results:

> In his statement Constable R A Longford seems to be admitting a situation of mandatory detention. He stated, "Constable Heys was directed to go to the stairs at the rear of that floor to prevent people leaving by that exit as some people had run out of that exit". Similarly, Constable Willott said, "He (Constable Lawson) informed me that they had arrested some men for indecent assaults or something similar and to ensure that nobody left the club at that stage". These statements do not support a contention that patrons of the club were co-operating with police whatever Inspector Toms thought about the evidence from complainants.
>
> The evidence of patrons regarding both aspects are that they were detained against their will and intimitated until they

provided their personal particulars. Common sense supports their contention. Could it ever seriously be considered possible that some 150 - 300 males, ensnared in premises catering for illegal homosexual activity, would willingly volunteer to line up and wait, for up to two or three hours, to provide police with their particulars if they had any choice. It is ludicrous to suggest that they would do so.

It is so disappointing for this Office to find that not only has Inspector Toms reached conclusions inconsistent with common sense, but that his conclusions have been accepted, despite the evidence, by the Police Prosecuting Branch, the Internal Affairs Branch and Deputy Commissioner Perrin.

This Office, pursuant to the provisions of the Police Regulation (Allegations of Misconduct) Act, relies on the integrity of police investigations and the advice tendered by the Commissioner. If the procedures are carried out within the spirit of the legislation, I need do little more than agree with the findings and proposals advanced by the Commissioner.

The facts of this case were not complex and my own reinvestigation yielded little evidence that would not have been available to Inspector Toms. It is, therefore, with some frustration and disappointment, that I conclude that the findings of the Internal Affairs Branch report were at odds with the evidence then available and that the comments of the police administration on those findings were not justified.

85. Complaints of rudeness against police officers

In one sense, complaints of rudeness against police (or, indeed, against any other public official) can be regarded as trivial and not properly the subject of investigation by the Office of the Ombudsman. Ideally, of course, this type of complaint should be dealt with inside the organisation. Sometimes, however, this is not done, and the complainant feels that it was a waste of time complaining "to Caesar about Caesar". More detailed investigation sometimes shows that an official or a police officer, in close contact with the public, is unfitted by temperament for such a role.

A regular source of tension and complaint is the issuing by highway patrol officers of Traffic Infringement Notices. Motorists sometimes react aggressively, and highway patrol officers must avoid becoming involved in an exchange of words that can, rightly or wrongly, be construed as rudeness. In such

cases this Office usually does not require investigation, at least until after the court proceedings relating to the alleged traffic infringement. Sometimes, however, the detail of a complaint is such that the Ombudsman requires investigation by the Commissioner of Police. Where there remains a substantial conflict between the evidence of police and citizens, the Ombudsman may even reinvestigate the matter. No more than one day is usually required for such a reinvestigation.

The Office of the Ombudsman reinvestigates a few of these complaints each year in order to demonstrate that citizens are not entirely without remedy for complaints against police officers who might be rude to them.

Matters Followed Up

86. Delay in police investigations: need for statutory amendment

In the 1984-85 Annual Report the Ombudsman again commented on frequent and extensive delays by police in completing the initial investigation of complaints. The Ombudsman recommended that the Act be amended to enable him to begin his own investigation if police investigation had not concluded in, say, 90 days, or some longer period agreed to by the Ombudsman and the Commissioner of Police.

Delays in police investigations have continued over the past twelve months and the Ombudsman is gravely concerned that these delays are affecting the efficiency of investigations of complaints against police. Two instances of serious delay were recently highlighted by the Ombudsman in reports to Parliament.

The Stewart Complaint

A complaint by Mr Leon Punch, then Member for Gloucester, on behalf of Mr P Stewart alleged that Mr Stewart's two blind sons

and two of their friends were assaulted by police at Central Police Station, and that the guide dog belonging to one of Mr Stewart's sons had been mistreated. The following is a history of the investigation.

17 October 1984	Complaint forwarded by the Office of the Ombudsman to the Commissioner of Police.
10 January 1985	Ombudsman requests a progress report on investigation.
23 January 1985	Progress report received indicating that complainants had been interviewed, but not civilian witnesses or police.
30 January 1985	Ombudsman received from Commissioner copies of statements made by complainants.
19 April 1985	Further progress report received indicating difficulties in locating civilian witnesses, stating that twelve police were to be interviewed, and anticipating that investigation could not be completed for a further three months.
9 July 1985	Request for further progress report.
22 August 1985	Progress report received, including copies of statements from four civilian witnesses and thirteen police witnesses. Section 26(1) of the Act invoked in relation to this material, thus preventing the Ombudsman from releasing it to the complainant.
21 November 1985	Further progress report received, indicating that investigation complete and that a submission to be prepared;

	the investigating officer also reported that he had been transferred, that the matter would have to be attended to in conjunction with Divisional supervisory duties, and that he hoped that the matter would be completed within one month.
31 January 1986	Request for further progress report.
10 February 1986	Progress report received anticipating that a full submission would be made within three weeks.
25 March 1986	Final report under Section 24 received.

The investigation took 17 months to complete and, as he noted in the report to Parliament on 7 April 1986, the Ombudsman believes that the intervention of the Minister for Police was instrumental in expediting the final stages of the police investigation. The first police officer was interviewed on 19 June 1985, eight months after the complaint was referred to the Police Department. The last witness was interviewed in September 1985. A further six months elapsed before a final report was received by the Ombudsman.

In his report to Parliament the Ombudsman said:

> The extraordinary delay by the Police Department in obtaining the statements and in finalising the investigation is of great concern to the Ombudsman. The role of the Ombudsman in the conduct of the initial investigation by the Police Department is very limited. The only power that the Ombudsman has is to require the provision of reports and other documents and, even if these are provided, he is not in a position to release these to the complainants if Section 26(1) of the Act is invoked. While the police investigation continues, all the Ombudsman can effectively do is report the matter to Parliament when there is such a delay in the investigation. The Ombudsman has no power to ensure the expedition of an investigation, other than by bringing the matters to the attention of Parliament and the public by way of a Special Report such as this.

The Miles-McKinnon Complaints

These complaints were referred to in the Ombudsman's 1984-85 Annual Report.

In his report to Parliament on 7 April 1986, the Ombudsman set out the following chronology of delay:

15 December 1984	Constable 1st Class Miles makes a detailed complaint through his senior officer to the Commissioner.
30 January 1985	First interview between Miles and an investigator from Police Internal Affairs - breaks down for technical reasons.
7 February 1985	Interview resumed - breaks down when Miles accuses investigator of having been seen drinking with police the subject of complaint after being delegated the responsibility for the investigation. Miles requests that the Ombudsman be informed of the complaint.
February/March 1985	Miles and McKinnon allegedly make repeated requests that the Ombudsman be informed of the complaint. Second investigator, a Chief Superintendent from outside the Internal Affairs Branch, appointed.
19 March 1985	Ombudsman's Office informed by telephone of the complaints.
April 1985	Second investigator commences investigation by serving memorandums on many police from the North Shore Area directing them to set out what they know about the numerous complaints (this

Directive Memorandum later becomes a subject of complaint).

17 April 1985 — Miles and McKinnon attend the Ombudsman's Office, Miles submits a copy of his ten-page original complaint and his records of interview with the first investigator (three pages and seven pages respectively). McKinnon submits a thirty-one-page complaint and eleven pages of associated documents. They submit to a tape-recorded interview with officers of the Ombudsman, the transcript of which runs to twenty-eight pages. Coincidentally, on the same day the Ombudsman receives from the Assistant Commissioner (Internal Affairs) a copy of Miles' original complaint and records of interview.

29 April 1985 — The Ombudsman writes to the Assistant Commissioner (Internal Affairs) questioning the delay in the investigation and referring to allegations by Miles and McKinnon that:

(i) the second investigator, in the presence of a Deputy Commissioner, threatened that if any junior police supported the allegations, they would be charged for not having reported the allegations sooner; and

(ii) the second investigator's Directive Memorandum was improper.

29 May 1985 — Miles and McKinnon submit to a tape-recorded interview with officers of the Ombudsman, the transcript of which runs to sixty-nine pages. Miles also submits a fifty-one-page statement and numerous supporting documents.

7 June 1985	The Assistant Commissioner (Internal Affairs) replies to the Ombudsman's letter of 29 April and encloses a twenty-four-page report from the second investigator, directed at justifying his investigative technique. The Assistant Commissioner requests the Ombudsman's permission to defer investigation pending the resolution of a submission to the Minister for Police "to establish an Inquiry pursuant to Section 45 of the Police Regulation (Allegations of Misconduct) Act". (Such an Inquiry is held before the President of the Police Tribunal and concerns matters relating to discipline in the Police Force.)
14 June 1985	The Ombudsman sends the Commissioner copies of all the material received or created in his Office and requires investigation of the further complaints. The Ombudsman also refuses consent to defer investigation because the nature of the proposed Inquiry has not been revealed to him.
24 June 1985	Deputy Commissioner Perrin writes to the Ombudsman requesting deferral of investigation into all matters and stating that the proposed Inquiry under Section 45 "relates to all grievances held by both Constables".
8 July 1985	The Ombudsman consents to a 14-day deferral and writes to the Minister about the matter.
23 July 1985	An officer of the Ombudsman is informed by telephone from Police Internal

	Affairs that a third investigator has been appointed, a Superintendent from outside the Internal Affairs Branch, and that the Minister has not replied to the request to convene an Inquiry.
1 August 1985	The third investigator commences investigation by serving upon junior police the same Directive Memorandum used by the second investigator.
15 August 1985	The then Minister for Police, the Honourable P T Anderson MP, consults the Ombudsman on the matter.
19-23 August 1985	Miles and McKinnon subjected to lengthy interviews by the third investigator.
12 November 1985	Ombudsman's Annual Report for the year ended 30 June 1985 tabled in Parliament. That Report contains strong criticism of delays in investigating this matter.
13 December 1985	The third investigator submits his one-hundred-and-forty-page report of his investigations into all but two of the areas of complaint.
9 January 1986	The report and associated papers are sent to the Ombudsman. The Assistant Commissioner (Internal Affairs) informs the Ombudsman that the papers relating to certain aspects of the investigation have been sent to the Legal Advisings and Police Appeals Section for advice.
13 January 1986	The Ombudsman writes to the Commissioner asking for reasons for the invocation of the confidentiality provisions and requesting priority be given to the remaining matters.

26 February 1986	The Ombudsman again writes to the Commissioner questioning the continuing delay and seeking details of further progress and, particularly, the nature of the advice sought from the Legal Advisings and Police Appeals Section.
3 March 1986	One of the Commissioner's staff writes to the Ombudsman informing him that investigation into the alleged conspiracy to pervert the course of justice (1984-85 Annual Report topic 106) has been completed with the exception of interviews with the two very senior police "D" and "E" who were to be interviewed by the Commissioner that week.
10 March 1986	Assistant Commissioner Shepherd writes to the Ombudsman revoking the application of some of the confidentiality provisions and promising his final report of investigations "in the very near future".
24 March 1986	Clarification of the confidentiality question sent to the Ombudsman.
26 March 1986	Further papers, including a report by the Commissioner of Police himself into allegations against other very senior police, received by the Ombudsman.

At the date on which he made his report to Parliament the Ombudsman had not received a final report from the Commissioner on the main allegations, as required by Section 24 of the Act, nor had he received replies to his questions of 26 February 1986. A final report was received on 21 May 1986.

Delay such as that outlined above not only compromises the investigation, in that evidence may be lost, memories fade, and witnesses disappear; it also hampers the Ombudsman's power to reinvestigate complaints. Indefinite delay in the police investigation also delays the commencement of any investigation by the Ombudsman. Such a position is intolerable.

In the report to Parliament, the Ombudsman referred to the amendment which he had proposed to the Police Regulation (Allegations of Misconduct) Act in his 1984-85 Annual Report. The proposed amendment is as follows:

> 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.

The Ombudsman noted that in other places with similar legislation the time period is much shorter, eg in Western Australia 42 days; in Toronto, Canada, 40 days. The Ombudsman believes a time limit of the order of 42 days would be totally unrealistic in New South Wales and has suggested a more conservative period with a proviso for an agreed extension of time.

In a media release on 10 April 1986 the then Premier said:

> The Premier, Mr Neville Wran, and the Minister for Police, Mr Paciullo are sympathetic to the recommendations of the Ombudsman concerning time limitations for police investigations of complaints against the police, as contained in two reports tabled in Parliament today.
>
> It is agreed that the legislation should be amended to specify a period after which the Ombudsman could take over the inquiry.
>
> The period of 90 days suggested by the Ombudsman, however, may be too short in the light of the experience of the complexity of many cases which have been the subject of


THE POLICE INVESTIGATION IS TAKING A WHILE..
THAT'S WHY I'VE TAKEN IT TO PARLIAMENT...
..CAREFUL - THE INK'S WET...
ZAP!

investigation.

The actual period will be determined after further discussion with the Commissioner of Police.

The Ombudsman welcomes the agreement of the then Premier to amend the Act to provide a time limit on police investigations and will pursue this issue as a matter of urgency.

In the meantime, the Ombudsman has indicated to the Commissioner of Police and the Minister for Police that, after the resumption of Parliament in late September 1986, he will make special reports to Parliament in any individual matter where he believes that there has been gross delay, contrary to the public interest.

87. Possible serious misconduct: four Section 33 reports: update

Last year's Annual Report referred to four reports to the Minister and Commissioner under Section 33 of the Police Regulation (Allegations of Misconduct) Act. This section of the 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.

The first report arose out of a complaint that arson squad detectives solicited a bribe from the prime suspects in a case. The Ombudsman's recommendation that evidence from the police investigation should be put before an independent legal adviser, to determine whether or not criminal or other proceedings should be instituted, was carried out by the Commissioner. The Solicitor-General considered the police evidence and determined that there was insufficient evidence for proceedings against the police to be instituted. No further action has been taken by the Minister or Commissioner following the Solicitor-General's advice. The Ombudsman was unsuccessful in his many attempts to obtain a copy of the Solicitor-General's opinion; this is referred to elsewhere in this Report.

The second Section 33 report arose out of a reinvestigation of police actions during a drug raid in a North Coast town and was made in November 1984. It was considered that a Detective Sergeant may have made a deliberately false statement about the incident. In January 1986 the Ombudsman asked the Commissioner of Police if any action was being taken on the report, and was informed by Executive Chief Superintendent Pry that the matters raised in the report had "been subject of extensive investigation", and that he considered that the Detective Sergeant's statement was not "deliberately false or made with any sinister intent in mind". Executive Chief Superintendent Pry advised that no further action would be taken in the matter and that the Minister had been advised accordingly.

The former Minister for Police then advised the Ombudsman that he was of the view that the matters raised in the report, and the results of further investigations, might warrant consultation in due course. He believed that it would be more appropriate to consider the report in conjunction with another matter concerning the same Detective Sergeant.

The third report concerned a complaint that a police officer had given false evidence in a Children's Court about shoplifting charges against a juvenile. In February 1986 the Ombudsman was advised that, after his report had been considered by the Solicitor for Public Prosecutions, court action would be taken against the police officer for "false swearing". The police officer has been committed for trial.

The fourth report under Section 33 arose out of a reinvestigation by the Ombudsman of an allegation that a senior police officer had wilfully used a police vehicle to damage another motor vehicle. The report referred to the submission, by an unidentified police officer, of a false Government Insurance Office "Report of Motor Vehicle Accident" form. The Ombudsman recommended that the Commissioner urgently investigate the origin of the false form. In December 1985 the Ombudsman asked the Commissioner if any action had been taken on this report. In July 1986 the Ombudsman was advised that, because the officer who

had submitted the false form could not be identified, despite the efforts of handwriting experts, the investigating officer believed that there was no point in sending the papers to independent counsel, to determine whether there were grounds for criminal or disciplinary proceedings.

88. Complaints by Messrs Ainsworth and Vibert against special Task Force

The 1984-85 Annual Report noted that the Ombudsman had completed the first stage of his direct reinvestigation about one of a multitude of complaints made on behalf of Messrs L H Ainsworth and E P Vibert about two members of Police Task Force 2. That complaint, made on 6 December 1983, was that two members of Task Force 2, Sergeant Hanrahan and Detective Sergeant Clark, had provided false information to the Commissioner of Police, Mr C Abbott, and to the then leader of the National Party in New South Wales, Mr L Punch. The complaint arose from a question asked in Parliament by Mr Punch on 22 November 1983 in these terms:

> .... Has the Minister [for Police] ordered enquiries to establish whether Assistant Police Commissioners Jim Pyne and Bob Day and a Mr Gordon Aldridge had lunch with poker machine industry figures who were then under police investigation? Does a diary seized by members of Police Task Force Two show the lunch appointment with the Assistant Commissioners listed on Wednesday, June 23rd, last year? What reasons have been given by the Assistant Commissioners for attending the luncheon with poker machine magnate Len Ainsworth, as indicated in his diary?

In the course of the Ombudsman's inquiry it was not denied by the two police officers the subject of complaint that they gave information about an entry in Mr Ainsworth's diary to the Commissioner of Police and also mentioned it in a discussion they had with members of the staff of Mr N Greiner, Leader of the New South Wales Opposition, and of Mr A Peacock, then Leader of the Federal Opposition. They denied, however, that the information they gave about the diary entry was false. When asked why they had discussions with outsiders and revealed the contents of the diary entry, the police officers maintained that their investigations into matters concerning Messrs Ainsworth and

Vibert had been interfered with. They said that improper approaches had been made to them by persons, including police officers, acting on behalf of Messrs Ainsworth and Vibert, and that this was of concern to them both in the public interest and from a personal point of view. They claimed that they went to the staff of Leaders of the State and Federal Oppositions to seek a kind of "insurance", and that the diary entry, viewed in the context of the approaches that had been made to them, could be seen as part of some web of corruption.

The Ombudsman's inquiry considered the following matters:

(a) whether all or any of the facts relied upon by the police officers were true;

(b) whether such facts as were found to be established in that regard constituted either a partial or a complete defence of the complaint; and

(c) whether, in the event that it was determined that such facts were not exculpatory, they ought to be regarded as mitigating circumstances relevant to the question of what, if any, action should be taken against the police officers.

On 11 September 1985 a statement of provisional findings and recommendations was forwarded to the complainants and police the subject of complaint. Subsequent to the issue of that statement, advice was sent to the complainants, the police the subject of complaint and the Commissioner of Police. Upon a request from this Office, counsel advised that other interested persons were entitled to receive copies of the statement, or parts of it -

(a) which contained adverse comment about them;

(b) in connection with which they could be expected to be able to provide information which might assist in the investigation.

Parts only of the document were provided to interested parties on 11 and 17 September 1985.

After 11 September 1985 written and oral comments and submissions about the statement of provisional findings and recommendations

were received from the complainants and other interested parties. In addition, further evidence was given by various people.

On 7 April 1986 proceedings were commenced by Mr Aldridge against the Ombudsman in the Administrative Division of the Supreme Court of New South Wales. These proceedings were listed for hearing on 11 and 12 September 1986. The Ombudsman was represented by Mr M R Gleeson, QC, and Mr J C Campbell of counsel, instructed by Messrs Ebsworth and Ebsworth. When the matter was called for hearing on 11 September, Mr Aldridge, who was also represented by Queen's Counsel, consented to a verdict in favour of the Ombudsman. The litigation delayed the conclusion of the matter. The Ombudsman immediately sent a draft report to the Minister for Police. The report has now been made final.

Having regard to the resources of the Office of the Ombudsman involved in the investigation, and in the public interest, the nature of the complaint and the Ombudsman's conclusions should be set out.

In order to understand the conclusions the Ombudsman reached it is necessary to set out some of the background events that, according to Sergeant Hanrahan and Detective Sergeant Clark, prompted them to act as they did. Among the events dealt with in the Ombudsman's final report were the following:

The search of the Ainsworth premises on 21 April 1982

At approximately 4.30 pm on 21 April 1982 a search warrant for Mr Ainsworth's business premises was executed by officers of Task Force 2. The police were accompanied on their raid by two Queensland officers, Inspector Bradbury and Detective Inspector Ingham. Other members of the raiding party included Sergeant Hanrahan and Detective Sergeant Clark.

When he first gave evidence at the Ombudsman's inquiry, Mr Ainsworth said, "I knew they were coming ... I had a phone call in the afternoon to say, 'The police are coming to arrest you; you better get out of there ... It's this Vibert business.' A few minutes later the same person rang and said, 'Clear out your safe ... they are coming to get you.'"

Sergeant Hanrahan said that when he entered the office, Messrs Clareborough and Fullerton (employees of Ainsworth) were present. He said that "from the opening remarks it was obvious to us that we were expected and comment was made on us having arrived later than had been originally expected". He said that Mr Clareborough said to Inspector Bradbury, "You're from Queensland, aren't you?."

Sergeant Hanrahan said that Mr Clareborough informed him that he and Ainsworth had had lunch that day with Mr Jim Pyne (an Assistant Commissioner of Police), and that Pyne had informed them that police would be attending Ainsworth's offices about 4 pm that date, in company with two Queensland police, for the purpose of conducting further searches of the premises.

Mr Clareborough in the evidence he first gave to the Ombudsman denied telling Sergeant Hanrahan that he had lunched with Mr Ainsworth and Assistant Commissioner Pyne that day. He said that Assistant Commissioner Pyne's name was not mentioned.

After a statement of provisional findings and recommendations was issued by the Ombudsman, Mr Clareborough asked to be allowed to give further evidence. Mr Clareborough said that, upon reflection, he now remembered that he had been present at a lunch attended by Assistant Commissioner Pyne on 21 April 1982, and that they had briefly discussed the Ainsworth matter (following a telephone conversation between Mr Ainsworth and Mr Clareborough).

Mr Ainsworth, too, gave further evidence, saying that he now recalled having a telephone conversation with Mr Clareborough, who was at a lunch attended by Assistant Commissioner Pyne. Following questions by Mr Nicholas QC, counsel assisting the Ombudsman, there appeared to be two discrepancies between the evidence given by Mr Ainsworth and that given by Mr Clareborough. Mr Ainsworth denied that he knew that Assistant Commissioner Pyne was attending the lunch, and he denied that it was he who expressly asked Mr Clareborough to take the matter of the impending police raid up with Assistant Commissioner Pyne.

The alleged approach by Sergeant Lambert to Sergeant Hanrahan

Sergeant Robert Lambert is presently attached to Lidcombe Police Station. He knows Mr Ainsworth very well. He has also known Sergeant Hanrahan for a long period. There is no dispute that Sergeant Lambert telephoned Sergeant Hanrahan in relation to the Ainsworth investigation.

Sergeant Hanrahan gave evidence that Sergeant Lambert had indicated that he (Hanrahan) should meet with Mr Ainsworth as it would be "worth [his] while". Sergeant Lambert strongly denied that any improper suggestion was made during the telephone conversation.

After the distribution of the statement of provisional findings and recommendations, Sergeant Lambert gave further evidence, changing his statement on the question of whether Mr Ainsworth had asked him to approach Sergeant Hanrahan. Sergeant Lambert first told the Ombudsman that Mr Ainsworth had asked him to make an approach to Sergeant Hanrahan. In his further evidence Sergeant Lambert emphasised that Mr Ainsworth had never asked him to contact Sergeant Hanrahan.

Sergeant Hanrahan's last discussion with the Commissioner of Police on 15 September 1983

On 15 September 1983 Sergeant Hanrahan and another officer had a meeting with the then Commissioner of Police and a Deputy Commissioner, Mr Ross. Sergeant Hanrahan gave evidence to the Ombudsman that, at the conclusion of the discussion, Mr Abbott had said:

> I hope you have taken steps to protect yourself because I don't think I will be able to look after you much longer.

Sergeant Hanrahan said that he was worried by this comment.

Mr Abbott was asked at the Section 19 hearing:

> Ombudsman: Might you have given [Hanrahan] a hint to protect himself in some other way?

> Abbott: Well, I was doing that along the line, always, you know. Self-preservation, look after yourself. And I was most concerned because I think I reached the stage then that it was time that, and I undertook and later did, arrange a transfer from the Task Force to uniform at a country posting for his own self-preservation.

The Ombudsman concluded that the discussions with the then Commissioner of Police on 15 September 1983 played a significant part in Sergeant Hanrahan's decision, some four weeks later, to meet staff of Leaders of the Opposition. In the Ombudsman's view the discussion at the meeting with Mr Abbott was a not unreasonable factor for Sergeant Hanrahan to take into account in making that decision.

Conclusions and Recommendations

In any Ombudsman's inquiry where there is a strongly disputed issue of fact, questions of credibility have to be resolved. In this matter the question of the credibility of Sergeant Hanrahan and Detective Sergeant Clark was strongly in issue. The Ombudsman found both Sergeant Hanrahan and Detective Sergeant Clark to be honest and very accurate witnesses.

The Ombudsman did not believe that Sergeant Hanrahan would concoct the notes recorded in his shorthand notebook (about the diary entry of a lunch appointment between Messrs Ainsworth, Pyne, Day and Aldridge) or rewrite them to include the relevant passage. He believed that the notes were taken contemporaneously. Mr Ainsworth was a not unimpressive witness: he was relaxed, had charm and had built up a successful Australian enterprise able to engage in export competition. Among other things, however, the Ombudsman concluded that he had not been given the truth about the events of 21 April 1982, and the further evidence he heard confirmed that strong impression. That evidence, while confirming his provisional view of the credibility of Sergeant Hanrahan and Detective Sergeant Clark, left the Ombudsman with some disquiet as to the evidence of Mr Ainsworth, and that of his supporting witnesses, about the discussion with Assistant Commissioner Pyne on 21 April 1982.

The Ombudsman also concluded that Mr Ainsworth was not entirely frank as to his knowledge of the role being played by Mr Aldridge, the latter's recruitment by Mr Ainsworth's solicitor, and his own contact with him. The Ombudsman also felt uneasy at the change in Sergeant Lambert's evidence following his discussion with Mr Ainsworth and his solicitor as to whether Mr Ainsworth had asked him to approach Sergeant Hanrahan. The Ombudsman preferred Sergeant Lambert's earlier evidence that Mr Ainsworth had asked him to approach Sergeant Hanrahan.

During the inquiry, reference was made to a decision of Mr K G Hammond SM, the Deputy Chairman of the Licensing Court, on an application by Ainsworth Nominees Pty Limited for an Amusement Dealer's Licence and subsequent proceedings relating to the Deputy Chairman's decision. The Ombudsman is aware that Mr Hammond formed a different view of the credibility of Sergeant Hanrahan and Mr Ainsworth, respectively. It is a matter for each body carrying out an investigation or inquiry to determine the credibility of witnesses before it. The inquiry before the Ombudsman had considerably more witnesses than were called to give evidence before Mr Hammond on the issues discussed on pages 71-77 of the decision of the Licensing Court.

Taking into account these conclusions about the credibility of witnesses in this matter, the Ombudsman, in his final report, made the following Principal Conclusions:

1. In the course of this Report I have indicated certain conclusions I have reached on the related topics I have considered. In this section I set out the principal conclusions I have reached which lead to the findings I am required to make under the Act.

2. The complaint as formulated was that Sergeant Hanrahan and Detective Sergeant Clark supplied false information to the former Commissioner of Police Mr C Abbott and the then leader of the National Party Mr Punch about an alleged diary note of Mr Ainsworth.

3. In my opinion for the reasons already given Mr Ainsworth did have a blue 1982 Collins diary in which there appeared for a date that is now unknown the following entry:

   "Lunch Gordon Aldridge, Bob Day, Jim Pyne 12 m d".

4. As I have found that such a diary entry did exist the provision of information about it to the then Commissioner of Police did not constitute the provision of false information and this part of the complaint is not sustained.

5. At no time did Sergeant Hanrahan and Detective Sergeant Clark meet Mr Punch the then leader of the National Party or any of his staff. They did not provide him with any information.

6. It is clear that on 12 November 1983 in the circumstances set out in this Report Sergeant Hanrahan and Detective Sergeant Clark did meet with Messrs Hooper and Harper, staff of the leader of the New South Wales Opposition, Mr Greiner and Mr Kerr a member of the staff of the Federal Opposition leader, Mr Peacock. It is also clear that during the course of this meeting the two police officers referred to the entry they had seen in Mr Ainsworth's diary and their concern at its apparent implications. (It was this information which was passed by the Liberal Party staff to Mr Punch or his staff and which with the addition of an erroneous date by someone other than the two police officers became the foundation of the question asked by Mr Punch in Parliament on 22 November 1983.)

7. Again, no false information was provided by Sergeant Hanrahan and Detective Sergeant Clark to the Liberal party staff they saw on 12 November 1983. However, in the context of the complaint, the question inevitably arises whether they acted wrongly in providing information about the diary entry to persons outside the police force. It is necessary therefore to consider this issue.

8. Section 12 of the Police Regulation Act 1899 empowers the Governor to make rules for the general government and discipline of the Police Force.

The Police Rules, made pursuant to that power, include the following provisions:

> 50. A member of the Force ... shall treat all information which comes to his knowledge in his official capacity as strictly confidential, and on no account without proper authority divulge it to anyone.
>
> 51. Without affecting the generality of Rule 50, a member of the Force shall observe the strictest secrecy in regard to departmental business, and is forbidden to communicate without proper authority in any way whatever to any person outside the Force any information in regard to Police or other official public business connected with his duties, or which may come to his knowledge in the performance of them.

9. In answer to the complaint Sergeant Hanrahan and Detective Sergeant Clark have put forward a number of incidents discussed in this Report which they contend, showed attempts to interfere with their investigations by persons acting on behalf of Messrs Ainsworth and Vibert (including police officers) and which led to the action they eventually took. In effect, they put this forward by way of defence and alternatively by way of extenuating circumstances to be considered in determining what recommendations I should make in respect of their conduct.

10. I have reached the conclusion that Rules 50 and 51 are absolute in form and have the effect of law. Accordingly, the conduct of Sergeant Hanrahan and Detective Sergeant Clark in giving information to Messrs Hooper, Harper and Kerr as to the contents of the entry in Mr Ainsworth's diary which knowledge they had obtained in their capacity as police officers was "contrary to law" within Section 28(1)(a) of the Police Regulation (Allegations of Misconduct) Act 1978. I am accordingly compelled in law to find that aspect of the complaint sustained.

11. There remains the question of the recommendations that I ought to make. For this purpose, I consider I am entitled to take into account the incidents discussed in this Report. Normally, a finding that police officers had disclosed information obtained in the course of their investigation to outsiders would lead to a recommendation for disciplinary proceedings. In my view the circumstances disclosed in evidence and discussed in topics in this report were exceptional. I believe that taken in combination (including the diary entry itself) these circumstances reasonably gave rise in the minds of Sergeant Hanrahan and Detective Sergeant Clark to a strong suspicion that powerful forces (possibly including some very senior members of the New South Wales Police Force) were ranged against their investigation. I believe that Sergeant Hanrahan and Detective Sergeant Clark were dedicated honest police officers. In all the circumstances, I propose to recommend that no action should be taken against them.

Accordingly, the Ombudsman made the following findings:

1. I find that part of the complaint which alleged that Sergeant Hanrahan and Detective Sergeant Clark supplied information which was false to the then Commissioner of Police to be not sustained.

2. I find that in supplying Messrs Hooper, Harper and Kerr with true information about a diary entry that had come to their knowledge as police officers they breached Rules 50 and 51 of the Rules made pursuant to the Police Regulation Act 1899 and in so doing acted "contrary to law" within the meaning of Section

> 28(1)(a) of the Police Regulation (Allegations of Misconduct) Act 1978. To that extent I find the complaint to be sustained.

The Ombudsman made two recommendations arising out of those findings: The first was:

> Having regard to the matters set out under the heading Principal Conclusions and elsewhere in this Report I make no recommendation that any disciplinary or other action be taken against Sergeant Hanrahan and Detective Sergeant Clark.

The Ombudsman also recommended:

> As a result of this investigation I believe that consideration should be given to the advisability when setting up a task force such as Task Force 2 of assigning to it an experienced lawyer familiar with the criminal law.

89. Complaints by Constables Miles and McKinnon

The 1984-85 Annual Report noted that two police officers, Constables Paul Miles and Max McKinnon, had made numerous complaints about the conduct of senior police, the majority of them stationed in Sydney's North Shore area.

Their allegations included consorting with criminals, conspiracy to pervert the course of justice, drunkenness on duty, failure to attend the scene of a serious crime, disposal of police exhibits prior to the completion of a court case, victimisation and harassment of junior members of the Police Force by senior officers, misuse of the transfer system, indecorous behaviour, misuse of police personnel and resources, driving while under the influence of intoxicating liquor, avoiding duty, improper investigation by the Internal Affairs Branch, and incorrect procedures for handling of commitment warrants.

It took thirteen months for the police investigation to reach the Ombudsman's Office, apparently because:

(i) The Detective Inspector assigned to investigate the allegations was seen drinking in a wine bar with police he was supposed to be investigating. A new investigating officer had to be appointed. Assistant Commissioner Shepherd commented:

> I believe [the Detective Inspector] was indiscreet by continuing to socialize with various members of the Force attached to 25 Division after being appointed to investigate the allegations made by Constable Miles. I am satisfied that his actions were not prompted by any sinister motive.

(ii) Constables Miles and McKinnon, while in the office of a former Deputy Commissioner with the newly appointed investigating officer, were allegedly threatened by these senior police officers, who attempted to influence the complainants to withdraw their complaints. A third investigating officer had to be appointed. Assistant Commissioner Shepherd commented:

> In the case of the Chief Superintendent, I do not feel that there is anything improper in his approach to this inquiry.

Assistant Commissioner Shepherd made no comment about the approach of the Deputy Commissioner to this interview.

When the investigation finally began the investigator interviewed over four hundred witnesses, mostly police officers. Thirty issues were investigated and of these, twenty-seven were found by the police investigator to be "not sustained"; two were considered "sustained". No further action was recommended by the police investigator in any of these complaints. One other aspect of the complaint has not been finalised, because the police officer the subject of the complaint had been suspended and was not prepared to speak to the police investigator.

The majority of the complaints came within the Police Regulation (Allegations of Misconduct) Act, but many grievances expressed by Constable Miles and McKinnon were areas of "discipline" rather than "conduct" in terms of the Act.

Assistant Commissioner Shepherd commented on the police investigation in a lengthy letter in which the following critical observations were made:

> I have noted your views on the calibre of the inquiry as set out in your special report to Parliament tabled on 10th April, 1986. Whilst I do not necessarily agree that your criticisms are warranted I must admit that there are a number of deficiencies ...
>
> The investigation officer on his own admission has not pursued all avenues of inquiry ...
>
> The investigator did not examine necessary departmental records such as notebooks, diaries, occurrence pad entries, which would have assisted him in determining the truth or otherwise of the complaints ...
>
> ... further enquiries should have been made in respect of "arrangements" at Chatswood Police Station regarding the execution of commitment warrants, issued to members of the police force and their families ...
>
> ... reports or statements should have been taken from a police officer (now retired) and a female parking patrol officer in relation to the circumstances of their transfers ...

The Assistant Commissioner nevertheless felt that no good purpose would be achieved in pursuing these matters. The Assistant Commissioner was of the opinion that only disciplinary action could be taken if the matters were found to be sustained.

The Ombudsman received the report on the police investigation on 22 May 1986 and commenced a reinvestigation of one of the issues on 1 July 1986.

The Ombudsman discovered that, in this single issue, four relevant police had not been interviewed during the police investigation. These witnesses have since been interviewed by the Ombudsman and his seconded officers. The Ombudsman has recently forwarded his statement of provisional findings and recommendations on this first issue to interested parties and is awaiting comments and submissions.

The complainants are preparing submissions to the Ombudsman on other aspects of the police investigation, and further reinvestigation will take place.

90. "Age tapes" and the Ombudsman

In the 1984-85 Annual Report the Ombudsman detailed the history of the investigation of complaints concerning the conduct of police officers who allegedly and unlawfully intercepted telephone conversations. The Ombudsman referred to the issue of Letters Patent to His Honour Mr Justice Stewart, by which the Royal Commission of Inquiry into Alleged Telephone Interceptions was established. The Ombudsman decided to defer the investigation of the complaint made under the Ombudsman Act. In relation to the complaints under the Police Regulation (Allegations of Misconduct) Act, he suggested to the Commissioner of Police that the letter and spirit of the Act could best be served by the Commissioner providing to the Ombudsman, by way of progress reports, copies of any material provided to the Royal Commissioner.

The Ombudsman took this action because he believes that it is consonant with the role of the Ombudsman that, where a specialist body like 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 is concluded. The Royal Commissioner reported on 30 April 1986 and his findings and recommendations in Volume 1 of the Report received extensive publicity.

The Ombudsman must now decide whether the investigations of the complaints which have been made should be resumed and, if so, the future course of those investigations. The Ombudsman's concern in these matters was stated clearly in his last Annual Report when, in relation to the system provided by the Police Regulation (Allegations of Misconduct) Act, he said:

> 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.

In addition to the obvious matters of principle which are involved, there are a number of practical and procedural issues to consider.

The first of these issues is the effect of recommendations for indemnities and undertakings made by Mr Justice Stewart on the investigations with which the Ombudsman is concerned. The Letters Patent authorised the Royal Commissioner to recommended that indemnities from prosecution be granted to those police officers involved in the alleged unlawful conduct and who co-operated in giving evidence to the Royal Commission. The Royal Commissioner was also authorised to recommend that undertakings be given by the Commissioner of Police, to those serving members of the Police Force who co-operated in giving evidence, that those officers would not be subject to disciplinary hearings. The Ombudsman has therefore written to the Commonwealth and New South Wales Attorneys-General and the New South Wales Commissioner of Police seeking details of the Royal Commissioner's recommendations and of any indemnities and undertakings given.

A second issue concerns the custody of material tendered to, or in the possession of the Royal Commission. Some of this material was furnished to the Royal Commission by the Commissioner of Police, who did not keep copies of the documents. Mr Justice Stewart declined, at an early stage of his inquiry, to provide copies of this material to the Commissioner of Police. This material would obviously be relevant to the complaints with which the Ombudsman is concerned. In his Report the Royal Commissioner recommended that custody of the material in the possession of the Royal Commission should be vested in the National Crime Authority and suggested ways in which this might be achieved. The Ombudsman has sought advice from the Commonwealth Attorney-General as to whether custody of the material has been vested in the Authority and, if so, whether the material can be made available to this Office.

91. Bogdan Ostaszewski

The previous Annual Report outlined the uncompleted reinvestigation of complaints stemming from the detention of Mr Bogdan Ostaszewski under the Intoxicated Persons Act. Mr Ostaszewski, a Polish migrant, was discovered in a coma in the Wollongong police cells on the morning of 1 June 1985. He has never emerged from that coma. He had been evicted from his boarding house during the previous night and the police, called to the scene by a relative of the boarding house proprietor, had detained him as an intoxicated person. The boarding house proprietor and his son gave a history of falls suffered by Mr Ostaszewski on the night of his detention, including a fall from a balcony. In addition to his head injury, Mr Ostaszewski had suffered extensive bruising.

The Ombudsman's report on his reinvestigation has concluded that there was no evidence to suggest that police assaulted Mr Ostaszewski. Advice which the Ombudsman obtained from Mr J R Dunford, QC, clearly indicated that it was appropriate that the police did not lay charges as a result of the injuries sustained by Mr Ostaszewski.

The Ombudsman said that it was unfortunate that the falls suffered by Mr Ostaszewski were not reported to the detaining police, and that the lack of competent and prompt forensic investigation made it impossible to determine the causes of Mr Ostaszewski's injuries. Medical and other evidence, including the opinion of the specialist neurosurgeon who gave expert advice to the Ombudsman, supported the view that the head injury probably resulted from Mr Ostaszewski's fall from the balcony of the boarding house.

The Ombudsman found major deficiencies in the standard of care and supervision given to Mr Ostaszewski while he was in the Wollongong police cells. This arose partly from lack of training of police officers in recognising that persons were unconscious, and partly from an inexplicable lack of Police Instructions for monitoring the condition of intoxicated detainees, who must frequently be at medical risk; there are detailed (if not

entirely clear or adequate) Police Instructions about the care of prisoners generally. The Ombudsman said:

> From this investigation it appears manifest that the current procedures for the housing and supervision of intoxicated persons in police cells are quite inadequate ... police are charged with the supervision and care of these persons ... with inadequate procedures and no appropriate training to guide and inform [them].

The Ombudsman strongly criticised the police investigation of the circumstances surrounding Mr Ostaszewski's injuries. He said that, because of the proliferation of rumours about possible police involvement in Mr Ostaszewski's sustaining his injuries, the Police Internal Affairs Branch should immediately have been called in to investigate. In the event, it became involved, months later, after a front page article in the local paper caused the Police Minister promptly to refer the matter to Internal Affairs.

The Ombudsman particularly criticised the taking of statements and reports by the local investigators, who failed to submit all possible witnesses to searching questioning. The collection of forensic evidence, too, was inadequate. The Ombudsman questioned the standard of training of "Scientific" police in New South Wales, and the system in this State for the collection and analysis of forensic evidence: a "Scientific" police officer attached to the Internal Affairs team had identified a large bedsore as a bruise.

The Ombudsman also criticised the standard of legal advice given the Internal Affairs investigation by the Police Prosecuting Branch, and said that it fell far short of the standards required by competent legal practice. In particular, he criticised the failure of the Branch to set out the material on which the advice was based and its failure to discuss the relevant law in a competent way.

The Ombudsman recommended that working parties review the systems for the housing and treatment of "at risk" intoxicated persons detained by police, the collecting and processing of forensic evidence in New South Wales, and the Police Rules and

Instructions in these areas. He also recommended interim amendments to the Police Instructions so that those concerning the treatment of ill or injured prisoners apply to ill or injured intoxicated persons. Other recommendations were that there should be automatic Internal Affairs investigations when persons are delivered seriously ill or injured from police custody, and that competent and qualified legal support should be made readily available to police investigators.

92. Meaningless progress reports

The 1984-85 Annual Report noted that progress reports from the Internal Affairs Branch "often show no progress in the investigation". There has been a change: progress reports now convey little useful information at all. Because the Ombudsman believes that he should keep complainants informed of progress in the investigation of their complaints, he usually sends them copies of progress reports from the Internal Affairs Branch.

At one time progress reports usually comprised copies of Internal Affairs Branch memorandums, for example:

> The Detective Superintendent
> POLICE INTERNAL AFFAIRS BRANCH
>
> Complaint by Mr alleging that Police fabricated evidence against him regarding a murder charge.
>
> * * *
>
> PROGRESS REPORT
>
> In relation to the complaint by Mr , owing to the current workload this inquiry has not yet been commenced.
>
> It is anticipated that this inquiry will be commenced the week starting 14 April, 1985.

Perhaps the Office of the Ombudsman could be notified accordingly.

Detective Senior Constable
Police Internal Affairs Branch
10 April, 1985

(This report referred to a complaint sent by the Ombudsman to the Commissioner of Police on 14 February 1985 - investigation eventually commenced on 16 April.)

Progress reports were supposed to be made regularly, but often were not, and this Office spent a great deal of time pursuing them.

In April 1986, without consultation with the Ombudsman, the Internal Affairs Branch introduced a new system of internal progress reports, which were intended also to be sent to the Ombudsman. Each month Internal Affairs investigators filled in forms about each investigation. The revised progress reports were often confusing to complainants, and frequently meant little; for example:

PERSONS INTERVIEWED SINCE LAST PROGRESS REPORT (Including Police)

Nil

.....
.....
.....

NUMBER OF PERSONS STILL TO BE INTERVIEWED (Including Police)

Five

.....

DEFERRAL/OTHER

Applied for: YES/NO DATE: APPROVED: YES/NO

RELATED COURT MATTERS STATUS Nil

Court :

For plea/mention/hearing

Date:

ATTACHMENTS Nil

SECTION 26(1) RECOMMENDATIONS Nil

Document :

Reason :

Period :

REASON FOR DELAY

Backlog of inquiries on other investigative matters

ANTICIPATED DATE OF COMPLETION

Not known at this stage.

.....

Investigating Officer
POLICE INTERNAL AFFAIRS
BRANCH

Date : 2.5.86

(A number of these reports often arrived from the same investigator, all alike, all saying that investigation was delayed because of workload.)

In August 1986, yet another change was made: each Internal Affairs investigator is now interviewed by one of the Superintendents at the Branch, who then prepares a report; set out below is the first page of one such report, which ran to four pages and dealt with sixteen investigations:

COMPLAINANT	FILE NUMBER	OMBUDSMANS FILE NO

RECEIVED PIAB 4/3/86

PRESENT POSITION

Eleven civilian witnesses seen. About 25 more civilian witnesses at and . Four Police will be interviewed. No anticipated date of completion can be given. Unchanged since report of 23 July, 1986.

COMPLAINANT	FILE NUMBER	OMBUDSMANS FILE NO

RECEIVED PIAB 15/11/85

PRESENT POSITION

Original investigation completed. Awaiting Court transcripts. Further complaints received which necessitates further trip to . Cannot provide completion date. Unchanged since 23 July, 1986.

COMPLAINANT	FILE NUMBER	OMBUDSMANS FILE NO

RECEIVED PIAB 1/11/85

PRESENT POSITION

Completed. Application made for deferrment (sic) on 18/8/86.

COMPLAINANT	FILE NUMBER	OMBUDSMANS FILE NO

RECEIVED PIAB 23/7/85

PRESENT POSITION

Awaiting papers from complainants solicitor and also transcripts from lower Court. Since last progress report a further complaint received via the Ombudsmans Office. Five of Six Police interviewed. Remaining Officer, Det. on Extended Leave in until late October, 1986. Will be finalised late November, 1986 if transcripts etc, are received.

These reports, too, meant relatively little and often arrived late. The staff of this Office thus developed the practice of telephoning the Internal Affairs investigators personally to

discuss progress. The police investigators seemed to like the practice, but some members of the Internal Affairs Branch Administration did not approve of it; they said that all telephone requests for progress reports should be made to certain "contact officers" at the Branch.

These contact officers are usually performing clerical duties; they have little knowledge of, or connection with investigations, and are rarely able to provide any useful information about them. Restricting telephone contact with the Internal Affairs Branch to communication with these officers unduly reduces the amount of information available to the Ombudsman. Whether or not that was the intention of the Internal Affairs Administration, the Ombudsman strongly objected to it and has directed his staff to continue, in appropriate circumstances, to telephone Internal Affairs investigators direct.

It is ludicrous, when the Ombudsman has a function under the legislation to make progress reports to complainants, to restrict in these ways the amount of information he is able to include in those reports.

93. Problems with the Intoxicated Persons Act

The detention of citizens under the Intoxicated Persons Act has again produced a number of complaints. The main causes of these complaints were set out in the 1984-85 Annual Report. Complaints dealt with this year included:

1. The Ombudsman sustained a complaint by an elderly diabetic who was detained as an intoxicated person when he was suffering from a hypoglycaemic reaction, even though a card in his wallet and his medical bracelet identified his disability.

2. The Ombudsman sustained a complaint that a solicitor from the Western Aboriginal Legal Service was wrongly detained as an intoxicated person after an altercation with a police officer; the solicitor had attempted to secure the release from police custody of two Aboriginal people detained under the Act.

3. Police in a north-western town detained two Aboriginal people under the Act. The Ombudsman concluded that one was not intoxicated to the required degree, and neither was behaving in the disorderly manner relied on to justify detention. The Ombudsman believed that there were two possible reasons for the detention: to reduce what the police thought was the possibility of more "riots" in the town; or because the more senior officer was trying to demonstrate to his junior, who was new in the town, an "appropriate" style of policing for the area. This complaint and its results are referred to in more detail in the Case Notes section of this Annual Report.

The Ombudsman had earlier recommended that police rules be changed to require police to inform intoxicated persons in detention that they are entitled to make a telephone call to a relative or friend, or to have one made on their behalf.

In November 1985 the Intoxicated Persons (Amendment) Act was assented to. It provides that:

> Where an intoxicated person is detained under this Act at any proclaimed place, including a police station, the intoxicated person -
>
> a) shall be informed ... that a responsible person who is willing immediately to undertake the care of the intoxicated person may secure the intoxicated person's release; and
>
> b) shall be given a reasonable opportunity to contact a person who is a friend or a relative for the purpose of securing the release of the intoxicated person into the care of the responsible person.

This initiative of the former Minister for Police, the Hon P T Anderson, was most welcome. It should reduce complaints by citizens detained under the Act that they were refused the opportunity to contact someone who could undertake their care and secure their release.

The Commissioner of Police has recently agreed to recommendations made by the Ombudsman that a publicity campaign about the Intoxicated Persons Act be conducted and that a poster outlining

citizens' rights under the Act be displayed in police stations and other appropriate places. A programme of police lectures on the legislation, commenced on the Ombudsman's recommendation, will raise the awareness of both police and citizens about citizens' rights under the Intoxicated Persons Act.

Another initiative in this area was prompted by the Diabetic Association of New South Wales: following representations by the President of the Association, the Police Department has agreed to issue to all police stations a poster prepared by the Association entitled "Not Drunk. He is a Diabetic".

94. Inadequate penalties imposed by Commissioner for police misconduct

In the 1984-85 Annual Report the Ombudsman expressed concern that monetary penalties imposed by the Commissioner of Police on police officers found guilty of "misconduct" and other serious charges did not always reflect the seriousness of the offences. He listed a number of cases in which fines imposed by the Commissioner were manifestly inadequate. In one case a police officer was fined only $100 for approaching a federal policeman, seeking to influence an investigation of an immigration racket.

The Ombudsman described the monetary penalties imposed in this and other cases as "derisory and out of line with community standards"; penalties should reflect the seriousness of charges.

During the last year a police officer was found guilty of misconduct after conveying private and defamatory information about the complainant to a department store credit officer. The officer was fined $50. The Ombudsman recommended again that monetary penalties imposed by the Police Commissioner should be reviewed in terms of the seriousness of the offence and in line with current values. The then Deputy Commissioner (Administration), Mr J C Perrin, refused to accept this recommendation, but said that he would "bear in mind" the Ombudsman's views.

In another case a police officer was fined $50 for neglect of duty. The officer failed to record the statement of an alleged witness to a motor vehicle accident, had failed to obtain statements from two witnesses, and had failed to record all relevant details of skid marks, the position of the vehicles, and road markings. As a result of the officer's neglect, civil litigation ensued, and the complainant incurred expenses of $2,500. These expenses were later reimbursed, on the Ombudsman's recommendation, by the Police Department. The Ombudsman recommended yet again that the monetary penalty be reviewed. The Assistant Commissioner (Internal Affairs), Mr R C Shepherd, replied:

> It is advised that your comments, expressed in that Report as well as your 1984/85 Annual Report, concerning the imposition of monetary penalties for Departmental charges admitted or found proved, have been noted.
>
> Obviously, this Department's practice of considering each such matter on its merits should continue. However, your view that any fine imposed should adequately reflect the degree of seriousness of the offence involved, will be borne in mind on all such occasions.

The Commissioner of Police later informed the Ombudsman:

> ... I am presently reassessing policy associated with the imposition of penalties in order to increase these penalties and heighten the deterrent effect.

The Ombudsman welcomes this decision by the Commissioner, and will closely monitor its results.

95. Legal opinions of Crown Law officers: no need for secrecy with Ombudsman

Last year's Annual Report referred to the difficulty that 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 Solicitor General, on such questions as whether there is sufficient evidence to prefer criminal charges, or to take disciplinary proceedings. The issues raised by the two cases discussed in last year's Annual

Report continued to be the subject of correspondence between the Ombudsman and the Attorney-General.

Following the Attorney-General's suggestion to the Ombudsman in August 1985 that alternative procedures would have to be devised in these matters, a Review Committee, comprising officers from the Attorney-General's, Premier's and Police Departments, reviewed the guidelines for prosecuting alleged criminal offences by police officers. The Ombudsman was asked to comment on the Review Committee's conclusions.

Before commenting, the Ombudsman wrote to the Attorney-General:

> Basically, I wish to avoid the costly situation where I make a recommendation for disciplinary or criminal proceedings to be taken against a police officer the subject of complaint to this Office, that I have to obtain an opinion from independent counsel and annex it to my report. In view of the limitations to which you refer on making available to me copies of advice given by the Solicitor General, it may be possible that in such cases I can recommend to the Commissioner of Police that advice be obtained from some other designated Crown officer or officers whose advice will not be subject to the same restrictions and a copy of whose advice can be provided to me.

On 31 January 1986 the Ombudsman wrote to the Minister for Police in the following terms:

> A primary concern of this Office is that in complaints under the Police Regulation (Allegations of Misconduct) Act or under the Ombudsman Act, the Ombudsman should receive copies of all legal advice which determines whether charges are laid or not. Following discussion with Mr Roach, the Solicitor for Public Prosecutions, and after further consideration I propose that a new paragraph 7 be added to the guidelines. A copy of the proposed new paragraph 7 is annexed.
>
> The short effect of the proposal is that the Commissioner is placed under an obligation to forward to the Ombudsman copies of advisings and opinions received by the Commissioner from the Solicitor for Public Prosecutions and Crown Advocate in any matter where a complaint is being investigated under the Police Regulation (Allegations of Misconduct) Act or Ombudsman Act. As indicated in 7(f), the Commissioner will be able to avail himself of the provisions of Section 26(1) of the Police Regulation (Allegations of Misconduct) Act if he believes it to be in the public interest to preclude publication by the Ombudsman of documents sent to him.

The suggestion made in this letter is a solution to a problem that I have been grappling with for some time and which is referred to in our Annual Report. In short, if the above proposal is not acceptable, the only alternative open to this Office following a re-investigation in which it is thought there may well be grounds for a prosecution is to brief private counsel direct to advise whether proceedings should be brought.

If this advice is in the affirmative then the recommendation made in my report would be that proceedings should be brought against the police officer(s) concerned and the opinion of counsel would be annexed. In the event of the Commissioner, on the advice of the Solicitor for Public Prosecutions or Crown Advocate, taking a different view of the matter it would have to be resolved by my applying to the Police Tribunal and seeking, under sub-section 5 of Section 30, a direction from the Tribunal that a criminal charge be laid. This alternative has the disadvantage that it is more costly and more confrontational, which is undesirable. If I am assured, by the adoption of the procedure set out in my suggested additional paragraph 7 of the Guidelines, that the Commissioner will supply full copies of the opinions of the Solicitor for Public Prosecutions to me, then my recommendation in any such case would simply be that I recommend that the Commissioner obtain the advice of the Solicitor for Public Prosecutions and act upon that advice or upon any subsequent advice from the Crown Advocate.

I seek your urgent consideration.

The new paragraph which the Ombudsman suggested be added to the guidelines reads:

7. Where the reference to the Solicitor for Public Prosecutions arises in connection with a complaint the subject of investigation under the Police Regulation (Allegations of Misconduct) Act, 1978 as amended, or under the Ombudsman Act, 1974, the following provisions will apply:-

a) At the same time the Commissioner causes the papers to be forwarded to the Solicitor for Public Prosecutions the Commissioner shall forward to the Ombudsman a copy of his letter to the Solicitor for Public Prosecutions and all documents forwarded to the Solicitor for Public Prosecutions.

b) The Commissioner shall send to the Ombudsman copies of all further correspondence between any officer of the Police Department and the Solicitor for Public Prosecutions relating to the matter in respect of which advice is being sought.

c) In notifying the Commissioner of his recommendations, the Solicitor for Public Prosecutions will forward to

the Commissioner a full copy of all advisings or opinions on which his recommendations are based.

d) Upon receipt of the recommendations from the Solicitor for Public Prosecutions the Commissioner shall forthwith send to the Ombudsman a copy of the letter setting out the recommendations and all advisings and opinions supplied by the Solicitor for Public Prosecutions pursuant to 7(c) above.

e) Where the Commissioner does not agree with the recommendations of the Solicitor for Public Prosecutions and the Solicitor for Public Prosecutions refers the matter to the Crown Advocate for further advice, the Commissioner shall forward to the Ombudsman a copy of his letter to the Solicitor for Public Prosecutions. Upon receipt of the advice of the Crown Advocate, the Solicitor for Public Prosecutions shall forward a full copy of that advice to the Commissioner who in turn will forward a full copy of the advice to the Ombudsman.

f) If he believes the public interest requires it, the Commissioner may invoke the provisions of Section 26(1) of the Police Regulation (Allegations of Misconduct) Act to preclude publication by the Ombudsman of documents sent to him.

On 10 February 1986 the Solicitor for Public Prosecutions and Clerk of the Peace, who had received a copy of the Ombudsman's letter of 31 January to the Minister for Police, wrote to the Ombudsman:

> I refer to your letter of 31 January last under cover of which you forwarded to me a copy of your draft paragraph 7.
>
> Your draft paragraphs 7(c) and 7(d) present difficulties in that I do not make available to the Commissioner copies of advisings or opinions upon which any recommendations are based. If advice from counsel has been obtained in addition to my own officer's opinion, that is simply paraphrased, if any specific reference is made to it at all, in my letter of recommendation to the Commissioner. Indeed, such additional advice sought may simply be by way of an informal reference to a Crown Prosecutor with an equally informal response. This procedure is consistent with the existing guidelines and with the proposed amendments wherein I am simply required to make a recommendation to the Commissioner.
>
> Similarly, in respect to your draft paragraph 7(e), any documented advice obtained from the Crown Advocate is not forwarded by me to the Commissioner. In practice I simply indicate in my response to the Commissioner the view held by the Crown Advocate.
>
> I note that in your letter to the Minister for Police and Emergency Services you express approval of a situation in

> which you are supplied with "full copies of the opinions of the Solicitor for Public Prosecutions" and if that be the case, your recommendation to the Commissioner would simply be that he obtain my advice or the subsequent advice of the Crown Advocate, and act upon it.
>
> As I indicated during our recent meeting, I have no objection to the Commissioner of Police providing to you a copy of any recommendation received from this Office concerning the question of criminal proceedings against a police officer. It nevertheless remains for the Commissioner, as my client to concur and actually provide the material you seek.

On 3 July 1986 the Minister for Police wrote to the Ombudsman in response to his letter of 31 January 1986. The Minister said:

> After careful consideration and having regard to advice I have received from the Attorney-General, I regret I am not able to agree to the addition of a new paragraph 7 to the guidelines.

Given the Minister's response in this matter, the only alternative left to the Ombudsman is that which he foreshadowed in his letter of 31 January 1986 to the Minister: that is, to brief private counsel for advice about possible proceedings.

96. Delays in providing court transcripts

In the 1984-85 Annual Report the Ombudsman referred to long delays in obtaining transcripts of court proceedings relevant to investigations of complaints about police. Such complaints are first investigated by the Police Department and, at that stage, the Ombudsman has no authority to obtain the transcripts directly from the court.

The Ombudsman has on several recent occasions referred these delays to the Attorney-General. The Deputy Secretary of the Attorney-General's Department had said that approximately 1300 applications for transcripts were received each month at the eleven transcription centres. These transcripts involved some 2,300 hours of recorded time, or about 11,500 hours of typing time. The Deputy Secretary said that the following priority order had been established to deal with applications:

(i) where person committed for trial and is in custody;
(ii) where person committed for trial and is on bail;
(iii) appeal where appellant is in custody;
(iv) appeal where appellant is on bail;
(v) matter is part-heard;
(vi) application by party in a completed matter;
(vii) coronial inquest.

The Deputy Secretary noted that the costs in the preparation of transcripts are very high. For that reason, the system of supplying duplicate tapes of proceedings to the police was introduced, where the only application for a transcript was one made by the police. The Deputy Secretary said:

> I appreciate the need for Police Internal Affairs Branch to obtain transcripts, but I do not consider it reasonable that they be given priority over any other applicant for a transcript.

On 11 November 1985 and 14 February 1986 this Office again referred instances of delay to the Attorney-General. The Attorney-General agreed that in each case there had been some delay: in the first instance, described by the Attorney-General as "inordinate", the Director of Local Courts Administration had requested the Management/Internal Audit Division of his administration to investigate the matter.

A much more disturbing situation was revealed in May 1986 over lengthy delay in the provision of transcripts in five cases. In the first matter three applications for separate portions of transcript had been received from the Police Department. The first application was received on 30 April 1985 and the transcript completed, and police advised, on 30 May 1985. Fees for the transcript were not, however, paid until 8 August 1985 and the transcript was sent on 13 August 1985. The second application was received on 11 October 1985 and the transcript (by far the longest portion) was completed on 12 December 1985. Police were advised on 24 December 1985, but fees were not paid until 20 February 1986 and the transcript was sent on 4 March 1986. The third application was received on 5 May 1986 and was still being prepared as at 16 May 1986.

In the second matter, the Attorney-General advised that there was no record of any application for a copy of the transcript being received from police. In the third matter, the application was received on 3 February 1986 and the police were advised on 11 April 1986 that the transcript was available. As at 14 May 1986 the transcript had not been collected by police, nor fees paid. In the fourth matter, the application was received on 31 January 1986 and the transcript was supplied on 21 April 1986. In the fifth matter, an application for the transcript (recorded by shorthand) was made prior to January 1986. The transcript was supplied on 24 April 1986. The delay was caused by the resignation of the Court reporter and the difficulty experienced by other reporters in reading the shorthand record.

A further example is provided by a case where an application for a transcript was made by police on 18 February 1986. In a letter of 18 June 1986, the Attorney-General said that police were advised on 24 February 1986 that the transcript was available. As at 13 June 1986, fees of $11.00 had not been paid and the transcript had not been collected.

It can be seen that the significant delays in three of these cases were due solely to the failure of the Police Department to pay for and pick up transcripts. On 25 June 1986, one of the Assistant Ombudsmen wrote at length to the Commissioner of Police, detailing the information received from the Attorney-General in these three matters, as well as the matter where there was no record of any application being received, and seeking the Commissioner's comments. As at 29 July 1986, no reply had been received from the Commissioner of Police in relation to these matters other than a letter of 7 July, concerning the first matter, enclosing a portion of transcript previously omitted.

The Ombudsman appreciates the personal interest of the Attorney-General in following up these matters and providing this Office with detailed information. In some cases the performance of the Police Department has, by comparison, been lamentable. To tell the Ombudsman that there had been delay in receiving court transcripts when those transcripts had been available for

collection for some time shows gross inefficiency or, worse, deception.

97. Traffic Branch - no longer an area of concern

The section in last year's Annual Report dealing with the Traffic Branch ended on a positive note: increased efficiency had resulted from clear policies, staff training and improved procedures. The number of complaints concerning the Traffic Branch has declined and the Secretary and his staff have dealt promptly with the matters which fall within their area of responsibility.

Nevertheless, problems can sill occur. For example, Mr D's complaint illustrates things that can go wrong with an infringement notice. Mr D's father complained in October 1983, and repercussions from the Department's handling of the matter were still being felt in June 1986.

Mr D was overseas between January 1983 and March 1984. Unbeknown to him, someone had obtained his licence renewal form and had renewed and used his motor bike licence while he was away; this person had also committed a number of traffic offences. In October 1983 Mr D's father received a summons for an offence allegedly committed by his son in May 1983. He wrote to the Superintendent of Traffic, returning the summons and explaining that his son had been overseas at the time of the alleged offence. He asked that the mistake be corrected.

Upon his return from overseas, Mr D found that the case, rather than being withdrawn, had been adjourned until June 1984. He rang the Police Department on a number of occasions, but could not discover who was dealing with his father's correspondence.

Enquiries showed that Mr D's father's letter had not been acknowledged, in accordance with departmental policy, because of high volumes of correspondence. Mr D's subsequent correspondence asking for some response met a similar fate. Investigation by this Office suggested that both the Secretary and the Assistant

Commissioner (Traffic) were reluctant to assume responsibility for the matter.

In the meantime, the person who had renewed Mr D's licence was committing further offences for which commitment warrants were issued against Mr D. Yet it appeared that no action had been taken to apprehend the person who had illegally renewed the licence. Enquiries that had been made appeared to have resulted from the intervention of this Office.

In June 1985 the Secretary gave Mr D an undertaking to have the warrants withheld and the convictions annulled. Nevertheless, the police again attempted to execute the warrants on 31 July. As at 25 June 1986, there remained a conviction on Mr D's driving record that had not yet been annulled. The Secretary was trying to correct this.

The Secretary has now agreed that in complex matters the Traffic Branch should provide an interim reply.

The Self Enforcing Infringement Notice System (SEINS) introduced by the Department on 1 July 1984 is now operating well, and there are no excessive delays in replying to correspondence. In January 1985 the Review Section of the Traffic Branch had 17,800 items on hand and a turnaround period of 104 days. This has been reduced to less than 2,000 items and a 14 to 21 day turnaround.

There is still concern about the way in which the Department deals with complaints against parking patrol officers and police officers who issue parking infringement notices. This Office declines most such complaints, because the matter can be determined in court. When this Office seeks information on such matters, which are not strictly administrative, the responsibility for a reply generally falls on the Commissioner of Police, rather than on the Secretary. There are sometimes delays of up to six months in obtaining information of this kind.

98. Mr Azzopardi's complaint against Internal Affairs Branch

The investigation by police, and then by the Ombudsman, into the complaint by Mr E J Azzopardi against officers of the Internal Affairs Branch was set out in the last two Annual Reports.

During 1985-86 the Ombudsman has taken evidence from further witnesses, including the former police officer initially cleared by the Internal Affairs Branch, ex-Sergeant Christopher Jones. Mr Jones has served a prison sentence for various offences connected with the operation of the Parramatta Police-Citizens Boys' Club.

The Ombudsman's statement of provisional findings and recommendations in this matter was completed on 18 March 1986 and sections of it were sent to the relevant parties. Unfortunately, the imposition of an order under section 26(1) of the Police Regulation (Allegations of Misconduct) Act by the Commissioner of Police precluded the Ombudsman from sending large sections of his statement to the parties concerned. In consequence of comments on the statement of provisional findings and recommendations, the Ombudsman heard further oral evidence from five witnesses, including Mr Azzopardi, two newspaper journalists, former Superintendent Bunt and civilians connected with the Parramatta Police-Citizens Boys' Club. Another four witnesses are to be heard in the very near future.

99. Public mischief prosecutions: promised abolition for Ombudsman complaints

In the Annual Reports for the years 1982-85 the Ombudsman expressed concern that police had prosecuted complainants to the Ombudsman's Office for the offence shortly described as "public mischief" under Section 547B of the Crimes Act. In the 1984-85 Annual Report, the Ombudsman referred to a letter of 19 June 1985 from the then Premier, saying that he had instructed that the Ombudsman Act be amended. The Ombudsman expressed the hope that the proposed amendment would soon be available. This matter remains of concern to the Ombudsman, as there have been several

cases in the last twelve months where complainants have been charged with, or threatened with a charge of, public mischief.

On 16 June 1986 this Office requested advice from the then Premier as to progress in the drafting of the amendment. On 14 July 1986 the Secretary of the Premier's Department advised this Office that a proposal was "presently under consideration".

Significant amendments to the Ombudsman Act were introduced in 1985 as a result of the "legislative foul-up" referred to in the 1984-85 Annual Report. While those amendments were clearly a matter of priority, the Ombudsman is concerned that, after the lapse of twelve months, the proposal to amend the Ombudsman Act in relation to prosecutions for "public mischief" has not advanced past the stage of a proposal and is still "under consideration".

100. Tow trucks - some action but legislative change still awaited

Previous Annual Reports set out details of a police investigation into an alleged tow truck racket. The police investigation has now concluded. In July 1986 the Ombudsman advised the Commissioner of Police that he would not reinvestigate the matter, setting out his reasons. He expressed concern about the police investigation:

> I have previously referred both in correspondence and in reports to Parliament to the unsatisfactory manner in which the complaints made by Mr Wellington and others associated with his business were investigated by police. In essence, Mr Wellington by his complaints sought to draw attention to what appeared to him to be a number of irregularities by police concerned with the operation of tow trucks in the area which might well suggest that police were involved in some form of corruption. Mr Wellington put this succinctly as follows:
>
> > "The original document given to the Internal Affairs and labelled as complaints, was in the form of several different situations which were suspicious to us and the intention was to supply enough information to warrant an investigation into local Police activities."

> Instead, as Mr Wellington pointed out, the police investigation appeared to look exclusively at the particular incidents raised by Mr Wellington and his associates. (Some 65 separate incidents were noted and 41 of these were formally reported on.) At no stage were any surveillance, undercover or like measures undertaken by the Internal Affairs Branch or any other specialist unit, in relation to the activities of the police in the area. Ultimately, reports were made by the police investigating the individual incidents, a Sergeant of Police resigned before completion of enquiries and refused to answer further questions, and some departmental action was taken against several police officers in respect of breaches of the various procedural requirements relating to the police role in relation to tow trucks.
>
> The various reports received in relation to the individual incidents (other than those covered by section 26(1) directions of the Commissioner) were forwarded to Mr Wellington and the respective complainants for comment. Ultimately, as a result of the resignation of the Sergeant of Police concerned, other changes in personnel and the general effect of the various police investigations, Mr Wellington perceived some beneficial changes in the position as it affected his company and expressed reasonable satisfaction with the changed situation although deploring what had occurred in the past. In these circumstances, this Office (having fully revealed the position in reports to Parliament) has given the formal finalisation of the complaints a low priority. The Office has continued to follow the slow and halting steps toward amendment of the Tow Truck Act and Regulations and welcomes the co-operation, improved procedures and details of statistical data relating to tow truck offences provided by Assistant Commissioner (Traffic) Fleming ....
>
> Finally, I should indicate that when I was in New York in October last year, I had a discussion with experts from the New York Internal Affairs Division and in particular as to the manner in which that department would approach allegations of police corruption in relation to tow trucks. I was given the benefit of both discussion and textual material, and was informed that such investigation could include the use of undercover police. It is to be hoped that if, in the future, similar allegations are received about the possibility of corruption in relation to tow trucks in any area of this State, the matter will be dealt with by the Internal Security Unit in an entirely different manner to the way in which the investigations were carried out in the present case.

The Assistant Commissioner (Internal Affairs) replied that the views expressed in the final paragraph would be borne in mind.

Amendments to the Tow Truck Act and the Regulations have been foreshadowed for some time. In March 1983 a Ministerial working


...TAKEN AS A WHOLE – THESE SUGGEST CORRUPTION
REST ASSURED – WE'LL GIVE EACH CASE INDIVIDUAL TREATMENT!

party was set up to examine the regulation of tow trucks. This Committee reported in June 1983 to the Minister. Among its recommendations was one that "the Police authorities be urged to step up enforcement of the Tow Truck Regulations both at the scenes of accidents, and at Police Stations, concerning the manner in which the authority forms are completed". In June 1984 a Tow Truck Advisory Council was set up to see if the recommendations in the report could be implemented. It proposed new legislation; amendments were scheduled for the September 1985 Parliamentary Session, but were not introduced.

On 29 July 1986 the Ombudsman wrote to the responsible Minister, the Hon P D Hills, requesting "any information you feel free to give me as to the present position in regard to the introduction of legislative amendments and the nature of those amendments". Mr Hills replied:

> These proposals which I put before the Cabinet have been referred for consideration by the appropriate Committee of Cabinet. I am therefore not in a position to let you have any further details at this stage.

The Ombudsman also wrote to the Assistant Commissioner (Traffic) requesting advice on the proposed amendments and details of the statistics for the period July 1985 to June 1986. Mr Fleming replied:

> In regard to the amendments proposed to the Tow Truck Act, information currently available to this Office is that the matter is still under consideration.

Statistics for the period 1 August 1985 to 30 December 1985 were provided; those for the ensuing period had not been compiled. Mr Fleming wrote:

> ... I am of the view that a more concerted effort is needed to ensure greater compliance with all facets of the Tow Truck Act and the traffic laws by tow truck operators and drivers.
>
> In this respect, I am causing an "Action Plan" to be developed, the main objective of which will be to expand the level of enforcement activities associated with tow truck operators and drivers in order to inculcate in them the need for strict observance of the traffic laws.

The Ombudsman is not convinced that the action so far taken by the responsible authorities is sufficient to deal with the problem. It is hoped that the Assistant Commissioner's "Action Plan" will achieve some success.

101. "No-bills" revisited: suggested giving of reasons to police

Last year's Annual Report recommended that, prior to any "no-bill" decision, the police officer responsible for commencing the prosecution and the prosecutor at the committal proceedings should be consulted and, before the filing of a "no-bill", given reasons for the decision. This recommendation arose partly from a particular investigation in the Office and also from the experience of police officers seconded to the Office. The Ombudsman was concerned that the secrecy of the present procedure provided a fertile ground for rumour and for suspicion that the "no-bill" provision could be misused.

This relatively short item in the Annual Report created considerable controversy and was widely discussed in the media and by the public. Vigorous correspondence passed between the Ombudsman and the Attorney-General, Mr Sheahan; this eventually led to a helpful personal discussion of the issue.

Those who criticised this part of the Annual Report claimed that the item reflected adversely on the law officers of the Crown. No such criticism appeared in the item, nor was it intended. The issue being addressed by the Ombudsman was that the secrecy of the existing decision-making procedure inevitably led to rumours and suspicion. In some cases, these rumours gained considerable currency, even among police officers. The Ombudsman observed that this process had a debilitating effect on those closely associated with the proceedings, particularly the police officers who had conducted the original investigation and those who had appeared in the committal proceedings.

Recently, in a different context, Mr Justice McHugh of the New South Wales Court of Appeal referred to the problems associated

with secret decision-making. In the case of John Fairfax & Sons Limited v Police Tribunal of New South Wales (30 July 1986) His Honour said:

> Without the publication of the reports of court proceedings, the public would be ignorant of the workings of the courts whose proceedings would inevitably become the subject of the rumours, misunderstandings, exaggerations and falsehoods which are so often associated with secret decision making. The publication of fair and accurate reports of court proceedings is therefore vital to the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice.

While some of the criticism of this short item in the Annual Report was misconceived, the Ombudsman believes that the extensive public discussion which took place in the period following its publication was healthy and worthwhile. The debate increased public awareness of the procedures involved in granting a "no-bill" application and brought into the open the competing arguments for maintaining the status quo or introducing some change. Indeed, the public discussion took the matter even further and raised the wider issue of whether or not reasons for granting "no-bill" applications should be made publicly available in all but special cases; such cases may arise where full disclosure would be contrary to the public interest. In South Australia the first steps in this direction have been taken. A declaration of the Rights of Victims of Crime has been approved by Cabinet and presented to Parliament by the Attorney-General. This declaration, which is used in South Australia as an administrative guideline, acknowledges that the victim of a crime should have the right to:

> .... be advised of justification for entering a nolle prosequi (ie to withdraw charges) when the decision is taken not to proceed with charges. (Decisions which might prove discomforting to victims should be explained with sensitivity and tact).

In New South Wales the position remains the same as that discussed in last year's Annual Report item. Very recently, however, the New South Wales Attorney-General proposed legislation to provide for the appointment of a Director of Public Prosecutions. One of the functions of the Director will be to make "no-bill" decisions.

While the appointment of a Director for Public Prosecution is to be welcomed for the reasons given by the Government and supported by the Opposition, the issue of giving reasons remains. The Ombudsman continues to believe that, at the very least, the modest proposal contained in last year's Annual Report should be implemented.

OPERATIONAL ASPECTS OF OFFICE OF OMBUDSMAN

Personnel Matters

1. Numbers and categories of Officers and Employees

The structure of the Office was significantly altered in January 1984 to take account of the new function of reinvestigating complaints against police, entrusted to the Office by the Police Regulation (Allegations of Misconduct) Amendment Act 1983. The Premier's Department and the Public Service Board agreed to the creation of the following positions:

Special Officer of the Ombudsman	10
Executive Assistant (Police)	1
Administrative Clerk	1
Clerical Assistant	1
Stenographer	2
Typist	2

This increased the staff of the Office from 39 to 56.

The structure of the Office was again altered in March 1984, when the Office was made a separate Administrative Unit under the Public Service Act, becoming directly responsible for personnel and accounting functions. The following changes were made:

Positions created	Positions deleted
Principal Investigation Officer (Grade 11/12)	Principal Investigation Officer (Grade 9/10)
Executive Officer (Grade 9/10)	Executive Assistant (Administration)
Senior Investigation Officer	Investigation Officer
Accounts Clerk	
Personnel Officer	
Administrative Clerk	

This increased the staff of the Office by three to 59.

In April 1984 the staff number was increased by two more positions: an Investigation Officer with special skills in dealing with people from non-English speaking backgrounds and a typist. In March 1985 a second position of Executive Assistant (Police) was created to assist with police reinvestigations. These changes brought the total complement of staff to 62. The only developments since that time have involved converting one position of Administrative Clerk to Clerical Assistant, in order to provide promotional opportunity for junior staff, and appointing an additional Assistant Ombudsman for twelve months.

As indicated in more detail below, at the request of the Ombudsman the Government appointed a second Assistant Ombudsman in order to deal with a backlog of police complaint reinvestigations.

Variations in the categories of Officers and Employees resulting from the above changes are shown in the following table:

	At 30 June 1986	At 30 June 1983
Statutory appointees		
Ombudsman	1	1
Deputy Ombudsman	1	1
Assistant Ombudsmen	2	1
Officers		
Principal Investigation Officer	1	1
Executive Officer	1	-
Executive Assistant (Administration)	-	1
Senior Investigation Officer	2	1
Investigation Officer	16	16
Special Officer of the Ombudsman (Seconded Police Officer)	10	-
Executive Assistant (Police)	2	-
Accounts Officer	1	-
Personnel Officer	1	-
Interviewing Officer	3	3
Keyboard staff and stenographers	16	11
Officer in charge, Records	1	1
Administrative Clerk	1	-
Clerical Assistant	4	2
Totals	63	39

2. Wage movement

There have been no exceptional movements in wages, salaries or allowances.

3. Personnel policies and practices

In late 1985 the Office reviewed personnel polices and practices, while developing its Equal Employment Opportunity Management Plan. The review covered recruitment, training and development, promotion and conditions of service.

All job advertisements are examined before publication to ensure compliance with the Anti-Discrimination Act. Job advertisements are given the widest possible circulation and, whenever possible, are advertised both within and outside the Public Service. Investigation Officers are appointed for limited terms of up to three years; this practice has the approval of the Public Service Board. In view of the high work loads of Investigation Officers, temporary appointments to these positions for periods of four to six months are made pursuant to the provisions of Sections 75, 76 and 80 of the Public Service Act to cope with temporary absences and peaks of investigation load. The Treasurer has recognised this aspect of the Office in the budget allocations.

The selection process is conducted in accordance with Public Service guidelines. A woman is always included as a member of the selection committee.

In a small office with limited resources it is difficult to provide in-house training for staff. The review of personnel practices identified this problem, as well as the need to increase opportunities for staff to participate in training programmes. Since that time efforts have been made to have staff participate in training programmes conducted by larger government departments. A one-day seminar for investigating and interviewing staff was held in June 1986, and more are planned for the coming year.

Opportunities for promotion are limited in a small office, particularly for junior staff. A reorganisation was thus undertaken to increase the promotion prospects of clerical assistants. In addition, a job rotation programme was established to give keyboard staff the opportunity to acquire clerical skills and increase their chances of promotion.

4. Industrial relations

Care is taken to see that this Office always acts within the law, but the functions of the Office are set out in the Ombudsman Act, and these must be the principal consideration when decisions that could have industrial relations ramifications are made.

A disagreement about short term appointments is a case in point. The view of the Ombudsman is that the best interests of the Office are served by the appointment of Investigation Officers for periods of up to three years. The Public Service Association disagreed, and the issue ultimately went before a Full Bench of the Industrial Commission, which decided that it had no jurisdiction in the matter.

The Ombudsman believes that, when a dispute has developed which could significantly affect the effectiveness of the Office and attempts at negotiation have failed, the issue should be taken to the Industrial Commission. Negotiation is a vital tool in the conduct of industrial relations, however, and potential disputes have in recent times been settled amicably in this way.

5. Consultants used by the Office

The Office has used the services of consultants in two investigations during the year. The first concerned a complaint that a council re-directed stormwater from a natural catchment area and channelled it through a culvert, causing erosion to private property. The law on such questions is that, if the council had channelled stormwater into a natural watercourse on private property, the council would not have been liable for the

damage caused by the erosion. Dr B S Jenkins, Senior Lecturer in Civil Engineering in the University of New South Wales, was engaged to provide a report on whether the channel running through the property was a natural watercourse and whether council was responsible for an increase in the amount of flow of natural runoff.

The second investigation concerned a complaint about the standard and frequency of inspections of the Qantas Catering Centre by the Department of Health. The services of Dr Graham Fleet, Senior Lecturer in the Department of Food Science and Technology in the University of New South Wales, were engaged through Unisearch. He provided a written report after inspecting the Catering Centre. He also examined the Department of Health's reports on their inspections of the Catering Centre.

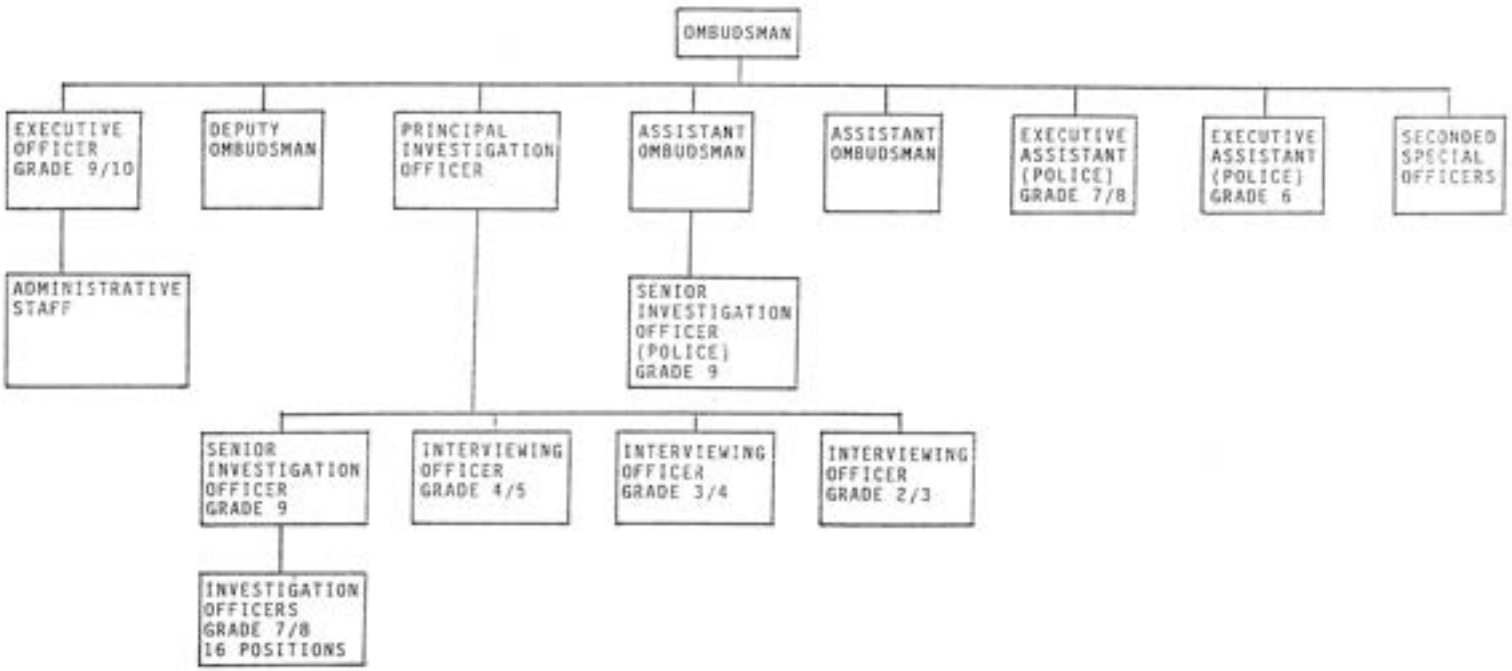
As required by the Ombudsman Act, the engaging of each of these experts was approved by the Premier. The Ombudsman appreciates the advice given by the experts to the Office.

6. Overseas visits

The only overseas visit during 1985-86 was made by the Ombudsman to Canada in October 1985. The "police discipline package" introduced by the Government in November 1983 created a great deal of overseas interest, particularly in Toronto, where the jurisdiction of the Toronto Public Complaints Commission is similar to that of the New South Wales Ombudsman.

The Ombudsman had been asked by Sidney Linden, QC, the Public Complaints Commissioner of Toronto, to deliver a keynote address, "Oversight of Law Enforcement: an Australian Model" at the first conference of the newly-formed International Association for the Civilian Oversight of Law Enforcement. The conference was attended by Ombudsmen, senior police officers and members of Civilian Boards of Review from many countries and States.

ORGANISATION CHART



102. Appointment of an additional Assistant Ombudsman

On 28 February 1986 the Ombudsman asked for approval to appoint an additional Assistant Ombudsman, for one year, to assist in clearing the backlog of police reinvestigations and to deal with major complaints from prisoners. On 30 April 1986 Cabinet announced the appointment of Ms Priscilla Adey to the position, which she took up on 19 May 1986.

Ms Adey, who is 33 years of age, was a solicitor in the Legal Aid Commission for nearly 8 years prior to her appointment. During that time, she worked in three of the Commission's branch offices and was the solicitor-in-charge of two of those offices (Mt Druitt and Bankstown) for three and a half years. She was a Senior Solicitor in the Indictable Section for three years and in that capacity, she gained valuable experience in the criminal jurisdiction of the District and Supreme Courts. In 1985 she participated in the first staff exchange between the New South Wales and Western Australian Legal Aid Commissions. She was admitted as a barrister and solicitor of the Supreme Court of Western Australia and during her secondment she worked in the criminal section of the Commission, where she was the head of that section. On her return to Sydney, she was appointed as Acting Solicitor-in-Charge of the Indictable Section, which position she occupied until early 1986, when she transferred to the newly-created Mental Health Advocacy Branch of the Commission, where she was in charge of the representation of forensic patients.

Ms Adey brings to the Ombudsman's Office the benefit of her experience of all levels of the criminal justice system and a deep interest in the problems of prisoners and the administration of prisons.

103. Equal Employment Opportunity

The implementation of the Equal Employment Opportunity Management Plan is a high priority in the Office of the Ombudsman. In a number of areas significant achievements have been made.

Recruitment

In February of this year the Ombudsman wrote to the then Premier, Mr Wran, seeking approval for the appointment of an additional Assistant Ombudsman. The position was advertised and Ms Priscilla Adey was appointed Assistant Ombudsman, taking up the position in May 1986.

In order to conduct reinvestigations under the Police Regulation (Allegations of Misconduct) Act, ten police officers are seconded to this Office. Since the commencement of the system in 1984, five women police officers have been seconded to the Office; two of these remain, the other three returning to the Force after promotion or to gain greater experience.

Recently, the Office advertised to fill four positions of Investigation Officer at grade 7/8 level. Three of the successful applicants were women. Of the 19 Investigation Officer positions in the Office, nine are occupied by women.

More generally, since October 1985, positions above grade 6 have been advertised both within and outside the Public Service. In these cases, the advertisements have also been displayed at legal centres and educational institutions. All advertisements have been reviewed by the Executive Officer to ensure that the requirements of the Anti-Discrimination Act have been satisfied.

Personnel management

Statements of duties of all positions in the Office are currently under review to ensure that they are up to date and reflect Equal Employment Opportunity principles. A Procedures Manual containing policies, procedures and practices has been prepared for the Accounts section and is in the process of preparation for the Personnel and Administrative sections. All staff are advised of information on Equal Employment Opportunity principles and issues and are provided with such information as is received from the

Office of the Director of Equal Employment Opportunity in Public Employment. An Exit Interview Form has been designed and approved and is in operation.

Selection and induction procedures

A woman representative has participated in every selection committee. All letters advising unsuccessful applicants contain a statement that the applicant is free to make an enquiry concerning his or her performance at the selection interview or concerning the reason for being culled. The Office has also prepared an induction kit, which is provided to all new employees.

Staff development

Arrangements have been made for officers of this Office to attend courses in "Basic Supervision" and to attend a Career Development Workshop for women. The availability of English language courses conducted by TAFE has been circulated to all staff, who have been invited to attend this course if they wish.

Career development

A review of positions in the Records section has been conducted. The review established a need to improve career prospects for base grade clerical assistants. One barrier to progression was the existence of the Senior Records Clerk position as a base grade clerical position. It was felt this position should be converted to a graded clerical assistant position to increase promotional prospects of the base grade clerical assistants. Negotiations were conducted with the Public Service Board and approval was obtained to give effect to this change. At the present time, a female base grade clerical assistant is acting in the Senior Records Clerk position pending its advertisement.

In an effort to allow typing staff to gain clerical skills, one keyboard operator has acted in the position of a base grade clerk in the Records section.

Conditions of Service

Surveys have been conducted on the possibility of introducing a nine-day fortnight, and on the demand for child-care facilities; responses to these surveys are being considered. Information has been provided to all employees on the availability of permanent part-time work and all employees have been invited to make application. All staff have been invited to participate in the TAFE language testing scheme. A permanent grievance mechanism to deal with sexual and racial harassment is in the process of being set up and should be finalised within the next three weeks.

104. Public Service Board

One of the functions of the Public Service Board is to grade positions in the various departments and authorities under its control and to determine salary levels offered. This affects the calibre of persons who can be recruited. Many Ombudsman's offices are free of control by the Public Service Board; in those cases the Office of the Ombudsman itself determines, within the confines of its budget, the number of its staff and salary levels for those staff.

The grading control by the Public Service Board over the New South Wales Office of the Ombudsman can result in inefficiencies and levels of salary which the Office of the Ombudsman may believe to be inadequate for the tasks involved. A case in point is the position of Accounts Officer in the Office. When the position was created, the Office asked for a grading and salary level which it believed was appropriate for this important officer. The Public Service Board reduced the grade from that requested, and at that time the Office was able to obtain a competent officer at the reduced grade. In April 1986 the Accounts Officer transferred to the Premier's Department and the

vacancy was advertised. Only one application, of insufficient merit, was received. This made it clear that the position had been under-graded; a submission had to be made to the Board for approval to increase the grade from Grade 4 to Grade 5/6. While the Board was prompt in agreeing to this request, the existence of Public Service Board control meant that the Office was without a qualified Accounts Officer for almost five months. Had the Office been free of this control, and allowed to make its own judgment of economic realities and the importance of the position to the Office, this precarious situation would not have occurred.

Another illustration of the adverse effects of Public Service Board control over the Office of the Ombudsman was referred to in the Annual Report for 1984-85 under the heading "Public Service Board Restrictions Impair Ombudsman's Efficiency: Typists and Stenographers". It was pointed out that the Public Service Board grading system that applied to typists and stenographers adversely affected the efficiency of the Office of the Ombudsman. The situation deteriorated throughout the year and the disparity between starting salaries for Public Service Board typists and stenographers and those in the private sector has increased. Staff turnover in this area has been unduly rapid, leaving highly motivated professional Investigation Officers with heavy workloads frustrated by typing backlogs. The Ombudsman accepts the need for restraint in times of economic difficulty, but believes that the same budget, free from the restraints of the Public Service Act, could be used to achieve a more efficient result without the need to comply with gradings designed in a different age and for the Public Service as a whole.

The responsible officers of the Board with whom the Office of the Ombudsman has come into contact during the past year have nevertheless been amicable and, to the extent the system and Board guidelines allow, helpful.

105. Treasury and the Ombudsman

The Office of the Ombudsman, like other government agencies, has had to contend with limited financial resources. The 1985-86

budget allocation was less than that sought, but with constant monitoring of the budget position and stringent allocation of limited financial resources, the Office managed to live within its budget, apart from supplementation of $30,000, granted by Treasury primarily because of heavy, unanticipated legal costs connected with a particular investigation.

By January 1986 it became apparent that expenditure on working expenses would exceed the original allocation by $30,000. The increase was mainly for legal fees, arising from the increasingly legalistic approach taken to reinvestigation of complaints against police.

One of the most demanding investigations conducted to date by this Office is into complaints against members of Police Task Force 2. Over 50 witnesses gave evidence, some on more than one occasion, and all evidence had to be taped and transcribed. The Ombudsman took evidence in Sydney, Melbourne and Brisbane. It was necessary, because of the sensitive nature of the matters involved, to obtain counsel's advice at various stages during the course of the inquiry and at the time of distribution of parts of the statement of provisional findings and recommendations. It was also necessary to employ both senior and junior counsel to give advice and to appear at certain of the hearings, where parties to the investigation were likewise represented. Recently, proceedings have been commenced in the New South Wales Supreme Court seeking an injunction restraining the Ombudsman from proceeding further with the matter; these resulted in further legal fees, even though, in the event, the Ombudsman was successful.

None of these costs could have been anticipated, nor is it possible to predict further costs that might arise out of similar investigations. Accordingly, approval was sought from Treasury to have the "Fees" item of the budget supplemented to the extent of $30,000, and this was approved.

As the year progressed, a close watch was kept on the "Fees" item, and in May 1986 the Ombudsman was able to advise Treasury that, although it had been necessary to increase expenditure on

some items, substantial savings had been made in other areas. The Ombudsman was able to obtain Treasury's permission to supplement the working expenses of the Office to the extent of $60,000 by reallocating savings made in the "Salaries" item of the budget. Ultimately, expenditure on fees amounted to $130,000, yet through stringent management of the overall budget, it was only necessary to seek from Treasury supplementation of $30,000.

The original allocation for the item "Leave on Retirement" was $19,000. By December 1985, ten resignations had occurred, requiring payments totalling $25,500. An application was therefore made to Treasury seeking what then appeared to be an inevitable supplementation. As the year progressed and savings were made, it became apparent that this over-expenditure could be absorbed; in early June 1986 the Ombudsman was able to write to Treasury and withdraw this request for supplementation.

Overall, at the end of the financial year, the total expenditure of the Office was well within the supplemented allocation.

The Public Finance and Audit Act requires the Office of the Ombudsman to introduce an effective system of internal audit. The Ombudsman has formally employed Messrs Priestly and Morris, Accountants, as internal auditors for the Office at an annual fee of $5,000. Again supplementation was sought for this amount but, because of savings made in other areas, the application was not pursued. Increased costs were met out of the original allocation.

Performance Indicators

106. Introducing performance indicators

The 1984-85 Annual Report anticipated the introduction of performance measurement for New South Wales government; the Premier's Department in April 1986 issued a circular on the subject, and in June 1986 the Regulation made under the Annual

Reports (Departments) Act 1985 required that "where practicable, qualitative and quantitative measures and indicators of performance showing the level of efficiency and effectiveness" of an organisation be included in its Annual Report. A circular from the Treasury said that these things were "desirable" in 1985-86 and mandatory in 1986-87.

It was suggested in the previous Annual Report that performance measurement would not accurately reflect the work of this Office, because it conducts several kinds of inquiries and investigations, with wide variations in the resources required for each and the measurable results achieved. A single telephone call might sometimes bring "results", while a long and complex investigation might produce a finding of "no wrong conduct"; the finding is a valuable "result", but it cannot be measured accurately in terms of "performance". With these things in mind, it was decided during the year to refine performance indicators for the Office. The following steps have now been taken:

1. Changes have been made to the clerical system in order to make it possible to enter essential data about complaints in the Office's computer.

2. Suitable programmes have been designed for entering complaints data into the computer and retrieving it in a form useful for both investigation and statistical purposes. Greg Andrews, a Senior Investigation Officer, has been largely responsible for this development.

3. Data from the computer has been used to show the stage of inquiry or investigation that each complaint has reached; this indicates, broadly, the amount of resources that have probably been devoted to it.

4. The method of categorizing complaints has been changed, again in order to reflect more accurately the resources likely to have been required in each matter. At the establishment of the Office of the Ombudsman, complaints were categorized according to the provision of the Ombudsman Act that was employed in dealing with them: Section 12 concerned complaints where the Office lacked jurisdiction, Section 13 with those that were declined for

one of the reasons envisaged by that provision (premature, insufficient interest, and so on), Section 15 with those that were discontinued, and Section 26 with matters where there was a formal finding of wrong conduct. Yet the important distinction, from the viewpoint of performance, lay between those complaints that had proceeded to formal investigation, and those that had not. There was a subsidiary distinction between complaints declined at the outset and those in which preliminary inquiries were made; indeed, preliminary inquiries could once have occupied as much time as formal investigations, although in recent years they have been much more strictly controlled.

The new categories of complaints, which were introduced in February 1986, are:

Not investigated	Computer Code
No jurisdiction	NJ
Declined at outset	DECO
Declined after preliminary enquiries	DECE
Resolved after preliminary enquiries	RES
No prima facie evidence of wrong conduct (i.e. complaints where no prima facie evidence of wrong conduct found after preliminary enquiries.)	NPFE
Investigated	
Discontinued (e.g. no utility, resolved, other reasons etc.)	DIS
No wrong conduct	NWC
Wrong conduct	WC

The "resolved" category has been refined in order more accurately to indicate performance; this is dealt with in point 7, below.

5. A register of wrong conduct reports was set up some time ago to record, mainly for statistical purposes:

a) for departments and authorities, local government councils and prisons - reports of wrong conduct;

b) for the police area of investigation:

i) sustained reports where no reinvestigation;

ii) sustained reports after reinvestigation.

This Office produces other reports which are indicators of performance and a record is now being kept of the following:

c) for departments and authorities, local government councils and prisons - formal reports of no wrong conduct (these are rare, but are always the result of a particularly complex investigation);

d) for the police area of investigation - not sustained reports following reinvestigation.

6. A register of compliance with recommendations in wrong conduct reports has been set up.

7. The category of "resolved" complaints has been refined. For many years the practice of the Office was to record a complaint as resolved only if the complainant wrote a letter specifically to that effect. It has been decided that this category should include all matters where, in the judgement of this Office, the problem raised by the complainant has been solved without the complainant necessarily having said as much in writing. This will more accurately reflect results achieved by this Office.

8. All instances where a public authority has taken constructive or remedial action of any kind following the involvement of this Office will be recorded in files before they are closed, and then transferred to a register. These are additional to "resolved" complaints, since public authorities sometimes take constructive action which does not necessarily solve the original problem. In some respects this kind of result could be said to reflect the performance of public authorities,

rather than of this Office, but it was pointed out in the last Annual Report that the mere involvement of this Office sometimes prompts a public authority to take action.

9. Several other sets of statistics will indicate performance; these include:

a) information provided to members of the public by telephone by the Office's Receptionist/Information Officer;

b) telephone inquiries dealt with by Interviewing Officers;

c) interviews conducted in the Office with prospective complainants;

d) interviews conducted during visits to prisons and juvenile institutions;

e) interviews conducted during Community Information Programmes;

f) the number of Investigation Officer-hours spent in visits to prisons and juvenile institutions, and in Community Information Programmes;

g) the kinds of action taken as a result of interviews at prisons and juvenile institutions;

h) the number of hearing days devoted to inquiries under Section 19 of the Ombudsman Act, divided according to the "general" or police areas of investigation, and whether held in the Office of the Ombudsman or in some other place.

When existing and new measures are combined, this Office will be able to provide the following indications of performance:

Information supplied to the public
Enquiries dealt with
Interviews conducted, according to location
Complaints handled, according to categories and stages
Action taken by public authorities, according to categories
Numbers of days of formal hearing, by category
Numbers of formal reports, according to categories

Responses to recommendations
Reports to Parliament

Some of these statistics have been collected for a number of years, including 1985-86, some are available for only part of the year, and others have been collected only from 1 July 1986. Those that are available for the full year are set out in the relevant sections of the Annual Report - reports to Ministers, visits to prisons and so on. In the 1986-87 Annual Report the full range of statistics, including those being compiled mainly as performance indicators, will be set out, in addition, in a section of the Annual Report devoted to performance.

107. Section 19 (Royal Commission) inquiries in the "general" area

Under Section 19 of the Ombudsman Act, the Ombudsman may hold inquiries, during which he may excerise powers similar to those of a Royal Commissioner. Witnesses summoned to appear before the inquiry may be required to answer questions in relation to the investigation, and to produce relevant documents. In 1985-86, Section 19 inquiries were held in seven matters in the "general" complaints area.

Generally, Section 19 inquiries are held when the usual investigative procedures of obtaining written materials have not been particularly fruitful, and when direct questioning of parties would be the most appropriate way of gaining information. This could arise because of the technical or complex nature of the matter under investigation, or because the investigation focuses on the actions of individual officers. Section 19 inquiries are also held when there is serious conflict in the evidence, when there have been excessive delays in responding to the Ombudsman's investigations, and when public authorities have, infrequently, been obstructive.

The Ombudsman also uses Royal Commission powers in reinvestigating complaints under the Police Regulation (Allegations of Misconduct) Act. This is discussed elsewhere in this Report.

108. Matters that are resolved

By far the majority of complaints made to the Ombudsman are discontinued or declined because there has been no wrong conduct by the public authorities involved, or because there would be little utility in investigating the matters. Another 10 per cent of complaints are not proceeded with because the problems are resolved following preliminary enquiries by the Ombudsman's Office. These cases are often minor, but their resolution brings to complainants an end to frustrating battles with the bureaucracy.

Typical of the cases that were resolved during the past year are the following:

DEPARTMENT OF EDUCATION: A company that leased premises to the Department in Ballina complained that it had been unable to recover outstanding arrears from the Department, and that a series of letters dating back to May 1983 concerning the arrears had been unanswered. Following preliminary enquiries, the Director-General notified the Ombudsman that a complete review of the case had been conducted, and a payment and apologies made.

It appears that the Department had surrendered the relevant premises in 1984 and that the file dealing with the matter had been filed without the rental arrears being attended to. The Department introduced a new checking procedure to eliminate the possibility of similar cases occurring in the future.

DEPARTMENT OF TECHNICAL AND FURTHER EDUCATION: As a requirement of his apprenticeship to a rural county council, the complainant was required to complete the TAFE Electrical Trades Course by correspondence through the College of External Studies, since no such course was offered at his local technical college. In March 1984 he applied to commence the final stage of the course, after successfully completing previous stages. The college allowed him to commence the three elective subjects in the course and told him that the core subject, Electronics, which was being re-

written and up-dated, would be available by the time he had completed the electives. He completed the electives in November 1984, but the Electronics unit was not available and was still not available when he complained to the Ombudsman in August 1985. By that time the Industrial Registrar had reduced his term of apprenticeship, and he was eligible for tradesman's wages, subject to confirmation of completing the course. Six months of back pay was owing to him at that time, but he was unable to collect it until he completed the course.

Preliminary enquiries by this Office during the next three months included meetings and telephone calls with TAFE officials. The complaint was finally resolved following action by TAFE, which re-structured the External Course Development Unit, established a position of Chief Education Officer to co-ordinate the final stage of material production and dispatch, and improved project management and communications between schools and the College of External Studies. The College Principal reviewed the system of course development and the provision of the subject material to the complainant, and the officers responsible for the delay were reprimanded.

STATE BANK: Following the theft of her State Building Society pass book a woman student complained to the Ombudsman of poor security procedures at a suburban branch of the State Bank, which acted as an agency for the Building Society. The woman had reported the theft to the Building Society within an hour, but discovered that $460.00 had already been taken from her account at the agency operated by the State Bank. The Bank apparently had allowed a male to make the withdrawal.

Preliminary enquiries were made of the State Bank, and the Ombudsman was informed that arrangements had been made for the complainant to be reimbursed.

AUSTRALIAN GAS LIGHT COMPANY: A resident of Newport complained that the gas company had incorrectly replaced a gas meter at his property some years previously, and that this had caused gas leaks around the joints. He said that he reported this to the company, which told him that it would "send someone out". When

this did not happen, the resident mended the leaks himself with putty and tape. The repairs eventually deteriorated, and he again notified the gas company, which now told him that it was his responsibility to have the leaks fixed.

Telephone enquiries were made to AGL, and they checked their records of the service; these showed that the gas meter had been replaced seven years ago. Despite the time lag, the company dispatched a service person to repair the leak at no charge.

ILLAWARRA COUNTY COUNCIL: The complainants purchased a block of Crown land that had been advertised as serviced. When they approached the council to connect power to the block, they were required to pay the $90 connection fee plus a $600 capital contribution fee. An investigation of a similar complaint in 1985 had found that council had advised the Department of Lands that no contribution fees were required for the sub-division. The Department had acted on that information and, by doing so, had misled prospective purchasers.

Following that investigation, the council resolved to refund the contribution fee. The council a year later, however, required these new purchasers to pay the contribution fee. When preliminary enquiries about this new complaint were made to the council, the council said that it would refund the $600 and was considering lifting the contribution fee from the sub-division in question.

METROPOLITAN WATER SEWERAGE & DRAINAGE BOARD: The complainants, who resided in Queensland, owned a property in Kingswood, which they rented out. In January 1986 they received an excess water account for $2,262.64. Enquiries to the Board revealed that an inspector had found a major leak from the service at the property in July 1985, and had issued a waste water notice to the tenant's baby-sitter, requesting that the service be repaired. A further inspection in November 1985 revealed that repairs had not been carried out, and that the leak was discharging 450 litres of water an hour. A further notice was issued to the managing agents, and the tenant was informed. A third inspection 11 days later revealed that no action had been taken, and the Board

issued a final waste water notice requesting repairs within 4 days. At the final inspection, the Board found the service shut off, the premises vacated, but no repairs carried out. They then disconnected the service and held the owners liable for the excess water bill. The Board, in its letter to the complainants, said that it had done "everything in its power to effect repairs to the defective service on the property".

The owners complained to the Ombudsman that they had never been directly informed of the defect. Following telephone enquiries to the Board, it conceded that it had delayed in its follow-up action after first detecting the defect and that, while there was no legal obligation to notify owners of leased premises of defects, it perhaps had a moral obligation to do so. The Board reviewed the excess water bill, and reduced it by approximately $2,000. The Board also undertook to review its guidelines, so that copies of defect notices would be sent to owners of leased premises, and prompt follow-up action taken.

STATE LIBRARY: A Victorian resident ordered photocopies of a document held by the State Library. The Library presented the complainant's cheque for payment in December 1985, but had not sent the photocopies four months later.

The complainant approached the Ombudsman, but by the time telephone enquiries were made to the Library, the photocopies had been sent. The Head Librarian of the Copying Service was apologetic about the unaccounted delay, and undertook to contact the complainants with a personal apology.

REGISTRY OF BIRTHS, DEATHS & MARRIAGES: A firm of solicitors complained of the delay in receiving a copy of a marriage certificate that their client needed to present to the Family Court. Enquiries to the Registry revealed that the original application had been received two months previously, but that there was no record of a follow-up letter from the solicitors or of the certificate having been sent. The Registry's computer system had malfunctioned, and the automatic advice when delays are experienced had not been issued. Arrangements were made to issue a certificate on that same day.

Promotion

109. Publicity

In January 1986 the Ombudsman's Office produced multi-lingual pamphlets and posters designed to increase community awareness of its services. One pamphlet, "Your Ombudsman", explains the role of this Office. Two of its inside pages are reproduced below.

ARABIC

ال''اومبدزمان'' يعمل من اجلك

ان ال''اومبدزمان'' ـ المحقق في الشكاوي ضد المصالح الحكومية ـ شخصية مستقلة. مهمته التحقيق في الشكاوي ضد الدوائر والمصالح الحكومية التابعة لحكومة نيو ساوث ويلز، اضافة الى الحكومات المحلية ـ كاونسلز. كما يمكنه التحقيق في الشكاوي ضد السلوك الغير لائق لافراد جهاز الشرطة ايضا.

ولن يكلفك شيئا ان تحيل شكواك الى ال''اومبدزمان''.

لمزيد من المعلومات، رجاء الاتصال بهاتف رقم ٢٣٥ ٤٠٠٠، او احضر شخصيا وناقش مشكلتك مع احد العاملين بمكتب ال''اومبدزمان''، علما بانه يمكن الترتيب لحضور مترجم شرط ان يتم تحديد موعد مسبقا.

لا بد ان تكون الشكوى كتابية ولن ينظر في الشكاوي الشفهية.

ال''اومبدزمان''
الطابق ١٤
١٧٥ بيت ستريت،
سيدني، نيو ساوث ويلز ٢٠٠٠
هاتف رقم ٤٠٠٠ ٢٣٥ (٠٢)

CHINESE

你 的 監 察 員

監察員（THE OMBUDSMAN）是一位獨立人仕。他的工作是調查一些涉及政府部門及地方議會的投訴。他不能調查有關警隊成員行爲不正的投訴。

不管分毫，閣下便可將問題提交監察員處理。

欲知詳情，請電235 4000，或親臨監察員之辦事處與辦事人員討論閣下的投訴。假如閣下預約會見，本處可安排傳譯員從旁協助。

投訴必須以書面方式呈交：

The Ombudsman
14th Floor,
175 Pitt Street,
SYDNEY, N.S.W. 2000
電話： (02) 235 4000

ITALIAN

IL DIFENSORE CIVICO (OMBUDSMAN)

Il difensore civico (Ombudsman) è una persona indipendente il cui compito è di indagare su lagnanze nei confronti di dipartimenti del governo del New South Wales ed enti locali (Local Councils). Può anche indagare su lagnanze contro il compotamento illecito di membri delle forze di polizia.

Interessare il difensore civico al vostro problema non costa niente.

Telefonate al 235 4000 per ulteriori informazioni oppure venite a discutere di persona la vostra lagnanza con uno dei collaboratori del difensore civico. Ci si può avvalere dell'assistenza di un interpeete fissando un apposito appuntamento.

Le lagnanze debbono essere presentate per iscritto.

The Ombudsman,
14mo piano,
175 Pitt Street,
SYDNEY, N.S.W. 2000
Telefono (02) 235 4000

MACEDONIAN

ВАШИОТ ОМБУДЗМЕН

Омбудзменот е независно лице чија должност е да истражува поплаки против државните установи и месната власт на Нов Јужен Велс. Исто така тој разгледува поплаки на зош однос поднесени против припадници на полицијата.

Ништо не ве чини ако се обратите со вашите проблеми кон Омбудзменот.
За понатамошни информации, телефонирајте на телефон 235-4000 или дојдете и разговарајте со еден од персоналот на Омбудзменот. Може да се обезбедат и преведувачи ако ни укажете време пред да дојдете.
Поплаките мора да бидат предадени писмено.

The Ombudsman
14th Floor,
175 Pitt Street,
SYDNEY, N.S.W., 2000
Телефон (02) 235-4000

The second pamphlet, "Police and the Citizen", is a guide to the procedures for handling complaints about the conduct of police officers.

The brightly coloured bi-lingual poster, "The Ombudsman Can Help You" is available in Arabic, Chinese and Italian. There has been a good response to the posters and pamphlets, which are to be produced in other languages.

February 1986 saw the publication of the first edition of this Office's newsletter, "The Investigator". Copies were distributed to government departments, local councils, schools, community centres, Members of Parliament, libraries and other outlets.

The first edition of "The Investigator" concentrated on last year's Annual Report, summarising some of its features and cases. The first page of this edition is reproduced on a later page. The newsletter will be produced every six months. The second edition should be available soon. It has a special feature on Reports to Parliament, including some recent examples. It also has an article on complaints about local councils, and explains the kinds of complaints against councils that can be dealt with by this Office.

Last year's Annual Report mentioned the publicity received by this Office from Redfern Legal Centre's "Streetwize" Comics, a project aimed at providing practical legal information in an easy-to-read format for young people. Comic Number 4 contained a story on "How to Complain to the Ombudsman". Redfern Legal Centre Publishing has continued to produce practical guides on how to use this Office. Recent examples are the section "Complaints" in the second edition of "The Law Handbook", and the chapter "Protecting Your Rights" in "Legal Rights and Intellectual Disability, A Short Guide", a cartoon from which is reproduced below.

The secrecy provisions of the Ombudsman Act continue to pose difficulties for this Office when it wishes to provide information direct to the public and to assist journalists by

THE INVESTIGATOR

Newsletter of the Office of The Ombudsman

14th Floor, 175 Pitt Street, Sydney 2000. Phone: (02) 235 4000

Vol. 1, No. 1 February, 1986

The Annual Report

As with all government departments, the Office of The Ombudsman has to submit an Annual report to the Minister for presentation in Parliament. Because of the confidential nature of much of the Ombudsman's work, together with the limitations on public comment due to the secrecy provisions of the Ombudsman Act, the tabling of the Annual Report is the one time each year when the work of the office can be drawn to the attention of the public through wide media coverage.

The office helps all sectors of the community and, through the distribution of information in places from community centres to prisons, attempts to inform the public of its role.

The 1985 Report, over 300 pages in length, is a very comprehensive document covering all aspects of work from basic staff and procedural matters to detailed explanations of investigations and issues of public interest.

The office is a very busy one receiving 5,424 written complaints in the year to 30 June, 1985. Four enquiry officers handle up to forty general telephone enquiries each day and also conduct interviews with people coming direct to the office.

The Ombudsman's Office is the avenue of last resort for aggrieved citizens and people are encouraged to take every possible action with the authority concerned before making a complaint. In recent years some authorities have set up special departments to deal with complaints, such as the Department of Health Complaints Unit, and others have liaison officers who attempt to resolve complaints before they reach the stage of being investigated by The Ombudsman.

When all else fails, people write in to make a complaint. What follows are examples of some of the complaints dealt with in the past year.

Forensic Medicine

A complaint about the procedures of the Division of Forensic Medicine of the NSW Department of Health was made on behalf of Michael and Lindy Chamberlain. The investigation found that the failure of the Department to retain test plates or slides of bloodstain tests was unreasonable. This failure, and the failure to make photographs of the test slides prejudiced the defence and made it more difficult for the Court to ascertain the relevant facts relating to the blood samples. The Ombudsman's recommendations have now been adopted by the Department.

Constables caught red-handed

At about 11.30 pm 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.

(Continued on page 2)

The Ombudsman?

Who is he? What does he do? These questions and many more concerning the role and function of the Ombudsman's Office and issues that arise from the work of the Office will be discussed in future publications of The Investigator.

Who is the Ombudsman? George Masterman, Q.C.

What is an Ombudsman? The Ombudsman is an independent statutory officer who is the head of the Office of the Ombudsman which is a separate "Administrative Office" under the Public Service Act.

What does the Ombudsman do? The Ombudsman investigates complaints about N.S.W. government departments and statutory authorities (e.g., the State Rail Authority, the Health Department and Maritime Services Board) local councils and members of the police force.

Who can the Ombudsman help? **Anyone** who has a complaint relating to a matter of administration concerning a N.S.W. public authority. Also, if you are not sure what to do about a problem, we may be able to suggest the best way of dealing with it.

Can your local Member of Parliament make a complaint on your behalf? Your local member can only make a complaint on your behalf if he obtains your written consent and forwards a copy of that consent along with your complaint to the Office.

How can you contact the Office of the Ombudsman? If you wish to discuss any problems or complaints you may have, you may phone the Office on (02) 235 4000 or visit the Office which is on the 14th Floor, 175 Pitt Street, Sydney any weekday between 9-5 pm. If you wish to lodge a complaint with the Office, it must be in writing and be either delivered or sent to the above address.

Who works in the Office of the Ombudsman? Deputy Ombudsman — Dr Brian Jinks
Assistant Ombudsman — John Pinnock
Principal Investigation Officer — Gordon Smith

Also, there are 18 civilian Investigation Officers, 10 seconded police officers, 4 Enquiry Officers and all the essential records and typing staff.

Cover page of the first edition of "The Investigator", the newsletter of the Office of the Ombudsman

commenting on or confirming media reports before their publication.

Last year's detailed discussion of the problem, in both the Annual Report and in special reports to Parliament, provoked extensive and sympathetic coverage in the media. Nevertheless, the Government has not seen fit to amend the legislation. Unless a case is one of the few which this Office reports to Parliament, or unless the public authority concerned releases the information (and that almost never happens), the Ombudsman is unable to speak on the matter. The problems with this section of the Act are dealt with in more detail elsewhere in the Annual Report. Meanwhile, media releases following Reports to Parliament remain one of the most important sources of publicity for this Office.

Some examples of media reports concerning last year's Annual Report are given on a later page.

In other jurisdictions, where the Ombudsman is not bound by the rigid secrecy provisions that exist in New South Wales, an open and responsible relationship between the Ombudsman and the media can be of considerable benefit to the public.

Some interesting remarks on this subject appear in the Report of the Saskatchewan Ombudsman for the year ended 31 December 1985.

> An Ombudsman can only make recommendations and cannot determine or change rights. Determining rights is the business of the judicial system and the legislators. If an Ombudsman was limited to making recommendations and had to keep those recommendations entirely internal to the bureaucracy and the political system, his effectiveness would be limited. This is where the media comes in as the Ombudsman's ultimate weapon is his express statutory authority to require governments to test their rejections of Ombudsman recommendations in the court of public opinion.
>
> Media coverage of annual reports, individual cases and the initiatives of the Canadian Ombudsman as a group is also essential to keep the public informed of the availability of the Ombudsman's office and more importantly, of the kinds of issues that are being pursued with the public service and government. In this sense, the Ombudsman needs the media and the media, to a considerably lesser extent, is not unhappy that there is an Ombudsman ...
>
> Frankly, I have nothing but praise for the media in this

State bigwigs gag me, says Ombudsman

Mr Masterman . . . says secrecy stifles him

THE State Ombudsman says senior NSW bureaucrats are gagging his office through obsessive secrecy.

Mr George Masterman said restrictive secrecy provisions of the Ombudsmans Act continued to pose enormous difficulties for his office in providing information to the public and the media.

The secrecy provision prevented him even from even giving the Attorney-

The Daily Telegraph

Ombudsman and open government

THE CREATION of the office of Ombudsman in 1974 was one of the more important reforms of the Liberal-Country Party Government. The appointment by the present Government of Mr George Masterman, QC, in 1981 quickened the pace of the office. It also marked the beginning of a slow process of expansion of the Ombudsman's powers – in 1983 in relation to investigation of complaints against police and last year by making the office independent of the Premier's Department.

The Government's reluctance to expand the Ombudsman's powers is well documented. In 1978 the Gov-

But he is still battling to have the secrecy provisions surrounding his office's investigation of complaints against government authorities relaxed. In his latest annual report Mr Masterman says the reasons for the Wran Government's reluctance on this score remains obscure. He says he "prefers to believe that the situation reflects the 'obsessive secrecy' of senior bureaucrats in NSW rather than any lack of commitment on the part of the NSW Government to openness and disclosure to its citizens".

Is Mr Masterman being facetious? Is an elected government ever so much the prisoner of its

Getting to the truth

THERE is refreshing candor in the State Ombudsman's annual report.

In these days when many official complaints and investigations are heavy in obfuscation and political overtones, Mr Masterman's findings smell of sweet objective honesty.

His unique position enables him to cut to the heart of a complaint and report on its validity in a manner which instils public confidence in his office.

Many of his investigations slice through bureaucratic boundaries so he can expose faults which those involved would, in other circumstances, be able to hush up.

But it appears Mr Masterman is not as free to express his feelings as he would like.

He is bound by secrecy provisions which can, at times, appear to border on the ridiculous.

$300m site broke planning says Ombudsman

Report canes schools on uniform rules

THE NSW Ombudsman, Mr George Masterman, has promised schoolchildren that he will protect them if they don't wear school uniforms.

In a major decision for young people's rights, Mr Masterman has said that his office would investigate if any student provided evidence of having been punished or disadvantaged for refusing to wear a uniform.

The judgment came in Mr Masterman's annual report tabled in Parliament last week.

Working 'at snail's pace

THE Ombudsman accused a number of Government departments and public authorities of working at a snail's pace.

An example of what he called "snail pace progress" was in the Consumer Affairs Department.

In last year's annual report the Ombudsman said a prompt conclusion was needed to deliberations by the Products Safety Committee on dangerous hose attachments.

Jailed youth, 16, begged for move

A 16-YEAR-OLD boy incarcerated in Maitland Jail's intractable section wrote to the NSW Ombudsman begging for help to get out.

The youth told the Ombudsman he was afraid for his life and said conditions in the jail were inhuman.

His plight was revealed yesterday in the Ombudsman's annual report, tabled in Parliament by the Premier, Mr Wran.

province for their handling of Ombudsman issues during my terms of office. I hesitate to think where my office would have been on some issues if members of the media had not been alert to the implications of the subjects we were raising. To cite an example or two, I do not believe this office could have ever accomplished as much as it did in the areas of gas safety inspections and child abuse in the day care and foster care systems, without the generous print and other media coverage that we received.

110. Community Information Programmes

During the year officers visited the following places:

Central Coast	: Newcastle, Gosford
Far North Coast	: Grafton, Lismore, Murwillumbah.

The programmes were again conducted at local community or neighbourhood centres. These venues have been successful in the past, as the public seem to prefer an impartial meeting ground, rather than a government office, to discuss their complaints.

All the neighbourhood centre co-ordinators were eager for the Office to use their facilities to ensure the success of visits. The invitation to citizens to make appointments was especially appreciated.

As previous experience has shown, extensive, pre-arranged publicity is essential for the success of these programmes. Once again, paid advertisements were placed in the local newspapers, press releases were distributed, and various community organisations were contacted. On their arrival, the officers conducted a number of media interviews and appeared on local television. In total, the officers interviewed 80 people in two and a half days on the Central Coast and 112 people in three days on the Far North Coast.

Because large numbers of people wish to discuss complaints, it has become necessary to arrange appointments at 20 minute intervals. The officers found that in the larger centres they were booked out well in advance of the day, and that some people had to be turned away and advised to telephone the Office directly. Most of those people who came without making an appointment were seen, if they were prepared to wait.

Unfortunately, owing to budgetary constraints and the heavy workload of the Office, it was not possible to extend the Community Information Programme this year. Nevertheless, the demand for these visits, particularly from the larger country centres, is such that more Community Information Programmes will be conducted in the future.

STATISTICAL SUMMARY OF COMPLAINTS UNDER OMBUDSMAN ACT

1 July 1985 to 30 June 1986

New result categories have been introduced this year. The aims of the new categories are to simplify the results and give them more meaning. Outlined below is an explanation of the new categories.

No jurisdiction	-	There is now only one "no jurisdiction" category.
Declined at outset	-	Complaint is declined without any enquiries being made.
Declined after preliminary enquiries	-	Complaint declined after some enquiries have been made, either by telephone or by letter.
Resolved	-	Complaints where, in the assessment of this Office, action by a public authority has brought about a reasonable settlement of the matter.
No prima facie evidence of wrong conduct	-	Complaints where preliminary enquiries, often including comments from the public authority and the complainant, reveal no prima facie evidence of wrong conduct, and the matter does not proceed to investigation.
Discontinued	-	Complaints that proceed to investigation, but stop short of a finding (matter resolved, no utility in

proceeding, the complainant takes legal action, etc).

No wrong conduct

Wrong conduct

STATISTICAL TABLES

AUTHORITY - DEPARTMENTS/STATUTORY AUTHORITIES	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Adult Education Board								1		1
Agriculture Department	3	12	2					1	2	20
Albury Wodonga Development Corporation			1							1
Anomalies Tribunal		3	1							4
Anti Discrimination Board	3	1							2	6
Apprenticeship Directorate				1					1	2
Art Gallery of New South Wales		1								1
Attorney Generals Department	6	4	3	9					3	25
Australian Gas Light Company		8	2	3	1				2	16
Bathurst Orange Development Corporation		1								1
Builders Licensing Board	3	23	8	6	11	2	1	2	9	65
Bursary Endowment Board		1	2		2					5
Bush Fire Council				1					1	2
Business Franchise Office									1	1
Chiropractic Registration Board									8	8
Coal and Oil Shale Mine Workers Tribunal	2				1				1	4
Commissioners of Enquiry, Office of	1									1
Consumer Affairs Department		9	5	2	2				3	21

AUTHORITY - DEPARTMENTS/ STATUTORY AUTHORITIES	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Consumer Claims Tribunal	10									10
Co-operative Societies Department		2			1					3
Corporate Affairs Commission	2	12	3	9	7			2	3	38
Corrective Services Department	5	108	52	44	90	21	8	4	73	405
Council of Auctioneers and Agents	1			1	5	1			2	10
Crown Lands Office		1	2			1			1	5
Crown Solicitors Office	5	2								7
Dairy Corporation of New South Wales		3	1	1	8	1			2	16
Darling Harbour Authority		2								2
Dental Technicians Registration Board		1								1
Education Department	7	29	6	7	13	3		2	19	86
Egg Corporation of New South Wales	1		4		1					6
Electricity Commission	1	4	1		1				1	8
Energy Authority							1			1
Environment and Planning Department		8	5	2	4	2	1	1	5	28
Equal Opportunity Tribunal	1									1
Fair Rents Board									1	1
Finance Department		1			2				2	5

AUTHORITY - DEPARTMENTS/STATUTORY AUTHORITIES	1. No Jurisdiction (NJ)	2. Declined at Outset (DOCO)	3. Declined after Preliminary Enquiries (DECS)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Fire Commissioners Board									1	1
Fish Marketing Authority									1	1
Flood Policy Advisory Committee					1					1
Forestry Commission		4	3		2	2			3	14
Government Actuary					1					1
Government Information Centre				1						1
Government Insurance Office	3	24	4	15	3	1	1		7	58
Government Printing Office		2		1						3
Government Real Estate Branch		1							1	2
Government Supply Department									1	1
Grain Handling Authority		2	1			1			1	5
Gundirimba Shire 'C' Riding Drainage Union	1									1
Harness Racing Authority					1					1
Hawkesbury Agricultural College		1		1						2
Health Department of New South Wales	6	35	6	9	11		1	2	14	84
Health Department of New South Wales (Prison Medical Service)	2	15	9	3	11		1		17	58
Heritage Council		3			2				1	6
Higher Education Board		2								2

AUTHORITY - DEPARTMENTS/ STATUTORY AUTHORITIES	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as at 30th June '86	10. Total
Home Care Service					1					1
Housing Department	3	56	1	5	21		1	4*	16	107
Hunter District Water Board		6	1		3			1	2	13
Industrial Development and Decentralisation Department	1	1								2
Industrial Relations Department	2	11	2	6	7		1	2	5	36
Institute of Technology		2								2
Investigating Committee	2								1	3
Joint Coal Board		1								1
Kuring Gai College of Advanced Education		1								1
Land Board Office	5	5			2				3	15
Lands Department		3	2	1	3	1		2 *	3	15
Land Tax Office		5	3	6	1				2	17
Land Titles Office		5		2	1		1		1	10
Legal Aid Commission	3	14	1		2				2	22
Liquor Administration Board			1		1					2
Local Government Department	2	3	1	1	1			2	6	16
Long Service Payments Corporation				2	1			3		6

AUTHORITY - DEPARTMENTS/ STATUTORY AUTHORITIES	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Lord Howe Island Board		1								1
Macquarie University	1	4			1		1			7
Main Roads Department	1	25	6	3	6	1		1	7	50
Management Committee, Joint Task Force into Drug Trafficking									1	1
Maritime Services Board	1	10	3	1	3			1	11	30
Meat Authority of New South Wales		3					1			4
Medical Board of New South Wales							1		1	2
Metropolitan Water Sewerage and Drainage Board		34	5	13	15	1	1		5	74
Mineral Resources Department		1			2	1		1	1	6
Minister for Police, Office of		1								1
Mitchell College of Advanced Education		1			2					3
Motor Transport Department		30	4	12	12	1		5	18	82
Motor Vehicle Repair Industry Council	2	2	1						1	6
Music Examinations Advisory Board		1								1
National Parks and Wildlife Service	4	13	2	1	5	2			1	28
Newcastle College of Advanced Education									1	1
Newcastle Gas Company		1								1

AUTHORITY - DEPARTMENTS/ STATUTORY AUTHORITIES	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as at 30th June '86	10. Total
Nurses Registration Board		1			2				2	5
Parole Board of New South Wales	7	2	1	1					1	12
Pastures Protection Board	1	2	2		2	1			2	10
Pathology Laboratories Accreditation Board		1								1
Payroll Tax Office			2						1	3
Pharmacy Board of New South Wales				1						1
Police Department	1	17	5	13	4			2	76**	118
Premiers Department		3			1				1	5
Privacy Committee of New South Wales	1									1
Protective Office	2									2
Public Accountants Registration Board		1								1
Public Authorities Superannuation Board	1	5		6	2		1		1	16
Public Service Board	1									1
Public Solicitors Office					1					1
Public Trust Office	2	6	1	3	1	1			2	16
Public Works Department		6	1	4	2	1	1	1	2	18
Real Estate Valuers Registration Board					1					1
Registrar of Racehorses	1									1

AUTHORITY - DEPARTMENTS/ STATUTORY AUTHORITIES	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Registry of Births, Deaths and Marriages		5	3	13	2	1			6	30
Release on Licence Board	2								1	3
Rental Bond Board		4	1	2	1				2	10
Rural Assistance Board									1	1
Secondary Schools Board		1								1
Senior School Studies Board		1		1				2 *		4
Small Business Office		1	1							2
Soil Conservation Service					1				1	2
Sport and Recreation Department		1							1	2
Stamp Duties Office		9	5	9	4		1	2	5	35
State Bank		5		1				1	2	9
State Contracts Control Board		1			2	1		1		5
State Electoral Office		2								2
State Library				1						1
State Lotteries Office		3					1			4
State Pollution Control Commission	1	1	2		6				2	12
State Rail Authority	4	9	12	12	10			1	28	116
State Sports Centre		1								1

AUTHORITY - DEPARTMENTS/ STATUTORY AUTHORITIES	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
State Superannuation Board	1	5	5	3	7				2	23
Strata Titles Office		2	3							5
Sydney College of Advanced Education		1			1					2
Sydney College of the Arts		1								1
Sydney Cove Redevelopment Authority								1		1
Sydney Cricket and Sports Ground Trust		13		1					1	15
Teacher Housing Authority				1						1
Technical and Further Education Department		5	2	4	1			1	3	16
Tick Control Board		1							1	2
Totalizator Agency Board		1			1					2
Tourist Commission of New South Wales		2							1	3
Traffic Authority of New South Wales		2			1				1	4
Travel Agents Registration Board		2	1	1	1				1	6
Treasury									1	1
University of New England		1				1				2
University of New South Wales									1	1
University of Sydney	1			1	1				1	4

AUTHORITY - DEPARTMENTS/STATUTORY AUTHORITIES	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Universities and Colleges Admission Centre		1								1
Urban Transit Authority		5	1	2	6	2		1	1	18
Valuer Generals Department	1	7		2			1		1	12
Veterinary Surgeons Board									1	1
Water Resources Commission	2	4	1		1			1	2	11
Western Lands Commission		2								2
Youth and Community Services Department	7	38	9	9	38	1	1	2	26	131
Zoological Parks Board								1		1
TOTAL	126	786	212	260	371	51	27	54	458	2345

*One report covered two cases of wrong conduct.

+One report covered three cases of wrong conduct.

++Fourteen matters are being investigated under both the Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act.

AUTHORITY - COUNCILS	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Albury City		4			1				2	7
Armidale City		2	1	1	1				1	6
Ashfield Municipal		9							2	11
Auburn Municipal					3		1			4
Ballina Shire		3			1					4
Balranald Shire						1				1
Bankstown City		7		2	3				3	15
Bathurst City		2	1						1	4
Baulkham Hills Shire		2	1	3	3				4	13
Bega Valley Shire		2	1	2	3	1				9
Bellingen Shire		3		2		1	1		3	10
Berrigan Shire		1	1			1				3
Bingara Shire						1				1
Blacktown City	1	10		1	4		1		5	22
Bland Shire					1	1				2
Blayney Shire		1		1					1	3
Blue Mountains City		6	3	2	7		1		6	25
Bogan Shire						1			1	2

AUTHORITY - COUNCILS	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Bombala Shire						1				1
Boorowa Shire						1				1
Botany Municipal		4	1	1	1	1			3	11
Bourke Shire	1					1				2
Brewarrina Shire						1				1
Broken Hill City		2						1		3
Burwood Municipal		2		1					1	4
Byron Shire	2	5	1		1	1		1	15	26
Cabonne Shire						1			1	2
Camden Municipal						1				1
Campbelltown City		1	2						4	9
Canterbury Municipal		7	2							9
Carrathool Shire		1				1		2*		4
Casino Municipal		1				1			1	3
Central Darling Shire					1	1				2
Central West County		2		1					1	4
Cessnock City	1	3	2		3	1			1	11
Cobar Shire						1				1

AUTHORITY - COUNCILS	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPRE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Coffs Harbour Shire		9	4	4				1	2	20
Concord Municipal		1	2		1					4
Conargo Shire						1				1
Coolah Shire		1				1				2
Coolamon Shire						1				1
Cooma-Monaro Shire		2				1				3
Coonabarabran Shire	2							2*	1	5
Coonamble Shire					1	1				2
Cootamundra Shire						1				1
Copmanhurst Shire						1				1
Corowa Shire						1				1
Cowra Shire			1					1		2
Crookwell Shire						1				1
Culcairn Shire						1				1
Deniliquin Shire		1							1	2
Drummoyne Municipal		1		1	1					3
Dubbo City		1				1		1		3
Dumaresq Shire			1		1					2

AUTHORITY - COUNCILS	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Dungog Shire					2	1			1	4
Eurobodalla Shire		5	1		4	1	2	1	2	16
Evans Shire				1	1	1				3
Fairfield City		3	2		2				2	9
Far North Coast		5								5
Forbes Shire					1	1				2
Gilgandra Shire								1		1
Glen Innes Municipal		2		1	1	1	1			6
Gloucester Shire						1				1
Gosford City	1	10	7	9	8		1		5	41
Goulburn City					1				1	2
Grafton City		2	2		1				2	7
Great Lakes Shire		6	4	2	3				4	19
Greater Lithgow City						1		2		3
Greater Taree City		5	2	2	2					11
Griffith Shire				2					1	3
Gundagai Shire		2			3	1				6
Gunnedah Shire						1				1

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Gunning Shire						1				1
Guyra Shire						1			1	2
Harden Shire						1				1
Hastings Municipal	2	5		1	4			1	1	14
Hawkesbury Shire		1		1	1			1	4	8
Hay Shire						1				1
Holbrook Shire					1	1				2
Holroyd Municipal	1		1	1	1					4
Hornsby Shire		5	2	2	1				5	15
Hume Shire						1				1
Hunters Hill Municipal		2								2
Hurstville Municipal		5		3		1			2	11
Illawarra County	1	1	2	1	1			1	1	8
Inverell Shire		2								2
Jerilderie Shire						1				1
Kempsey Shire	1	6			1				4	12
Kiama Municipal		5			3	1				9
Kogarah Municipal	1	4	1		1	1	1		1	10

AUTHORITY - COUNCILS	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Kuring Gai Municipal	1	13			3	1			1	19
Kyogle Shire		2		1	1	1				5
Lachlan Shire				1		1				2
Lake Macquarie City	1	15	3	5	9				4	37
Lane Cove Municipal		5		2	5					12
Leeton Shire						1				1
Leichhardt Municipal	1	10	2		4	1			6	24
Lismore City		1	2		1	1			1	6
Liverpool City		2	2	1	3	1			2	11
Lockhart Shire		1	1			1				3
Lower Clarence County									1	1
Maclean Shire		1	2	1						4
Macquarie County									1	1
Maitland City		6			1	2	2			11
Manilla Shire		1				1				2
Manly Municipal		9	1		3				2	15
Marrickville Municipal	1	5		1	2				7	16
Merriwa Shire		1	1					1		3

AUTHORITY - COUNCILS	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Moree Plains Shire			2	1	2	1				6
Mosman Municipal		2							5	7
Mudgee Shire		9		2					1	12
Mulwaree Shire								1	1	2
Murray River County					1					1
Murray Shire		1		1		1				3
Murrumbidgee Shire						1				1
Murrurundi Shire						1				1
Muswellbrook Shire			1		2					3
Nambucca Shire		7	1		1			1		10
Namoi Valley County					1					1
Narrabri Shire			1		6	2			2	11
Narrandera Shire		1				1				2
Narromine Shire						1				1
Newcastle City		9	3	3	2		1	1	2	21
New England County			1							1
Northern Rivers Electricity		5	1	2	3				2	13
Northern Riverina County		1								1

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North Sydney Municipal		5	2	2	4				5	18
Nundle Shire						1				1
Nymboida Shire						1				1
Oberon Shire		1	1			1				3
Orange City		2				1			1	4
Ophir County					1					1
Oxley County		2			2	1			1	6
Parkes Shire						1				1
Parramatta City		15	11	2	4				2	34
Parry Shire			2			1				3
Penrith City		5	1				3			9
Port Stephens Shire		2	1	1	3			1	2	10
Prospect County		4	2		4				2	12
Queanbeyan City		1								1
Quirindi Shire						1				1
Randwick Municipal		8	1	1	5				4	19
Richmond River Shire		1			1				1	3
Rockdale Municipal		1	2	2	1	1			2	9

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Ryde Municipal		6			1					7
Rylstone Shire		2							1	3
Scone Shire		2								2
Severn Shire						1				1
Shellharbour Municipal					1				10	11
Shoalhaven City	1	6	1	2	6	2		1	3	22
Shortland County		3	1					1		5
Singleton Shire			1			1			1	3
Snowy River Shire		1				1				2
Southern Mitchell County					1					1
Southern Riverina County		1								1
Southern Tablelands County			1	2						3
Strathfield Municipal	1	1							2	4
Sutherland Shire	2	20	6	2	3			1	10	44
Sydney City	3	14	6	6	8	2	1	5	9	54
Sydney County		19	1	1	5				6	32
Tallaganda Shire						1		1		2
Tamworth City		2	1		2		1		2	8

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Temora Shire						1				1
Tenterfield Shire						1			1	2
Tumbarumba Shire						1				1
Tumut Shire					2	1			3	6
Tweed Shire		4	1	1		1		5**	1	13
Ulan County						1				1
Ulmarra Shire		2				1			2	5
Upper Macquarie County			1							1
Uralla Shire			1						4	5
Urana Shire						1				1
Wagga Wagga City		2	1		1	1			1	6
Wakool Shire						1				1
Walcha Shire			1			1				2
Walgett Shire		1				1				2
Warren Shire						1				1
Warringah Shire	3	13	8	2	10	1		1	4	42
Waverley Municipal	1	9	3	1	4			4**	2	24
Weddin Shire						1				1

AUTHORITY - COUNCILS	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Wellington Shire									2	2
Wentworth Shire						1				1
Willoughby Municipal		5	1	2	2					10
Windooran Shire						1				1
Wingecarribee Shire		1		2	2				1	6
Wollondilly Shire		5			1	1				7
Wollongong City		4	1	1	1				3	10
Woollahra Municipal	2	5	3	2	1				4	17
Wyong Shire		8	1	3	24	1		1	3	41
Yallaroi Shire						1				1
Yarrowlumla Shire		1				1				2
Yass Shire			1		1	1				3
Young Shire		1				1				2
	31	466	136	104	231	109	17	41	230	1365
Under Investigation as at 30/6/85										- 411
Received										954
* One report covered two cases of wrong conduct.										
** Two reports each covered two cases of wrong conduct.										

AUTHORITY	1. No Jurisdiction (NJ)	2. Declined at Outset (DECO)	3. Declined after Preliminary Enquiries (DECE)	4. Resolved after Preliminary Enquiries (RES)	5. No prima facie evidence of wrong conduct (NPFE)	6. Discontinued after Investigation (DIS)	7. No Wrong Conduct after Investigation (NWC)	8. Wrong Conduct after Investigation (WC)	9. Current as of 30th June '86	10. Total
Unscheduled Bodies (Outside Jurisdiction)										
Australian Government Departments	134									134
I Employer/Employee	56									56
II Private Organisations/Individuals	293									293
	609	786	212	260	371	51	27	54	458	2828
Local Government Authorities	31	466	136	104	231	109	17	41	230	1365
Total From All Sources	640	1252	348	364	602	160	44	95	688	4193
Less Under Investigation as at 30/6/85										- 1064
Total Received For Year Ended 30/6/85										3129

(c) POLICE COMPLAINTS

Public Authority	NOT OR NOT FULLY INVESTIGATED				NOT SUSTAINED			SUSTAINED			TOTAL
	Declined	Conciliated	Discontinued before Ombudsman reinvestigation	Discontinued during Ombudsman reinvestigation	Not sustained finding without reinvestigation	Deemed not sustained - no request for reinvestigation (Section 25A(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)		(9)		
Members of N.S.W. Police Force	656	175	133	16	51	121	39	12	18	9	123C

NOTES TO TABLE

(1) The numbers given in each column are based on the number of letters of complaints 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 complaints 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) Discontinued matters where complainant does not wish to pursue, where preliminary enquiries reveal no utility in reinvestigation or where before reinvestigation concluded matter is referred to Police Tribunal.

(6) That is, on the undisputed facts there is no misconduct.

(7) 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).

(8) This category represents cases where although there is conflicting evidence and the complainant requests reinvestigation, the Ombudsman believes reinvestigation is not warranted.

(9) That is, on the undisputed facts there has been misconduct.

SUMMARY OF OPERATIONS

Narrative Summary

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 Ombudsmen	Priscilla Adey
	John Pinnock
Principal Investigation Officer	Gordon Smith

Complaints received

In the year ended 30 June 1986 the following written complaints were received:

Ombudsman Act	
Departments and authorities (other than Corrective Services)	1,436
Local councils	954
Department of Corrective Services	256
Outside jurisdiction	483
Police Regulation (Allegations of Misconduct) Act	
Complaints against police	1,676
	4,805

Reports to Ministers

A total of 118 reports of wrong conduct were made to Ministers during 1985-86. Of these, 80 related to complaints against government departments and 38 to complaints against local councils. Section 25 of the Act provides for consultation with Ministers about reports made by the Office.

Reports to Parliament

Twelve reports to Parliament were made during the year, including reports on:

- Failure by Sydney Cove Redevelopment Authority to comply with the provisions of the Environmental Planning and Assessment Act prior to consenting to building of Grosvenor Place.
- Failure by Department of Corrective Services to develop command structure for controlling gaols during prison officers' strikes.
- Delay by police in investigating police assaults on blind people.
- Exclusion of civilian investigators from reinvestigating complaints against police.

Royal Commission Inquiries

Section 19 of the Ombudsman Act confers the powers of a Royal Commissioner on the Ombudsman when making or holding inquiries. Thirty-four inquiries were held during the year, twenty-seven in reinvestigating complaints against police and seven in investigating the conduct of departments and authorities.

Role of the Ombudsman

The previous Annual Report attracted a good deal of attention from the media, and some people, including the then Premier, suggested that the Ombudsman was adopting "too high a profile". The Ombudsman's view is that profile is in the eye of the

observer. The Office of the Ombudsman has been established by statute, but it is based on a European model, and is sometimes seen to fit uncomfortably into institutions of government patterned on the so-called "Westminster model". The Office has a role that will be better understood, over time; it would be unfortunate if its powers were restricted, or if an Ombudsman were appointed on account of an apparently compliant attitude.

Secrecy

The secrecy provisions of the Ombudsman Act have continued to bedevil the Office. In some cases the public is deprived of information about such things as complaints concerning passive smoking, and in others the Office is prevented from giving details that might assist other investigative bodies. The Ombudsman again requests that the New South Wales Act be amended in terms identical with those of the Commonwealth and Western Australia.

Functions of the Annual Report

Some reactions to the previous Annual Report seemed to suggest that the Ombudsman should comment only on those investigations that had safely been concluded. Yet there are a number of things that might drag on for years if the Ombudsman did not bring them, as examples of delay, to public attention. The Office of the Ombudsman, to be effective, must keep the public informed of its work; there would be little point in reporting only on those matters that had been comfortably consigned to the "forgotten and therefore safe" basket.

Public authorities should give reasons

The Ombudsman believes that public authorities should, in all but the most exceptional circumstances, give to the public reasons for decisions; failure to do so would not usually be considered reasonable, within the meaning of the Ombudsman Act. There has

recently been some difference of opinion on this point between the New South Wales Court of Appeal and the High Court of Australia. The Ombudsman, without canvassing the legal arguments on either side, remains firmly of the opinion that it is administratively reasonable for public authorities to give reasons for their decisions, regardless of the technical requirements of the law. Conduct can be within the law, but can still be found "unreasonable" in terms of the Ombudsman Act.

Fish Marketing Authority

After receiving information in connection with another matter, this Office began an "own motion" investigation of the Fish Marketing Authority which suggested that the conduct of certain Authority staff had exceeded that which could be considered reasonable. For one thing, concessional rates of commission had been granted to certain sellers of fish, contrary to the Authority's guidelines. More seriously, some officers of the Authority seemed to have engaged in fish wholesaling on their own account. Since the Office of the Ombudsman has become involved, the Authority has adopted more stringent procedures, but investigation is continuing.

Ombudsman scrutiny of recommendations to Ministers

The Minister for Industrial Relations interpreted a recommendation by this Office as meaning that he should explain his exercise of discretion in refusing an application for renewal of a Theatrical Agent's Licence. In fact, this Office had recommended that the Department give full details to the Minister when asking him to exercise his discretion. A similar recommendation was made concerning a complaint about the failure by the Department of Corrective Services to give full details to the Minister of a prisoner's application for an interstate transfer. This Office cannot investigate the conduct of Ministers, but will continue to examine, where appropriate, the advice given to them by public authorities.

Advance payments for resumed land

Public authorities sometimes resume private land, and can make part-payment to the owners, pending final settlement. Investigations by the Office of the Ombudsman have shown, however, that some public authorities are slow in making part-payment, and that others could pay a larger proportion of the purchase price. Recommendations have been made in an effort to overcome these problems. In 1985-86 this Office again drew attention to the unjustly low rate of interest paid during the twelve months following resumption: four percent, when market rates are four or five times that rate. There has been some recent action to increase the rate.

Role of Department of Local Government

The Department of Local Government has seemed reluctant to investigate the actions of local government councils that have apparently breached the law. During the last year wrong conduct reports were prepared against the Department: a council levied different garbage rates for ratepayers and non-ratepayers, notwithstanding the relevant provisions apparently forbidding such differences, and where another council apparently failed to obtain declarations of interest from certain Aldermen, contrary to the requirements of the Local Government Act; both matters were brought to the attention of the Department of Local Government, which failed to obtain independent legal advice on the former, and to carry out a reasonably detailed investigation of the latter. This Office has since been advised that a working party has been set up, in order to consider a "prosecutions policy" for councils that appear to be acting against the law.

Permanent residence in caravan parks

Caravan parks are becoming permanent homes for an increasing number of people, and numerous complaints arise: at one extreme, that permanent establishments in caravan parks are destroying the

amenity of people living in nearby conventional homes; at the other, that people who wish to live in caravan parks are denied their rights by park managers, some acting on the instructions of local government authorities. The Government has tried to draft new regulations to meet the changing social circumstances, but the legislation has not yet come into force. In the meantime, this Office has treated each complaint according to its merits and circumstances; these can differ very widely.

Mosman and the Dog Act

Sydney's Mosman Council resolved, in effect, not to enforce certain provisions of the Dog Act, passed by the New South Wales Parliament. The Ombudsman has told the Minister for Local Government that the council appeared to be condoning breaches of the law, and that the accepted principle was that public authorities should not try to promote purposes against the spirit of the law which gave them power to act. Mosman Council should leave itself able to act against any breach of the Dog Act, according to its discretion; it should not resolve to act only in limited circumstances.

Council employees and the Ombudsman Act

The Ombudsman has been advised by eminent counsel that the Ombudsman Act does not technically provide jurisdiction over employees of local government councils. Parliamentary debates at the time of the introduction of the relevant legislation show that all parties intended local government employees to come within the Ombudsman's jurisdiction. The Ombudsman has made two reports to Parliament on this matter, and can only speculate as to the reasons why his jurisdiction has not been extended to this area.

Prisoners and the Mental Health Act

The Ombudsman is investigating four cases in which the Mental Health Act, in force from 1958 to August 1986, was apparently used, in effect, as a means of holding people in preventive detention. In one case numerous procedural errors prevented a prisoner facing trial, even though he had been found by a jury to be fit to plead. In another instance, a patient has apparently been held in a mental hospital for 38 years, despite the fact that she has been recommended on a number of occasions for placement in a nursing home. Changes to the Mental Health Act should mean that such patients will be reviewed regularly; the Ombudsman will continue to follow developments.

Searching of visitors to prisoners

The Ombudsman investigated a complaint that the wife and six year old daughter of a prisoner had been "strip-searched" during a gaol visit. Following recommendations made by the Ombudsman, the Department of Corrective Services amended the regulation to define the extent of searches and to make it clear that any person objecting to a search may still have a non-contact visit with a prisoner.

Need for civilian investigators in reinvestigating complaints about police

In April 1986 the Ombudsman made a second report to Parliament about the need to allow civilian investigators to reinvestigate complaints about police. The present restrictions cause double handling of files and unnecessary delays, and prevent the use of civilian applicants with police experience.

The Ombudsman's view is that he should be able to select the best available investigators for the important task of reinvestigating complaints against police, whether from within the New South Wales Police Force or elsewhere. The existing restriction is anomalous and creates unnecessary suspicion as to the

independence of the investigation carried out by the Office of the Ombudsman.

Delay in police investigations: need for statutory amendment

The Annual Report sets out two examples of very long delays in police investigations, one concerning alleged assault by police on blind people. In two reports to Parliament, the Ombudsman proposed a legislative amendment to enable him to commence his own investigation if police investigation had not concluded in, say, 90 days, or some longer period agreed to by the Ombudsman and the Commissioner of Police. The former Premier and the present Minister for Police agreed in principle to the change, and the Ombudsman looks forward to its enactment.

Classes of conduct and the Internal Affairs Branch

The Police Regulation (Allegations of Misconduct) Act says that virtually all investigations of complaints against police must be conducted by the Internal Affairs Branch, unless the Ombudsman and the Commissioner agree on "classes" of conduct to be investigated by other police. The Ombudsman suggested an agreement on "classes" of conduct in March 1985, in order to reduce the workload of the Internal Affairs Branch. The Commissioner of Police did not respond until January 1986, and then only after the Ombudsman had written to the Minister and the Police Board. An agreement is now in force.

Need for immediate statements

Investigating police often wait until the very end of their investigations before taking statements from police officers the subject of complaint; this may be twelve months or more after the complaint. The Ombudsman believes that statements should be taken from everyone as soon as possible after the incident that has given rise to the complaint. This is merely good investigative technique.

No useful comments from Police Department

When the Ombudsman believes that there has been wrong conduct by public authorities or police he distributes a statement of provisional findings and recommendations to all of the parties involved. Most public authorities provide useful comments to be taken into account by the Ombudsman, but there is scarcely ever a detailed response from the Police Department. This assists neither the Ombudsman nor the police officers the subject of complaint.

Case Notes

Cases dealt with during the year included:

Quite a charge: Commercial fishermen repairing their boat used electricity supplied by the Maritime Services Board to drill screw holes with a hand-held electric drill. The Board charged them more than $170.00, including labour and a 66 per cent surcharge. The Minister eventually instructed the Board to review the account.

Medical examination: In order to make trouble for a former woman friend, a man told the Department of Motor Transport that she was prone to blackouts and convulsions. The woman told the Department that the man had made other mischievous reports about her, but the Department still made her take a medical examination. The Department has now changed its procedures, and investigates reports of medical problems more thoroughly.

What trucks? Hastings Municipal Council's inspector looked at the wrong park after the council was told about trucks, a boat and a bulldozer parked on a public reserve. Even after the Ombudsman found wrong conduct against the council, the council was slow to act.

Paddington bizarre: In February 1975 Sydney City Council approved a three-month trial for a "church bazaar" in Paddington.

Ten years later a much-expanded flea market was still operating, without council approval. The Deputy Ombudsman criticised the council's failure to make a proper planning decision on the matter.

Taxi depot or park? Waverley Municipal Council bought a service station site to extend a public park, but allowed it to be used as a taxi depot, without warning nearby residents, who complained that the council took no action when the depot was used as a service station, contrary to council approval. Council has since said that it will not renew the lease of the taxi company.

Lost alarm messages: A doctor installed an extensive security alarm system, but when the alarm went off in error the police did not respond to the security company's warning call. It transpired that telephone messages sometimes fell from a conveyor belt taking them to the police radio despatcher. The system has been changed so that the radio operator can monitor a telephone call.

Intoxicated Persons Act: The Annual Report describes two cases where people were incorrectly detained as intoxicated persons. The Police Department has begun lectures to instruct officers in all of the provisions of the legislation.

Financial Summary

Funds allocated by Parliament for the operation of the Office of the Ombudsman during the year ended 30 June 1986 totalled $2,538,000. Additional supplementation of $30,000 was approved during the year, giving a total funds allocation of $2,568,000. Expenditure for the year totalled $2,557,868. Significant expenditure items were:

Item	Expenditure	% Total Expenditure
Salaries and other employee payments	$ 1,837,933	71.8 %
Rents	$ 305,897	11.9 %
Fees	$ 130,180	5.0 %
Stores	$ 79,285	3.0 %
Postage	$ 52,546	2.0 %
Travel	$ 46,537	1.8 %
Printing	$ 40,265	1.5 %

Total expenditure was just over $10,000 (0.3%) less than budget, but this is accounted for by the fact that $10,000 is held in a special account to cover National Wage increases and cannot be used for any other purpose.

The New South Wales Office of the Ombudsman carries out a number of functions that in other countries and States are carried out by separate organisations. For example, in some countries prison complaints are handled by a Prison Ombudsman; indeed, this was a recommendation of the Nagle Royal Commission into New South Wales Prisons. In some countries and States complaints against police are handled by a separate Police Complaints Authority. Again, in many countries, including the United Kingdom, complaints against local government authorities are investigated by separate Local Government Ombudsmen. It is the Ombudsman's view that the existing situation in New South Wales is the more effective and cost efficient solution. It enables a sharing of functions and costs in one recognisable institution. This multi-purpose function of the New South Wales Office of the Ombudsman needs, however, to be borne in mind in considering the financial aspects.

FINANCIAL STATEMENTS

BOX 12, G.P.O.
SYDNEY, N.S.W. 2001

OFFICE OF THE OMBUDSMAN

AUDITOR-GENERAL'S CERTIFICATE

The books and accounts of the Office of the Ombudsman for the year ended 30 June 1986 have been audited in accordance with Section 34 of the Public Finance and Audit Act 1983.

In my opinion the accompanying receipts and payments statement, summarised receipts and payments statement and statement of special deposits account balances, read in conjunction with the notes thereto, comply with Section 45E of the Act and are in accordance with the accounts and records of the Department.

K.J. ROBSON FASA CPA
AUDITOR-GENERAL OF NEW SOUTH WALES

SYDNEY
9 October 1986

Office of the Ombudsman
Year Ended 30 June 1986

Pursuant to Clause 8 of the Public Finance and Audit (Departments) Regulation 1986, I state that:

(a) The accompanying financial statements have been prepared in accordance with the provisions of the Public Finance and Audit Act 1983, the Public Finance and Audit (Departments) Regulation 1986, and the Treasurer's Directions.

(b) The statements present fairly the receipts and payments of that part of the Consolidated Fund, and those accounts in the Special deposits Account operated by the Department.

(c) There are not any circumstances which would render any particulars included in the financial statement to be misleading or inaccurate.

G. G. Masterman
OMBUDSMAN

12 SEP 1986

A Delany
Accounts Officer

12 SEP 1986

Table A

OFFICE OF THE OMBUDSMAN
RECEIPTS AND PAYMENTS STATEMENT FOR THE YEAR ENDED 30TH JUNE 1986

DETAILS	NOTE	1.1 INVESTIGATION OF CITIZENS COMPLAINTS			NON-PROGRAM RECEIPTS AND PAYMENTS			TOTAL		
		1984/85	1985/86		1984/85	1985/86		1984/85	1985/86	
		ACTUAL $000	ESTIMATE $000	ACTUAL $000	ACTUAL $000	ESTIMATE $000	ACTUAL $000	ACTUAL $000	ESTIMATE $000	ACTUAL $000
CONSOLIDATED FUND RECEIPTS :										
Other Receipts		...	...	...	16	8	19	16	8	19
Miscellaneous Services Rendered		...	...	...	*	...	*	*	...	*
Total Consolidated Fund Receipts		...	...	...	16	8	19	16	8	19
CONSOLIDATED FUND PAYMENTS :										
Salaries and other employee payments #	10	1,788	1,908	1,838	...	...	...	1,788	1,908	1,838
Maintenance and working expenses		602	630	720	...	...	...	602	630	720
Other services		1	...	...	...	...	...	1	...	...
Total Consolidated Fund Payments		2,391	2,538	2,558	...	...	...	2,391	2,538	2,558
SPECIAL DEPOSITS ACCOUNT RECEIPTS :										
Balance of Salaries Adjustment		...	...	...	-3	NA	5	-3	NA	5
Suspense - Salary Deductions		...	...	...	49	NA	6	49	NA	6
Provision for the Purchase of Computers		...	...	...	...	NA	16	...	NA	16
Total Special Deposit Receipts		...	...	...	46	...	27	46	...	27
SPECIAL DEPOSITS ACCOUNT PAYMENTS:										
Salaries and other employee payments		...	...	...	517	NA	619	517	NA	619
Plant and equipment		...	...	...	...	NA	3	...	NA	3
Total Special Deposits Payments		...	...	...	517	...	622	517	...	622
ALL FUNDS TOTAL RECEIPTS		...	...	...	62	...	46	62	...	46
TOTAL PAYMENTS		2,391	2,538	2,558	517	...	622	2,908	2,538	3,180
less Inter-fund transfers		...	...	...	517	...	619	517	...	619
TOTAL - NET PROGRAM PAYMENTS		2,391	2,538	2,558	...	...	3	2,391	2,538	2,561
# Includes salary and allowance of the Ombudsman - Special Appropriation Act 4 of 1976		85	86	87						

Table 8

OFFICE OF THE OMBUDSMAN
SUMMARISED RECEIPTS AND PAYMENTS STATEMENT
OF THE CONSOLIDATED FUND AND THE SPECIAL
DEPOSITS ACCOUNT BY ITEM FOR THE YEAR ENDED
30TH JUNE, 1986

Details	Note	1984/85 Actual $000	1985/86 Estimate $000	1985/86 Actual $000
Receipts				
Other Receipts				
Repayments to Previous Years Vote		2	1	5
Unclassified Receipts		14	7	14
Miscellaneous Services Rendered				
Commission on Deductions		*	...	*
Balance of Salaries Adjustment		-3		5
Suspense - Salary Deductions				
Salary deductions		50		5
Motor Vehicle Advances - Repayments		-1		1
Provision for the Purchase of Computers		...		16
Total Receipts		62		46
Payments				
Salaries and Other Employee Payments	10	1,788	1,908	1,838
Maintenance and Working Expenses		602	630	720
Plant and Equipment				
Purchase of Computers		...		3
Other Services				
Overseas Visits		1		...
Total Payments		2,391		2,561

Table C

OFFICE OF THE OMBUDSMAN
STATEMENT OF SPECIAL DEPOSITS ACCOUNT BALANCES AS AT
30TH JUNE, 1986

Previous Year						Current Year		
Cash $000	Securities $000	Total $000	Account	Note	Cash $000	Securities $000	Total $000
-1	...	-1	694 Advance to Purchase Motor Vehicles		...	...	...
13	...	13	1140 Balance of Salary Adjustment		18	...	18
50	...	50	1196 Salary Deductions		55	...	55
...	...	...	1784 Provision for the Purchase of Computers		13	...	13
...	...	...	1953 Unclaimed Salaries		...	...	...
62	...	62	Total - All Special Deposits Accounts		86	...	86

OFFICE OF THE OMBUDSMAN
NOTES TO AND FORMING PART OF THE FINANCIAL STATEMENTS

Note 1 General

(a) The financial statements of the Office have been prepared on the basis that the transactions of the Public Accounts are reported on a cash basis with the exception of payment for salaries which are reported on an accrual basis.(Note 10 also refers.)

(b) The financial details provided in Tables A and B relate to transactions on Consolidated Fund and Special Deposits accounts and are in agreement with the relevant sections of the Treasurer's Public Accounts.

(c) A reference in the receipts and payments statement to an "estimate" figure means:

(i) in the case of a special appropriation the amount included in the estimates in respect of that appropriation; and

(ii) in the case of an annual appropriation the amount provided in the estimates to be appropriated by the relevant Appropriation Act as advised by the Treasury.

(d) A reference in the receipts and payments statement to an "actual" figure means the payments actually made by the Office in respect of the item to which it refers with the exception of payment for salaries which are reported on an accrual basis as per (a) above.

Note 2 Schedule of uncollected amounts

There are no uncollected amounts as at 30th June, 1986, due to the Office of the Ombudsman's function of investigating complaints being provided as a free service.

Note 3 Amounts due and unpaid for goods and services received

Amounts due and unpaid for goods and services received by 30th June, 1986, and comparative amounts as at 30th June, 1985, for the following items :

1984/85		1985/86
70.45	Books	439.00
1,223.00	Fees	...
46.50	Motor Vehicles	103.37
361.10	Printing	1,124.00
1,336.76	Stores	883.90
$3,037.81		$2,550.27

Note 4 Contingent liabilities

There is no form of contingent liability pending as at 30th June, 1986

Note 5 Amounts repayable on outstanding loans and advances

The Office of the Ombudsman has no form of Public Borrowings all funds are provided from Consolidated Fund.

Note 6 Debts written off

The Office of the Ombudsman had no bad debts to be written off during this financial year ended 30th June, 1986

Note 7 Commitments

Commitments on hand as at 30th June, 1986, and comparative amounts as at 30th June, 1985, for the following items :

1984/85		1985/86
	Books	25.00
	Motor Vehicles	50.00
	Plant and Equipment	2,106.21
	Postal and Telephone	70.00
	Printing	57.00
2,721.49	Stores	361.27
$2,721.49		$2,669.48

Note 8 Material assistance provided to the Department

No material assistance was provided to the Office during the financial year ended 30th June, 1986

Note 9 Sums of money held for two years or more

The were no monies held by this Office as at 30th June, 1986 that should have been sent to the Treasury.

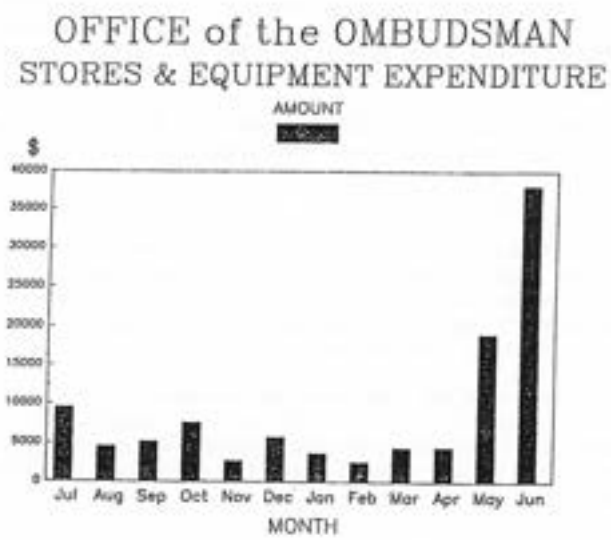
Note 10 Full years costs for Salaries and Wages expenditure

The expenditure for salaries and other employee payments for consolidated fund was $1,837,932.57 which includes an amount of $18,428.65 for the final four days of the year to reflect the full year's salary costs.

Note 11 Exemptions from Financial Reporting Requirements

The financial statements have been prepared in accordance with the provisions of the Public Finance and Audit Act 1983, the Public Finance and Audit (Departments) Regulation 1986, and the Treasurer's Directions. There have been no exemptions granted by the Treasury.

END OF AUDITED FINANCIAL STATEMENTS



Note to the Graph

During the course of the financial year one investigation, into the complaint by Messrs Ainsworth and Vibert against two police officers, required far greater expenditures on legal fees and transcription of tapes than anticipated. QC's were retained by the complainants and a number of witnesses. It was necessary for the Ombudsman also to retain Queen's Counsel.

During this period expenditures on planned acquisitions of stores were severely constrained or held back. In January, 1986 application was made to the Treasurer for supplementation of $30,000 to the Ombudsman's Budget on account, principally, of this Ainsworth investigation. When this supplementation was granted on 10 March, 1986, the Ombudsman was able to go ahead with the planned necessary purchases of stores in April, May and June. Payment for these stores was made in May and June as shown in the graph.

The June, 1986 figure of $38,000 ($34,000 for Stores) shown above represents the following major items:- one Burroughs Terminal; $9,866; five Screen Printer Typewriters; $13,464; thirteen Ergonomic Keyboard Operator Chairs; $2,160; one Tape Copier; $2,849; on Ergonomic Desk; $1,113; and Burroughs Maintenance Agreement for one year; $2,664. All these items were necessary for the efficient running of the office.

Explanations for Table A

1 All totals have been rounded to the nearest one thousand dollars ($1,000). Asterisks in tables denote that the amount is five hundred ($500) or less.

2 The saving of $70,000 of the Budget Allocation for salaries and other employee payments was due to the resignation of a number of officers and the difficulties in replacing a number of seconded police officers who have left the Office.

3 The over expenditure of $90,000 of the Budget Allocation for maintenance and working expenses related to the following items:

Fees for services rendered

The conduct of reinvestigations under Section 19 of the Ombudsman Act has proved more costly than was originally anticipated, particularly, in relation to the need to obtain competent legal advice and to have evidence transcribed quickly and accurately.

There has also been an increasing tendency to subpoena the files of this Office for the use in court proceedings. The service of each subpoena requires legal representation in the particular proceedings on behalf of the Ombudsman.

4 Budget allocation supplemented to the extent of $30,000 by the Treasurer from Treasurer's Advance and the remaining difference between actual and estimated expenditure on maintenance and working expenses has been offset by the difference between actual and estimated expenditure on salaries and other employee payments.

Major Assets on hand as at 30th June, 1986

Class of Asset	Quantity Acquired	
	Prior 1.7.85	Post 1.7.85
Motor Vehicles	8	2
Photocopiers	3	1
Computer Systems	3 Stations	6 Stations

REPORT

OF THE

OMBUDSMAN OF NEW SOUTH WALES

FOR THE

YEAR ENDED 30 JUNE, 1986

VOLUME II – CASE NOTES

CASE NOTES

TABLE OF CONTENTS

COMPLAINTS AGAINST AUTHORITIES AND DEPARTMENTS

COMPLAINTS AGAINST AUTHORITIES AND DEPARTMENTS

COUNCIL OF AUCTIONEERS AND AGENTS

Auctioneers and agents compensation fund

Ms R complained about alleged delay by the Council of Auctioneers and Agents in processing her compensation claim against the Auctioneers and Agents Compensation Fund, and about the alleged failure to repay rental bond money which appeared to have been misappropriated by a real estate agent.

Ms R rented a flat in November 1982 and paid $200 rental bond money, which was lodged by the managing agent with the Rental Bond Board. The lessor terminated the agent's services in February 1983, and Ms R continued to rent the flat until June 1984. When Ms R made enquiries about her bond money, she discovered that it had been paid to the agent. The Rental Bond Board received a claim form from the agent authorising the payment of the bond to the agent in October 1983. The form bore a signature which resembled that of Ms R.

Ms R reported the matter to the police, declaring that she did not sign the rental bond claim or authorise the agent to collect the money on her behalf. The police failed to locate the agent. Enquiries were made of the Rental Bond Board, and the Board referred the matter to the Council of Auctioneers and Agents Compensation Fund. The Board informed this Office that they normally refer matters involving the conduct of a real estate agent to the Council, especially when monetary loss has occurred. In this instance, the Board was advised by the Council that the agent was disqualified in July 1983 from practising as a licensed agent, and that it was investigating a number of matters concerning him.

The Board referred Ms R's claim to the Council in September 1984. The Council sent information about the Fund to Ms R, and she lodged a claim in November 1984. The claim was examined by the Claims Clerk in December 1984, and by the Deputy Registrar in January, 1985; a recommendation for payment was made. The claim

was submitted to a Sub-Committee of the Council in February 1985, a decision was made to disallow the claim, and the decision was endorsed by a full Council meeting in March 1985. The claim was referred back to the Rental Bond Board.

Investigation of the complaint revealed that Ms R's claim was disallowed because the agent was not a licensee at the time of the alleged misappropriation of funds. Section 64 of the Auctioneers and Agents Act specifies that the Fund is to be used to compensate a "failure to account" by a licensed agent. The Chairman of the Council advised that for a number of years the Council adopted a very lenient policy of paying out compensation claims. This policy was altered at the beginning of 1985 as a result of legal advice.

The Chairman of the Council also advised that:

1. Proposals have been formulated to amend the Auctioneers and Agents Act so that compensation may be extended to victims of unlicensed agents.

2. A closer liaison has been established between the Board and the Council, and there is a better understanding of the specific circumstances whereby a landlord or a tenant can claim against the Fund.

3. The Council is reviewing its administrative procedures and attempting to expedite the processing of compensation claims. The present position is that, when it is clear that a claimant is not eligible for compensation, the application is submitted directly to a Council meeting rather than being examined firstly by a sub-Committee. The Council will attempt to offer a full explanation to claimants when claims are disallowed.

In the light of this information, and because Ms R was later compensated by the Rental Bond Board, investigation of the complaint was discontinued.


HOW DID I GO IN '64?
YOU'D BE BETTER OFF IF YOU'D DONE IT AFTER '78...
DEPT EDUCT

DEPARTMENT OF EDUCATION

Higher School Certificate marks

The Department of Education refused to provide the complainants with the marks obtained in their Leaving Certificate/Higher School Certificate examinations, which they sat in 1964 and 1972 respectively. The Department's Examination and Scholarships Division replied to the complainants' request for their marks in these terms:

> While it is the current policy of Board of Senior School Studies to release to candidates details of scaled marks, aggregate marks and rankings for subjects presented, the policy prior to 1974 held this information was to remain confidential to the Board and was not to be released to candidates.
>
> The changes in policy since 1974 are not retrospective to include prior examinations and therefore only that information provided on your original certificate/ result notice is available to you.

Formal investigation of the complaint showed that Certificates issued by the Board prior to 1978 presented an approximate picture of candidates' performance. Candidates would not have known whether they obtained the minimum mark or something better for the "Award", "Level Gained" or "Grade" in a particular subject, but from 1974 until the release of scaled marks and percentile bands for each subject in 1978, the aggregate mark was shown on a certificate, providing candidates with a measure of total performance.

The Ombudsman concluded that the Department's letter to the complainants was misleading, since it inferred that individual marks obtained in an examination sat after 1974 are now released, which is in fact not true. The only mark released from 1974 until 1978 (when individual marks and percentile bands were made

available) was the aggregate mark. Until 1978 the scaled marks which would lead to the "Award", "Level Gained" or "Grade" for each subject were (and are now) deemed to be confidential by the Board.

The main reasons for the Board's refusal to release the marks were:

1. Decisions made by Boards from 1974 have not been applied retrospectively to the decisions of earlier study boards and, while aggregates are now released to candidates, the present Board did not see itself having the power to vary the considered decisions of earlier Boards.

2. The Board therefore considered that it did not have the power to vary the rules under which the Higher School Certificate was conducted in previous years. Such a decision would establish a precedent for the retrospective application of all policies which have been amended by subsequent Boards. The implications of such a precedent would be significant. For example, many people who did not qualify for the award of a Certificate under the rules operating at the time of their candidature, might become eligible if those rules were to be amended retrospectively.

3. Another concern expressed by the Board related to the changed methods of reporting Higher School Certificate results since 1974. As results have been reported in a variety of ways since the Higher School Certificate was introduced, the information requested might be misleading if judged by current criteria.

The Ombudsman concluded that he could see no valid reason why a current Board must adhere to the more secretive position adopted by a previous Board; there were no rules, regulations or principles of law which would prevent the Board from releasing

results to candidates prior to 1978, and changes in the reporting of the Higher School Certificate over the years would not be a major impediment to the release of the marks in question. The Ombudsman found that any reasonable person would consider that candidates had a right to know the scale of marks they obtained in a public examination, and that the refusal of the Board of Senior School Studies to release marks to students who sat for their Leaving Certificate/Higher School Certificate prior 1978 was unreasonable, unjust, and based on irrelevant considerations.

The Ombudsman recommended that the Board provide the complainants, and others with similar requests, with the scaled mark for each subject, in addition to the "Award", "Level Gained" or "Grade". He recommended that, if the maximum mark obtainable in each subject for that year and the aggregate mark were available, then this information should also be provided. He further recommended that the Board provide an explanation as to the limitation of the meaning of the marks with each statement of results. The Board has refused to adopt these recommendations.

DEPARTMENT OF FINANCE

Delay in preparing a "stated case"

Under section 124 of the Stamp Duties Act a person liable for payment of duty, who is dissatisfied with the assessment by the Chief Commissioner for Stamp Duty, may request him to "state a case" for the opinion of the Supreme Court. Ms F made such a request in February 1984 and later complained to the Ombudsman about unreasonable delay by the Stamp Duties Office in stating a case.

Ms F made the request through the Stamp Duties Office at Newcastle and this was forwarded to the Sydney Office on 23 February 1984 for attention. It is the normal practice of the Stamp Duties Office to refer the matter to the Crown Solicitor. The Crown Solicitor is asked to consider the assessment and, if he agrees with it, to prepare the stated case. Yet the Stamp Duties Office did not refer Ms F's request to the Crown Solicitor until 16 July 1984. When Ms F made her complaint to the Ombudsman on 27 February 1985, the stated case had still not been prepared.

Clause 6 of Schedule 1 of the Ombudsman Act precludes the Ombudsman from investigating complaints about the conduct of a public authority acting as a legal adviser to a public authority. Therefore, the Ombudsman did not have jurisdiction to investigate any delay on the part of the Crown Solicitor. The investigation of the complaint was confined to the time when the matter was referred from Newcastle until the time it was referred to the Crown Solicitor.

In response to preliminary enquiries by this Office, the then Commissioner for Stamp Duties said, "... after preliminary perusal of the papers time was needed to deliberate upon all relevant aspects prior to referral to the Crown Solicitor". Nevertheless, the file showed that no action was taken by the Sydney Office from the time it received Ms F's request on 23 February 1984 until 16 July 1984, when the request was referred to the Crown Solicitor.

The Deputy Ombudsman found that insufficient action was taken by the Stamp Duties Office and that, in failing to take adequate steps to ensure that a stated case was prepared, the conduct of the Office was unreasonable. In his report, the Deputy Ombudsman recommended that:

1. when a request to state a case is received by the Stamp Duties Office, the matter should be referred to the Crown Solicitor within three months for consideration and/or the preparation of a stated case; and

2. if there is a delay in referring the matter to the Crown Solicitor, the person requesting the case to be stated should be notified of the delay in writing and given reasons for the delay.

The Secretary of the Department of Finance agreed with the recommendations and drew the Deputy Ombudsman's attention to the publication in May-June 1985 of a three-year Management Plan for the Department. This Plan included an aim that requests for stated cases should be referred to the Crown Solicitor within 3 months of receipt. The strategy, he said, "is a recognition of previous unacceptable delays in the [Stamp Duties] Division's performance". He also told this Office that people requesting a case to be stated would be advised when the matter was referred to the Crown Solicitor, and that he had directed that potential litigants be informed of the progress in preparing a stated case.

DEPARTMENT OF HOUSING

Rent for teacher housing

The complainant told the Department of Housing in November 1985 that he would be leaving his rented house in December, but rent was deducted from his salary until January 1986. The overpayment was refunded in April, but the complainant maintained that he was still owed $141.

After enquiries by this Office, the Department examined the complainant's account and discovered that a temporary employee, because of inexperience, had ignored several rental payments; the complainant was owed $282.00. A cheque was posted to the complainant in May 1986, together with a letter of apology from the Department.

The Department said that the Government Real Estate Branch, which acts as the agent for the Teacher Housing Authority and the Public Tenant Housing Authority, arranges rental deductions from tenants' salaries. Owing to payroll deadline dates, rental deductions often continue beyond the dates that tenants vacate

rented premises, and refunds of over-deducted rent become necessary. Some 700 teacher transfers occur between November and May each year, and there are another 200 public service vacancies. The Government Real Estate Branch has an increased workload during this period and must employ temporary staff.

In view of the Department's action on this complaint the matter was considered resolved.

DEPARTMENT OF INDUSTRIAL RELATIONS

Delay in setting claim for underpaid salary

On 1 March 1982 Mr L lodged a complaint with the Department of Industrial Relations that his former employer had been underpaying him. Mr L's complaint was acknowledged by a letter, which set out the Department's role in investigating complaints. The letter was a standard one, and said, in part:

> The matter will be investigated and a further communication will be sent to you in due course.
>
> Where an underpayment of wages, holiday pay or long service leave is disclosed, the Department's investigation frequently results in the payment to the employee of the amount owing. However, should the Department be obliged to institute legal proceedings, there is no guarantee that these proceedings will result in the payment of moneys claimed.

The letter went on to say that employees may institute civil proceedings on their own account.

On 21 April 1982 an inspector of the Department visited the premises of Mr L's former employer and, in the course of the visit, obtained a cheque for part of the amount that Mr L alleged was owed him. The inspector also served upon the employer a Notice to Employer, which required the employer to notify the Department in writing within 14 days of the action taken to attend to the alleged breaches. The inspector, in his report dated 28 April 1982 said, "I will follow up [the employer's] commitment of having stated that he would have this sorted out

within the 14 days from 21.4.82". There was no record that the matter was followed up by the inspector, nor of any direction given to him to do so.

The file was returned to Head Office and part-payment of Mr L's claim was sent to him nearly 2 months after it had been received by the inspector. The letter covering the part-payment said, in part, "Further instalments will be forwarded to you as they come to hand."

On 23 July 1982 an officer from the Legal Branch ordered a re-inspection of the employer to see if action had been taken by him about the alleged breaches. A report from the inspector, saying that he considered further recovery unlikely, was not received in the Legal Branch until 18 November 1982, and no action was taken by the officer to ensure that a re-inspection had been carried out.

From 18 November 1982 until 9 November 1983, the only action taken by the Legal Branch was to write to Mr L, asking him if he would be prepared to attend court to give evidence against his former employer. At some stage the officer of the Legal Branch had instituted a search at the Corporate Affairs Commission to ascertain whether the employer company had gone into liquidation, thereby making recovery action impossible. The search established that the company had not gone into liquidation.

On 9 November 1983 a further re-inspection was ordered; this was carried out on 6 December. The inspection report said that there appeared to have been a breach of the award, and the employer was issued with a Notice to Produce Time Sheets and Pay Sheets. Proceedings were commenced against the company on or about 21 December 1983, 22 months after Mr L lodged his complaint with the Department.

Mr L complained to the Ombudsman about the delay by the Department in investigating his complaint and recovering the money due to him from his former employer. In response to preliminary enquiries by this Office, the Secretary of the Department said that Mr L had been advised at the outset of the

Department's role in investigating complaints and the alternative method of redress against the employer for the recovery of money.

The Secretary acknowledged that there had been delay by the Department, but attributed it solely to the medical incapacity of the inspector, who was later retired from the Department on medical grounds. He also said that difficulty was experienced in recovering further money from the employer because of his impecunious state.

Nevertheless, there were two periods of delay in the investigation of Mr L's complaint. The first occurred after the initial part-payment of Mr L's claim, and the second from 18 November 1982 to 9 November 1983, when the matter was in the hands of the Legal Branch and little action was taken to investigate the complaint. The Deputy Ombudsman found that these delays were unreasonable.

The Department of Industrial Relations has a statutory obligation to enforce the provisions of the Industrial Arbitration Act and the Annual Holidays Act. The Deputy Ombudsman accepted that the Department has no statutory responsibility to recover moneys owed to employees, but noted that it had taken that task upon itself over the years, as a public service additional to its statutory role. Notwithstanding the standard letter sent to Mr L at the outset, the Department did in fact carry out a debt recovery function and wrote to Mr L in such a way as to lead him to believe that further action would be taken on his behalf to recover the money owed to him by his former employer. That being the case, the Deputy Ombudsman concluded in his report, the function should have been carried out in an expeditious and efficient manner.

In his draft report to the Minister for Industrial Relations, the Deputy Ombudsman recommended that:

1. The Department ensure that, where a complaint has been lodged and an investigation undertaken, a decision be made as soon as possible, and in any event within six months of the

lodgement of a complaint, whether an information will be laid against an employer. If the Department encounters any difficulty in investigating the complaint, it should ensure that the complainant is informed accordingly, and given an explanation for the delay.

2. The Department ensure that persons on whose behalf the Department is conducting an investigation are adequately informed in writing of the progress of the investigation.

3. The Department ensure that, when it becomes apparent that the Department is unlikely to recover money from the employer on behalf of the complainant, the complainant be promptly reminded of his or her own legal remedies against the employer.

The Minister agreed with most of the recommendations but commented that, while he agreed that a decision whether or not to institute proceedings should be taken as soon as possible, he did not consider that a time limit should be imposed. He pointed out that proceedings under the Acts administered by his Department are taken with the authority of the Minister and that the Minister should not be bound by time limits in the exercise of his discretion. Such limits, he said, are a matter for the Parliament to set, if it sees fit. In view of the Minister's response, the Deputy Ombudsman decided not to pursue the aspect of the recommendation which related to the six month period.

On 15 January 1986 the Secretary of the Department, in a letter in response to the Deputy Ombudsman's final report, acknowledged that the demand for debt recovery work carried out by the Department had grown to such an extent that the resources of the Department could not cope sufficiently with its statutory functions. Accordingly, employees were to be made more aware of their own remedies against employers.

He also advised that the Minister had approved a change of policy on matters for which the Department would commence prosecution action, including those where:

the breach is serious/deliberate;
the employer has previously been in breach of the industrial legislation; or
a point of law with wider industrial ramifications is at issue.

The Deputy Ombudsman was satisfied that sufficient action had been taken by the Department to implement the recommendations.

DEPARTMENT OF MAIN ROADS

Liability for rates

The complainants in 1974 leased a Sydney property owned by the Department of Main Roads. They were to pay all "rates, taxes and assessments". Rate notices arrived from Sydney City Council and were paid, but the first account from the Water Board was not received until 1979. By that time the lessees owed over $2,000 in water rates. Inquiries by this Office revealed that the Department of Main Roads did not notify the Water Board of the lessees' liability for rates until August 1978. The Department could provide no explanation for this oversight.

From 1974 to 1978 the Water Board sent rate notices for the property to the Department, where they were merely endorsed "lessee to pay" and filed. No attempt was made to send the notices to the lessees.

The Department received Council rate notices for 1974, 1976, 1978, 1980 and 1985. The notices for 1980 and 1985 were marked by Council as "Lessee Notified", yet the Department paid $1.152.45 to the Council for the 1980 rates. No payments were made for other years and there was no explanation for the 1980 payment.

There was no dispute as to the lessees' liability to pay rates, but the Department's administrative conduct was found by this Office to be wrong. It was recommended that the Department pay all outstanding rates to the Water Board and allow the

complainants one year to repay the Department, in quarterly instalments. The Department had offered a similar proposal to the complainants, but they had rejected it. It was also recommended that the Department ask the Council for a refund of the rates it paid for the year 1980, on the basis that the complainants were prepared to pay the amount directly to Council.

The Department has been installing a computer-based property management system designed to eliminate errors such as those described here. In April 1986 the Department said that its properties would be entered in the computer, which would conduct weekly searches of the properties and print reports of properties where tenancies had changed. The reports would then be sent to the rating authorities. The computer would reject notices for properties for which the Department was not responsible; rejected notices would be returned to rating authorities for redirection to the responsible tenants.

This arrangement seemed satisfactory, and no further action was considered necessary.

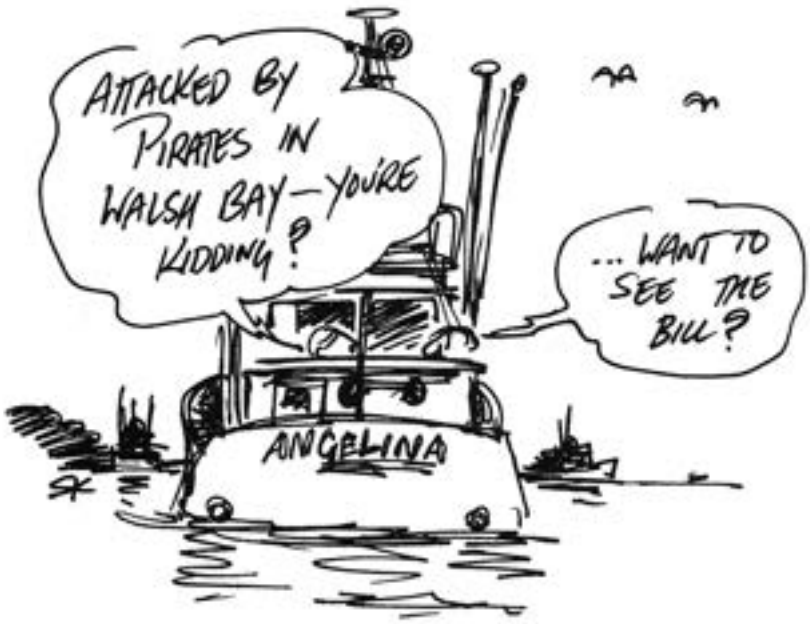
MARITIME SERVICES BOARD

Quite a charge!

The complainants operated a 9 metre fishing boat. In June 1984, when maintenance on the boat was required, they moored the boat at Walsh Bay and, on three occasions, used electricity supplied by the Maritime Services Board to drill a number of screw holes with a hand-held 240 volt drill. The Board charged over $170 for electricity, including an amount for labour and a 66% surcharge.

The complainants objected to the Board, which explained:

> ... the charges incurred are for the major part the cost of labour by the Board's employees in connecting and disconnecting power supplies. The fact that the vessel "Angelina" required power for most of the time outside normal hours resulted in a higher charge. The 66% overhead is a normal oncost to the basic rate to cover varying contingencies.


ATTACKED BY PIRATES IN WALSH BAY — YOU'RE KIDDING?
... WANT TO SEE THE BILL?
ANGELINA

> The charges are as per the current scale in accordance with the conditions of supply.

This Office asked for more details of the charge for labour, and was told that the charge was for half an hour's labour for an electrical mechanic and an electrical assistant to connect the electricity supply, and half an hour's labour each for them to disconnect it.

The complainants told this Office:

> ... we were instructed by the mechanic who connected the power, to disconnect the power ourselves (this involved removing the plug from the power point!) and return the equipment (a power extension cord and distribution and fuse board) to the MSB workshop office on Towns Place, Walsh Bay, which we did on each of the three occasions.

Enquiries by this Office of the Sydney County Council revealed that 90% of hand-held drills are rated at 500 watts. Continous operation of this type of drill for 12 hours would consume six kilowatts of electricity. At the then current domestic rate, such power consumption would cost less than 50¢ and, at the then current general supply rate, it would cost less than $1.

The Board argued that "the complainants had signed a form agreeing to the conditions of supply and to pay the current scale of charges". However, a note on the Board's file said:

> It is thought the (current scale of) charges are more applicable to the supply of electricity to larger commercial ships, rather than for repair work on Fishing Vessels, neverthelss they are the only scale of charges in operation and were duly applied.

Telephone enquiries of Board officers revealed that electricity supplied by the Board is used mainly by large vessels for illuminating cargo holds, general lighting on ships, operating fans during the handling of noxious cargo, and so on. Electricity is also used by fishing vessels for refrigeration. One Board officer said that it was unusual for the Board's electricity supply to be used for small repair jobs; the Board had only one scale of charges, geared to the use of electricity

by large vessels. The Board made no attempt to draw the complainants' attention to this fact.

After this Office became involved, and because the complainants played some part in the disconnection of supply, the Board decided to waive 50% of the disconnection fee. In addition, an administrative error was discovered and, in all, the Board reduced the account by $52.59.

The complainants maintained that they were never shown a copy of the Board's scale of charges. However, even if they had seen the scale of charges, it would not have been unreasonable for them to pay only fleeting attention to the document, bearing in mind the normally low cost of operating a hand-held drill. Anyone with a knowledge of County Council rates would not expect to pay $120 for the consumption of electricity worth about $1, even taking into account labour and overhead costs in making that electricity available.

The Board's conduct was found to be wrong in that it had failed to:

(i) adequately explain its electricity supply charges;

(ii) properly review its electricity supply charges;

(iii) take into account the special circumstances when carrying out its review in this case.

The Deputy Ombudsman recommended that:

(i) the account issued to the complainants be reviewed to take into account the special circumstances of their case;

(ii) procedures be adopted to ensure that uneconomic use of electricity is specifically drawn to the attention of an applicant in addition to providing a copy of the current scale of charges;

(iii) procedures be adopted to ensure a meaningful, accurate and prompt response to future queries about electricity supply charges.

The Board advised that no further reduction to the account was possible; future users would be made aware of the scale of charges and a more "business like approach" would be used in future. However, on 24 June 1986, after receiving the draft report, the Minister told this Office that he had instructed the Board to implement the Deputy Ombudsman's recommendations.

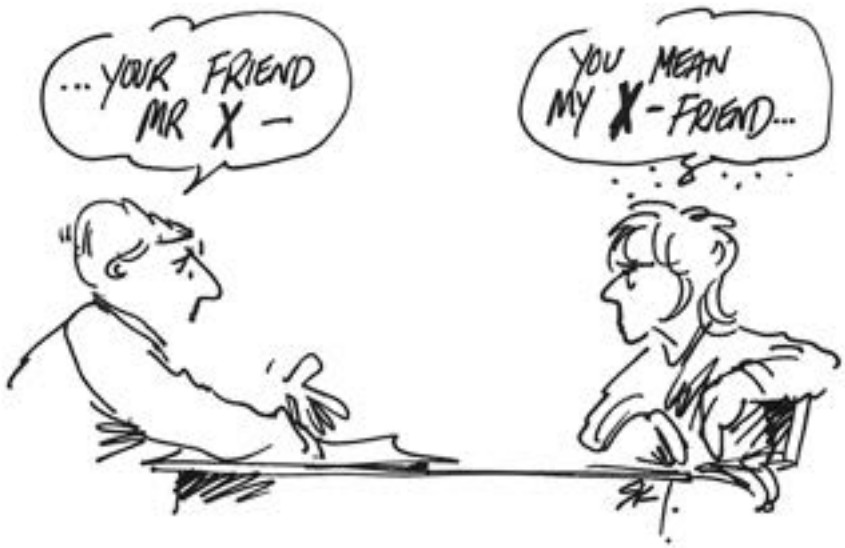
DEPARTMENT OF MOTOR TRANSPORT

Unreasonable request to have a medical examination

Ms S complained about a decision of the Department to review her medical fitness to hold a driver's licence, and to require her to undergo a medical examination at her own expense.

The Department had received information from Mr X. He claimed to be a close friend of Ms S and said that she was prone to blackouts and convulsions. In accord with Departmental procedures, Mr X was interviewed by an Inspector and his allegations about Ms S's medical fitness were reported to the Department's Medical Officer. No action was taken to attempt to substantiate Mr X's allegations. The Department decided to review Ms S's medical fitness and to require her to undergo a medical examination; a notice to this effect was sent to her.

After receiving the notice, Ms S, whose job depended on her being able to drive, contacted the Department by telephone and letter. Ms S told the Department she was medically fit and that she did not suffer any disabilities. She also asked if Mr X was the


...YOUR FRIEND MR X -
YOU MEAN MY X-FRIEND...

informant, and told the Department that she had obtained a restraining order against Mr X, who had been harassing her and telling lies about her to a number of government departments. The Department told Ms S that it could not disclose the source of its information and that she had no alternative but to undergo the medical examination; otherwise her licence would be cancelled. Ms S submitted herself for a specialist medical examination and was certified medically fit to drive.

Investigation by this Office revealed that the Department's procedure for dealing with medical information about licensees was to interview only the informant. The information was sent to the Department's Medical Officer for his recommendation as to the action to be taken. The Ombudsman found that the Department's conduct was unreasonable and wrong because it had:

1. failed to adopt proper administrative and investigative procedures to deal with information received from an identified source about the medical fitness of a licensee;

2. required Ms S to undergo a medical examination at her own expense on unsubstantiated information; and

3. failed to review the decision to require Ms S to undergo a medical examination after she had provided the Department with vital information about the informant.

At the time the Ombudsman made his report, the Department had already initiated a review of its procedures to ensure that thorough investigation is conducted, involving both the informant and the licensee, before referring a matter to the Medical Officer. The Ombudsman recommended that an ex-gratia payment be made to Ms S to compensate her for the expense involved in undergoing the medical examination, and this recommendation was accepted by the Department.

Unregistered motor vehicles

For many years the Motor Traffic Act said, in effect, that an unregistered vehicle could be driven to the nearest motor registry for registration. The Act said nothing about driving a vehicle from a registry if registration were refused. In a case of that kind a problem with third party insurance could also arise. The Motor Vehicles (Third Party Insurance) Act says, in effect, that insurance cover continues for fifteen days after the registration of a vehicle expires. If registration were refused, and repairs took more than fifteen days from the day of expiry, then the vehicle would no longer be covered for third party insurance.

The complainant in this case bought an unregistered "bongo van" for his son, arranged a cover note for third party insurance, drove the van to a motor registry and was there told that some repairs would have to be made before the van could be registered. The repairs were listed on Department of Motor Transport Form 700, the "Unregistered Vehicle Inspection Report", which had the following note at the bottom:

IMPORTANT NOTICE TO VEHICLE OWNER

> The vehicle may be driven by the shortest practicable route to the place where it is to be repaired or garaged, with due regard to the faults described above. Note that, unless the vehicle is covered by insurance before you drive it away, you could be liable for the full costs of an accident.

The complainant said that he explained to one of the motor registry staff that the van would be repaired in the workshop of his employer, some distance away, and was told that "as long as I went by the shortest practical route that was OK and that I did not have to insure unless I wanted to". A few days later, after the third party insurance cover note had expired, the complainant was driving the van from his home to his employer's workshop when he was stopped by police, and later summonsed, for driving an unregistered and uninsured vehicle. He maintained, among other

things, that the information given to the public by the Department of Motor Transport about driving unregistered motor vehicles was incorrect in some respects and incomplete in others.

The Commissioner for Motor Transport told this Office that the Department and the police had agreed in 1953 that there would be no prosecution of people driving away from motor registries in unregistered vehicles that were being taken for garaging or repair. The agreement was intended "to obviate needless prosecutions in genuine cases". The Commissioner also said that the information about insurance at the bottom of the Form 700 "could be misinterpreted". The Commissioner agreed to recommend that the legislation be amended to allow vehicles that had been refused registration to be driven legally to a garage or workshop, to issue an additional instruction to motor registry staff about the need for third party insurance, and to amend Form 700 so as to make these things clear. The Commissioner's agreement on these points was noted in the statement of provisional findings and recommendations that was compiled on this complaint, and in the draft report that was later sent to the then Minister, the Honourable Barrie Unsworth. Mr Unsworth requested a consultation, and his views and a brief summary of the discussion during consultation were included in the final report.

The Motor Traffic (Unregistered Vehicles) Amendment Act 1986 was assented to on 21 April 1986, and amendments to the Motor Traffic Regulations such as to "permit the driving of unregistered vehicles on public streets for all essential purposes associated with the original registration process" came into effect on 1 August 1986.

Record errors

In July 1983 the Department by letter asked the complainant to pay the transfer fee following the sale of a second-hand car. The Department's records showed the complainant to be the owner of the vehicle.

In August 1983 the complainant told the Department that he did not own and had never owned the vehicle in question. He asked the Department to amend its records. The complainant's letter was overlooked by the Department. Further, his name was left on the Department's records as the owner of the vehicle.

Later, two traffic infringements involving the vehicle were issued and the Department told the Police Department that the complainant was the owner of the vehicle. The complainant, understandably, complained to the Minister and to this Office in early 1985.

The Department admitted its error, saying that it had issued instructions to all appropriate staff in order to prevent a similar situation occurring again. The instructions were comprehensive and appeared satisfactory.

The conduct of the Department was found to be wrong in that it had attributed, incorrectly, the ownership of a vehicle to the complainant and, when advised of that error, had failed to correct its records. The action taken by the Department in issuing new instructions to its staff was deemed to be appropriate in the circumstances and, accordingly, no recommendations were made in the report issued by this Office.

DEPARTMENT OF PUBLIC WORKS

A quick response

The Parents and Citizens' Association of a primary school complained about delay that had occurred in the replacement of the school's inadequate septic system, which had been installed in 1973 when the school had 20 students and one teacher. By 1983 the school population had grown to more than 120 students and eight staff members.

Investigation showed that excessive delay had occurred in the connection to the septic system of a demountable classroom

containing toilet facilities. The Education Department had begun investigating the adequacy of the old septic system in November 1983, but the Public Works Department had not made a site inspection until June 1984. Technical advice for upgrading the system was not received from the Public Works Department until March 1985. Work commenced in April 1985.

When the Department was notified of the investigation by this Office, it initiated its own internal investigation into the matter. The Departmental investigation identified administrative inefficiency at the relevant Area Office and in several areas of the Building Construction and Maintenance Branch, including programming of work, obtaining technical advice and client liaison. Following its investigation, the Department commissioned an officer to undertake a review of certain administrative procedures in the Branch.

As a result of the Departmental review, wide-ranging and effective new procedures were introduced and no recommendations were made in the Ombudsman's report in the matter.

STATE CONTRACTS CONTROL BOARD

Failure to pay cleaning contractor

In January 1985 Mr H complained that the State Contracts Control Board had not paid his firm for cleaning services provided during the previous six months, and that he had agreed to negotiate a conditional contract with the State Contracts Control Board, only to find that the Board had decided to call tenders. The complaint was complicated by the fact that Mr H had originally been awarded a three-year cleaning contract, but the contract had been broken when the premises came under the administration of a different Government body.

Mr H continued to clean for the new tenants for two months after they occupied the premises, and was paid directly by the new tenants. He was then notified that the State Contracts Control

Board would be taking over payment for cleaning services in June 1984, with the tenants to check the hours worked. After three months of submitting invoices to the tenants, which were forwarded to the Board for payment, Mr H became concerned that he had not received any money. After repeated telephone calls and enquiries, Mr H was paid, in late December 1984, approximately $15,000 of the estimated $60,000 owed to him.

During the latter half of 1984 Mr H was asked to submit a quotation for the cleaning contract, in order to formalize the arrangements for cleaning. After some delay in determining which areas were to be included in the quotation, Mr H submitted a quotation. It then came to Mr H's notice that the contract for cleaning of the premises was to go to tender, although he had not formally been advised that his initial quotation was unacceptable.

Following preliminary enquiries, an investigation was commenced by this Office, during the course of which Mr H was paid the remainder of the outstanding monies, together with an adjustment resulting from a national wage case decision.

Following the preparation of a wrong conduct report, the State Contracts Control Board informed this Office that the Cleaning Branch of the Board had introduced a register for correspondence, as well as a follow-up system to report undue delays in dealing with letters.

DEPARTMENT OF TECHNICAL AND FURTHER EDUCATION

Student Union fees

For the past 20 years Newcastle Technical College has imposed a "compulsory" student union membership fee on all students enrolling in a course of 72 hours or more, unless they have obtained a "waiver". Mr C, a student at the college, questioned the validity of this compulsory charge. He was told by the Principal in a letter that "at present the fee is 'compulsory' in that staff cannot complete an enrolment without a waiver but

waivers can be easily obtained for any just reason". His class teacher informed him that he could not be enrolled until he produced his student union membership number.

Clarification was sought from the Director-General of TAFE, who advised that "any payment of fees is voluntary, not compulsory and not a pre-requisite for enrolment". He explained that there had been some confusion in the past; a circular had set out the Department's policy on voluntary contributions by students to college funds. It said that "any college notice, brochure or pamphlet issued should indicate the voluntary nature of student amenities contributions", and there should be no coercion of students to have them accept such charges.

Newcastle Technical College levied student union and student amenity fees, relying on the college constitution, which had been approved by the Minister for Education in 1965 and which provided for compulsory membership as a condition of enrolment. Moreover, in January 1985 the Department advised that the Minister had agreed to an increase in fees.

The Director-General had a legal opinion from the Crown Solicitor which said:

> The Technical and Further Education Act, 1974, contains no express provision enabling the charging of fees for services rendered to students or for any other purpose, nor is there any authority expressed in the Act for the constituting of a body such as the Union at Wollongong Technical College (similarly Newcastle) ... while it may perhaps be possible to rely on the Minister's power in sect 7 ... in order to validly constitute a body such as the Wollongong Technical College Union at any College, I think express power should be provided in the Act, particularly if it is proposed to impose on all students a membership fee wherever a Union has been established ... express authority will be necessary in the Act to charge a compulsory fee ...

This information was not given to senior staff in the colleges, however; the Principal of Newcastle Technical College was not aware of its existence.

The conduct of the Department was found to be wrong: it had obtained legal advice, but had not told the Principals of the

colleges which were affected. The college practice of not enrolling students until they produced a union number or a waiver amounted to coercion.

College staff have now been told that no student can be excluded from class for the non-payment of fees. It has been made clear that student union membership is voluntary and that all prospective students must be informed of that fact. Letters to this effect from the Principal have been circulated and displayed on notice boards.

The Department has confirmed that the recommendations made in the Ombudsman's report are being complied with: a new circular is being prepared, and further advice has been sought from the Crown Solicitor with a view to amending the relevant legislation.

URBAN TRANSIT AUTHORITY

Alleged failure to compensate

The complainant, a motor vehicle repairer, was retained by the Urban Transit Authority to repair a motor home damaged in an accident with one of the Authority's buses. Following the direction of UTA officers, he took the damaged motor home to his workshop, where repairs commenced. According to the complainant, he asked the UTA about returning the vehicle to its owners, and was told not to do so without first obtaining from the owners the name of their insurance company; this the owners of the motor home refused to divulge.

The complainant was then threatened with legal proceedings if the vehicle was not returned to its owners. He contacted UTA officers, who, he maintained, refused to authorise release of the vehicle until details of insurance were provided.

The owners then served the complainant a Supreme Court summons for recovery of their vehicle; this required attendance at the Court the next day. The complainant claimed that he again

contacted the Urban Transit Authority and was instructed by a legal officer to get legal representation and defend the matter. Nevertheless, in a short and unceremonious hearing he conceded that he had no right to retain the vehicle. Representatives of the UTA were also present in court but did not intervene. The court ordered that the vehicle be returned to the owners and that the complainant pay the owners' legal costs. Together with his own costs, the legal proceedings cost the complainant $5,594.00; he felt that the UTA was responsible for the expense.

Where the UTA has a "knock-for-knock" agreement with a particular insurance company, and the owner of an insured vehicle makes a claim directly on the Authority, the Authority is entitled to seek recovery of its outlay for repair of the vehicle, less any excess, from the company insuring the vehicle. The UTA's Managing Director admitted that "it is to the Authority's advantage to obtain insurance details", but added that "officers of the Authority are well aware that a determination on payment of a claim cannot be withheld simply because insurance details have not been provided".

The Authority provided information about its general procedures and answered specific questions asked by this Office. It maintained that none of its officers had advised the complainant to refuse return of the vehicle or to defend the summons in court. It conceded, however, that "it does appear that instructions were issued to stall delivery until an NRMA inspection was carried out".

The Managing Director said that he believed that the Authority's actions and advice had been misinterpreted by the complainant. Nevertheless, the Authority recognised that the complainant "had nothing to gain from not releasing the vehicle" and offered the complainant an ex gratia payment of $5,594 to cover legal fees arising form the court proceedings.

The complainant still maintained that the advice he had received from the UTA officers was clear and unequivocal, and that no misinterpretation had occurred, but he was prepared to accept the Authority's offer. The Authority's procedures for authorising

repairs appeared to be otherwise adequate, and so the complaint was considered "resolved".

WATER RESOURCES COMMISSION

Who should pay?

Mr B, a rice grower in the Murrumbidgee Irrigation Area, relies on a constant supply of water to his property; this brings him into contact with the Water Resources Commission. Mr B complained that the Commission had incorrectly charged him for water used on his property. Although he had protested, he eventually had to pay all of the charges because the Commission threatened to cut off the water supply to his land if he did not. At the time, Mr B had a rice crop which would have been destroyed without water.

The issue in dispute was not the amount charged for the water which had been used, but who should pay the account. Mr B had purchased one part of a property which had been divided in two. Before purchasing the property, Mr B had farmed the land under licence from the owner. The balance of the land was similarly farmed by another licensee. During that time, the accounts were not sent to the owner (who lived in Victoria), as required by the legislation, but were sent to the two licensees, who apportioned the accounts between them. Once the property was subdivided each part could be rated separately but, shortly before this occurred, a dispute arose between Mr B and the other licensee over who should pay a certain portion of the account. The Commission, through its agent, the State Bank, chose to enforce the outstanding amount against Mr B. He maintained that the other licensee was responsible.

This Office found that the Commission's actions in proceeding against Mr B for payment of the outstanding water rates was not in accordance with the relevant legislation, or with the Commission's practice. As a result of this Office's recommendations, Mr B was refunded the sum of $501.09, which he

had paid under protest, and a payment was also made in lieu of interest on that sum to the date of refund. Other recommendations were made about the Commission's procedures in forwarding notices of assessment of rates to owners of land, and about its procedures in assessing rates on land being subdivided. Those recommendations also were implemented by the Commission.

ZOOLOGICAL PARKS BOARD

Economy and accountability - the Western Plains Zoo

Last year's annual report noted that anonymous complaints to this Office are usually sent to the relevant public authority for information and comment. An anonymous letter about an employee of Western Plains Zoo, however, resulted in an investigation in the first instance by this Office, mainly because the letter in effect alleged corruption. The investigation found "no wrong conduct" on the part of the employee, but revealed a good deal about perceptions of accountability and economy in the public sector.

During the investigation the Officer in Charge of Western Plains Zoo was asked, among other things, about the procedures used when several steel-framed sheds were built at the Zoo, and about related procedures for the construction of some hundreds of thousands of dollars worth of extensions to the kiosk, then in progress; the investigating officers were taken on a tour of the extensions. When asked for project files or other records concerning the construction of the steel-framed sheds, the Officer in Charge said that there was no "general" file containing written quotations, and no file or journal in which telephoned quotations were recorded. Later, written quotations for some aspects of the kiosk extensions were produced, and the Officer in Charge said that some quotations had been recorded in such places as staff members' diaries. There seemed to be a lack of system in dealing with such things, however.


WE DO THINGS DIFFERENTLY IN DUBBO, DONT YOU KNOW!

The staff of Western Plain Zoo argued that they had created a good deal in the way of public assets at the Zoo by acting, in effect, as prime contractors. They had purchased many of their requirements directly from local suppliers and had used Zoo workers for much of the labour, engaging specialists and sub-contractors as required. They maintained that conditions in an area like Dubbo were different from those in the city, where various tendering procedures had to be followed. In Dubbo there was a limited number of suppliers, one soon got to know which of those were likely to provide goods prices and efficient work, and the others would grow annoyed if they were frequently asked for quotes but were rarely given orders.

In Sydney the Director of the Zoological Parks Board produced a document setting out purchasing procedures that had been endorsed by the Board in late 1979, without saying that the document had been produced following adverse findings by the Auditor-General; this was discovered later in the investigation. The Director was told that, as far as this Office could see, the procedures were not being followed for the extensions to the kiosk, although the procedures themselves appeared to be appropriate. It seemed that the Director could not produce an endorsement of the recommended procedures by the Board, nor formal instructions to staff to follow those procedures.

In a statement of provisional findings and recommendations on this investigation the Deputy Ombudsman concluded that, although it could be argued that substantial assets had been created at Western Plains Zoo at relatively low cost, there was no conclusive evidence to support that argument. The Deputy Ombudsman said, "... public authorities must produce evidence if they are to be accountable for the taxpayers' money that they spend". In what was intended to be a mild admonition, he found that there had been wrong conduct by the Board in a "technical" sense, and recommended that the Board formally endorse the 1979 recommended procedures and direct Zoo staff to follow them.

The statement of provisional findings and recommendations brought a heated response from the Chairman of the Zoological Parks Board, Mr A E Harris. Mr Harris set out the circumstances of the

1979 Auditor-General's report, and seemed to argue that the production of the document about recommended purchasing procedures meant that the recommendations in the Deputy Ombudsman's statement had already been complied with. He was also angry that the investigation had been undertaken on the basis of an anonymous complaint, and maintained that it, in turn, had been a waste of taxpayers' money. He said that the Board would not report on the implementation of the recommendations.

The finding of wrong conduct was nevertheless confirmed, and a draft report sent to the Minister, the Honourable Janice Crosio. In the draft report, as in the statement of provisional findings and recommendations, it was pointed out that the purchasing procedures recommended to the Zoological Parks Board in 1979 were, according to the observations of the staff of this Office, still not being observed at the Western Plains Zoo in the building of kiosk extensions, and some examples were given. The conclusions in the draft report pointed out that "...it is merely sound housekeeping or business practice to require competitive tenders, leaving aside any questions of accountability. It is not possible to say whether a particular purchase or undertaking is the 'best' available without introducing open competition into the contracting process. Any extra effort required for this purpose is bound to be repaid in the long term." The Minister did not request a consultation on the draft report but wrote, in much the same vein as Mr Harris:

> It is difficult to understand what all the fuss is about. It is apparent that appropriate tendering procedures were in place. Staff were instructed as to the procedures to be followed and these procedures were carried out to the best of the ability of the officers concerned within the environment in which they operated. Further, there is the serious matter of a costly investigation at the taxpayers' expense generated by an anonymous letter.

The Minister, too, rejected the findings and maintained that the recommendations in the draft report had already been implemented. The Deputy Ombudsman thereupon made the report final.

The Office of the Ombudsman may make recommendations, but it is for the public authority to decide whether to implement them. If the public authority refuses, then a report may be made to Parliament. It was decided not to do so in this instance, mainly because the public authority refused even to acknowledge the facts observed by the investigating staff of this Office. Nor, owing to the provisions of Section 34 of the Ombudsman Act - the secrecy provisions - was this Office able to send a copy of the report to the Auditor-General or to the Public Accounts Committee; it was unlikely that Mr Harris would do so, in view of his reaction to the recommendations in the report. Nevertheless, following the tabling of this Annual Report, the matter will be drawn to the attention of the appropriate persons.

This Office holds to the view that there is utility in pursuing anonymous complaints, a view that is supported by the findings in this investigation; some people might consider that the defensive reaction of the public authority was itself a cause for concern. As to the question of the cost of the investigation, the relevant accounts are available, and have been open to both the internal auditor of this Office and to the staff of the Auditor-General. The investigation itself has been made public through this Annual Report. This Office has accounted for itself in this matter. It is unlikely that the same thing could be said for the Zoological Parks Board so far as the kiosk extensions at Western Plains Zoo are concerned.

COMPLAINTS AGAINST COUNCILS

BROKEN HILL CITY COUNCIL

Need to call tenders

Ms M, a director of a quarry company, alleged that Broken Hill City Council had not called for tenders for the supply of ready-mixed concrete and stone aggregate. Prior to 13 September 1985 the Local Government Act required that tenders had to be called by a council for materials worth $13,000 or more. The amount has since been increased to $22,000.

In his reply to preliminary enquiries, the Town Clerk said that he was not aware of any order for ready-mixed concrete or stone aggregate for $13,000 or more. Ms M did not dispute this; her claim was that the council avoided the intention of the tendering provisions of the Act by placing a large number of orders for amounts less than $13,000 each. She cited one example where, she estimated, the total price for concrete provided by a certain company was about $60,000. She said that, despite several requests for tenders to be called, this had not been done.

In one instance the council decided to pave part of a street and needed some 574 cubic metres of ready-mixed concrete; this work involved estimated expenditure of over $13,000.

The council entered seventeen contracts with the one company for this project. Some of the contracts were entered into on the same day. The total cost of concrete ordered for the project was $50,580.98.

The council said that it only approached one company about supplying the concrete because it was only aware of one company within 250 kilometres of the city that could supply the required materials. This Office thought that the council was unlikely to find out about the existence of any other companies if it declined to advertise.


BUT WE ONLY KNEW OF ONE COMPANY THAT COULD DO IT...
...AND YOU SIGNED 17 CONTRACTS WITH THEM JUST TO KEEP THE ACCOUNTING STAFF BUSY...
SK

The Deputy Ombudsman recommended that the council review its policies for calling tenders and, in future, comply with the law (Ordinance 23 of the Local Government Act). In response the Town Clerk wrote:

> The requirements of Ordinance 23, Clause 6 of the Local Government Act have been made known to each Alderman and the relevant staff member.
>
> In view of the action taken you can be assured that tenders will be called in future in all cases where the contract involves an estimated expenditure of an amount of $22,000.00 or more.

CARRATHOOL SHIRE COUNCIL

Yes, Minister

In April and May 1985 residents of Hillston complained that Carrathool Shire Council had levied a charge on all townspeople for providing drainage in one area of the town. They alleged that the charge not in accordance with section 378A (12) of the Local Government Act, which says:

> Except as provided in subsection (10) [which refers to supply of water], the charge or fee in respect of any service for the supply of water or the rendering of sewerage or drainage services shall be paid to the Council by the person to whom or at whose request the service is supplied or rendered.

In November 1984 the Minister for Local Government visited Carrathool Shire and gave oral approval for the Hillston Differential Town General Rate to be increased above the 8% limit set by the Government. The council applied for this increase, but withdrew the application when it analysed the effect of the proposed rate increase on individual properties, deciding that a levy would raise the required funds more equitably.

The Department of Local Government was made aware of the council's actions by a letter from one of the complainants and on 29 June 1985, at the council's request, the Minister for Local Government received a deputation from the council to discuss the

matter. The council then told this Office that advice from the Minister for Local Government and from the Department supported its actions. Nevertheless, the following note from the Department's legal officer was found by the Investigation Officer who examined the relevant files:

> CARRATHOOL SHIRE COUNCIL : HILLSTON DRAINAGE CHARGES
>
> It appears from the Secretary's note that the Minister has informed the Council that its actions were "quite proper and equitable". Unfortunately, that tends to preclude an opinion to the contrary from myself.
>
> I have always been of the view that sections 378A (8) and (12) must be read together - that is, the charge "for or in connection with", eg the rendering of drainage services must relate to a service supplied or rendered to the person levied with the charge. My "private view" accords with the Ombudsman's preliminary findings and Mr M's questions (which, he alleges, are supported by an independent legal opinion not supplied).
>
> I think that it is now a policy decision as to what replies should issue.
>
> ALO 26.8.85

In a letter to the Ombudsman dated 8 October 1985 Mr H P S Fox, the then Secretary of the Department of Local Government, said he tended to agree with the view of the legal officer.

The drainage system was definitely needed in the Newtown area of Hillston, and council attempted to raise the funds for the system in an equitable manner. Under the Local Government Act, however, it is not possible to levy a charge for provision of a service on persons other than those to whom the service is supplied. This Office recommended that Carrathool Shire Council refund the drainage charge and adopt some other means of funding the stormwater drainage scheme. The council accepted and implemented these recommendations.

EUROBODALLA SHIRE COUNCIL

Improper handling of tenders

In October and November 1983 Eurobodalla Shire Council advertised for tenders for the development of a site owned by council in Bateman's Bay. Council envisaged that the development would include a service station, a fast food outlet, a tourist information centre and council offices. Mr B complained to the Ombudsman about the manner in which council handled the tenders. The complainant was a director of a company which joined with another company in a joint venture to submit a tender for the development of the site.

Council resolved on 23 January 1984 not to accept any of the tenders submitted, but to invite two of the tender companies to further discuss their tenders with a special committee of council. Council did not inform tenderers of this until 12 March 1984, when they were called to a meeting and asked to make another offer for the development, with a reduction in the size of the site to be developed. Revised tenders or offers were submitted soon afterwards.

Council then redefined the nature of the development and, later again, the size of the area to be developed. On the final occasion, the tendering companies were presented with new guidelines for development and asked to submit a new development proposal within 2 days, advising the Town Planner by telephone of the price to be offered. The new guidelines were not in writing. Investigation by this Office showed also that there was no record of any discussions between the council and the companies about the development of the site.

On 28 May 1984 council resolved to accept the offer for development from one of the original tenderers. The complainant, one of the parties in the joint venture, made a formal complaint to council about the manner in which it dealt with tenders for the development and requested an immediate halt to dealings and the recalling of tenders in accordance with the Local Government Act. Council refused this request, claiming that the way it had

negotiated with potential developers was reasonable and that everyone had been given equal opportunity to submit the best price to council for the purchase of the land.

At the time that tenders were originally called, the Local Environmental Plan limited access to the site from two of the boundary roads. This was made clear to potential tenderers in the guidelines made available by council. On 11 October 1984 the company that had successfully negotiated the purchase and development of the site submitted a development application to council. The application showed that access to and from the site was not permitted under the Local Environmental Plan. The development application was submitted to the Department of Main Roads and the Police Department for their views on the proposal. Both Departments indicated their opposition to vehicular access to and from the main road, and said that they did not consider the site suitable for development as a service station.

The Town Planner recommended that council refuse the application on the grounds that the development proposals did not comply with the Local Environmental Plan, that the architectural style of the building was unsuitable, and that the proposed means of entrance and exit were unsatisfactory. Nevertheless, council resolved to amend the Local Environmental Plan to allow access to the site from the main road. The Plan was subsequently made by the Minister for Environment and Planning, although council was exhorted to give careful consideration to the traffic implications if direct access from the main road were proposed.

On 15 August 1985 council resolved not to proceed with negotiations for the sale of the site.

In his final report, the Deputy Ombudsman found council's conduct unreasonable in that council:

1. delayed notifying tenderers that their tenders had been unsuccessful;

2. failed to advise interested parties in writing about its decision to alter the size of the area to be acquired and developed;

3. required interested parties to submit an offer for the purchase and development of the site within 2 days of being orally advised of new guidelines;

4. requested interested parties to submit their offers by telephone;

5. failed to re-advertise for expressions of interest or for new tenders after substantial alterations had been made to the area to be developed;

6. amended Local Environmental Plan 13 (substantially changing the development potential of the site) after negotiations with interested parties had been completed and after the submission of a development application by the successful offeror, without having advertised the revised conditions for the development; and

7. failed to record the results of discussions with interested parties.

The Deputy Ombudsman recommended that council:

1. advertise for expressions of interest or for submission of tenders in accordance with Ordinance 23 of the Local Government Act when it resolved to sell or lease land for development;

2. advertise amended conditions or guidelines when it subsequently resolved to alter any of the original conditions or guidelines for development, and call for fresh expressions of interest or tenders;

3. develop administrative procedures to ensure that all council officers and committees make a record of all advice given and the results of discussions with parties interested in acquiring and/or developing land within council's control; and

4. immediately issue a directive to its officers and committees that all offers for the purchase and/or development of council land be submitted to the Shire Clerk in a sealed envelope by a time specified in writing.

Council has advised the Deputy Ombudsman that it has resolved to accept all the recommendations made by him and is taking steps to implement the recommendations.

HASTINGS MUNICIPAL COUNCIL

Pointless refusal

Authorities sometimes respond to enquiries by this Office in a positive way that makes formal investigation unnecessary. This was the case in one complaint dealt with during the year, involving Hastings Municipal Council.

Solicitors complained that their client who wished to disclose to a prospective purchaser all matters affecting his property, had applied for a certificate under section 149(5) of the Environmental Planning and Assessment Act. The required fee had been paid. However, council refused to issue the certificate because it wished "to avoid compensation claims".

The solicitors said that, if Hastings Municipal Council could refuse to give this information, then every other council could refuse as well; this would make section 149(5) pointless.

Council's refusal to issue the certificate was based on legal advice circulated to all councils in 1981 by the Local Government and Shires Associations because the wording of the relevant form had been of concern. The form was changed and in February 1982 councils were told of legal advice that the revised form was satisfactory; it would be in order for the information sought in section 149 certificates to be provided. Hastings Municipal Council failed to amend its policy at that time.

After the matter was raised by this Office, Council decided to provide the requested information to the complainant. This disclosed that a Tree Preservation Order applied to the land. The complainant could not understand why Council had refused to provide that information in the first place. In any event, Council told this Office that it had decided, in future, to provide the required information upon application and payment of the prescribed fee. As the complainant was satisfied with the outcome, the matter was not pursued.

Move that truck - sometime

Mrs S complained to Ombudsman's officers visiting Port Macquarie about the failure of Hastings Municipal Council to take action against a resident who was parking a boat, two trucks and, sometimes, a bulldozer on a public reserve. The resident owned land less than 1/2 a kilometre away from his house, but had persisted in leaving his vehicles on the reserve, even though complaints about his actions had been made to council for three years.

Council told this Office that the parking of vehicles (including boats) on public reserves was in contravention of council ordinances and said:

> The Ordinance Inspector has been directed to keep the park under surveillance to take appropriate action to effect the removal of any unauthorised vehicles.

This information was sent to Mrs S.

In June 1985 Mrs S said that nothing had changed and provided photographs of the trucks parked on the reserve. Council was asked to provide details of the action it had taken in the light of the undertaking it had given. Council said that no action had been taken because the Ordinance Inspector had been monitoring the wrong park. Council assured this Office that steps would then be taken to stop the resident using the reserve, which would be inspected regularly to ensure that there were no further breaches.


WHAT TRUCKS ?
HASTINGS M.C.

Nevertheless, Mrs S said that the park had been free of trucks for only three nights during July 1985. Council was asked why nothing had been done, and replied that it had not formally resolved to prohibit parking on the reserve, and so could not take any action; in effect, there had been no contravention of council ordinances by the resident.

Council eventually passed the necessary resolution, and in March 1986 erected signs prohibiting parking on the reserve. In April 1986 Mrs S said that the signs had been erected, but that the trucks were parked on the reserve as usual.

Council's conduct was found to be wrong and a report was made. Council did not dispute the facts set out in the report, but claimed that no real harm had been done. It took the view that, although its failure to act may have been "wrong" in terms of the Ombudsman Act, the problem was primarily one of public relations, and the complainant, Mrs S, had not been affected in any way.

Council had missed the point. The offending resident owned land less than 1/2 a kilometre away from his residence on which he could park his vehicles, yet he persisted in parking and maintaining his vehicles on land which belonged to the public. By his actions he was both visually and physically polluting community property which council had the responsibility to maintain. The resident's actions were, at least after March 1986, an act which was in contravention of council ordinances.

An opportunity was given to the Minister for Local Government, the Hon J A Crosio, MP, to consult before the Deputy Ombudsman's report was published. The Minister did not wish to consult, but said that she acknowledged the valuable service this Office provides on individual complaints against councils. Later, in a newspaper report in the Sydney Morning Herald on 4 June 1986, the Minister expressed the view that this had been a trivial complaint. During a meeting with the Ombudsman and two of his officers on 5 June 1986, the Minister agreed with the Investigation Officer that the matter raised by Mrs S was one that had needed to be pursued.

HAWKESBURY SHIRE COUNCIL

Submission ignored

In July 1984 Hawkesbury Shire Council received a development application for the erection of residential flats in an historic area of South Windsor. In accordance with its policy, council brought the application to the attention of adjoining and adjacent land owners, requesting that submissions be made by a specific date. The complainant, along with two other residents, delivered submissions to the council on the afternoon of the day specified.

Prior to council's receiving those submissions, and before the appointed date for the receipt of submissions, council had prepared a report on the development application. At council's General Purposes Committee Meeting which was to decide on the development application, the three submissions received were reported as "late correspondence". The names of the objectors were noted and a brief description of the objections was provided; there was no discussion on the merits or otherwise of the submissions. There was no evidence on council's files to suggest that the submissions were considered in any detail.

Council sought to argue during the course of the investigation that there was no statutory requirement on it to notify owners of adjoining and adjacent properties, as it had done in this case. Such a statement is technically correct, but there is little value in council's going to the trouble of seeking submissions and, without waiting until the due date for receipt of submissions, compiling a report on the development application. This action made a nonsense of council's otherwise commendable policy.

The conduct of council was found to be unreasonable, in that it failed to accept as valid, submissions which it had received before the due date. In addition, council failed to consider the

submissions fully and to prepare a report which could be viewed and considered by the General Purposes Committee prior to its decision on the development.

This Office sent to council a statement of provisional findings and recommendations, and council advised that it had introduced new administrative procedures for considering development applications and relevant submissions, so as to avoid a similar situation occurring again. These new procedures were considered to be appropriate, and so no recommendations were made to council.

LEICHHARDT MUNICIPAL COUNCIL

Clontarf Park

The Clontarf Park Action Group complained that no valid development consent existed for the erection of Housing Commission accommodation on the Clontarf Park site at the corner of Adolphus and Wallace Streets, Balmain.

The group alleged that the Mayor had been authorised to approve the development application lodged by the Housing Commission, but only upon receipt of the concurrence of the Minister for Planning and Environment to the conditions recommended by the council. They further alleged that the Mayor granted consent to the application, even though the Minister refused his concurrence in relation to two of the conditions. On this basis, the group contended, no valid consent existed.

Investigation found that, at the time the council resolved to authorise the Mayor to approve the development application under the specified conditions, it also delegated to him the authority of council generally to determine building and development applications while the council was in Christmas recess.

The Minister's concurrence to the proposed development (apart from two of the conditions recommended by the council) was received during the time that the Mayor was exercising the

general delegated authority of the council for building and development applications. On this basis the council by its delegated officer, the Mayor, had reconsidered the development application in the light of the Minister's response, prior to consent being granted.

The Ombudsman decided that, in this matter, he should not find the conduct of the council and the Mayor to be wrong in terms of the Ombudsman Act.

MAITLAND CITY COUNCIL

Unwanted footpaths

During a Community Information Programme in Maitland in March 1985, two pensioners discussed their complaint with an Investigation Officer of the Ombudsman. The matter concerned the Maitland City Council's decision to charge the owners of property for paving the footpath outside their homes.

Early in 1983, the Town Clerk wrote to the nine landholders on the southern side of Clift Street, Maitland, saying that the council had decided to pave the footpath adjacent to their properties and that, in accordance with the Local Government Act, the council was entitled to charge ratepayers for half of the cost of the work and that the council would render accounts when the work was completed. The particular street is a short dead-end street, six of the nine landholders being aged pensioners. Eight of the nine householders petitioned the council, saying that they did not wish the work to be carried out, as they did not consider that it was necessary, in view of the cost involved. In March 1983 the council decided to continue with the work, but resolved that it not press for payment of half cost, because some owners were pensioners. The council wrote a letter to all of the ratepayers, advising them of this decision.

The paving work was completed early in 1984 and the property owners received accounts of between $250 and $450 each. Some of the property owners paid the accounts, others did not. The


THE COUNCIL WANTS THE FOOTPATHS AND THE MONEY...
WELL - WE DONT WANT THE FIRST - AND HAVENT GOT THE SECOND...
SK

council continued to send details of outstanding accounts to those property owners who did not pay and, although council said that legal proceedings would not be commenced, it became apparent that the debt would be a charge on the land should a property be sold.

This Office concluded that the council had misled the property owners, who believed that, as a result of their petition, the council would not require them to pay for the paving work. This Office was also concerned at council's action in sending accounts rendered, when it had been resolved not to press for payment.

After formal investigation of the complaint was begun, the council decided to rescind its earlier resolution and to approve the writing-off of all accounts for the paving works, totalling $3,076.05. All monies paid were refunded.

The important issue raised, as far as this Office was concerned, was the unclear terminology used in council's letter to the property owners about whether payment would be required. At the conclusion of the matter, one of the complainants wrote to this Office:

> I would like to congratulate you on the expeditious and tidy manner in which you have resolved this matter. It is very comforting to know that one has recourse to such assistance. I am most grateful for your help.

MOREE PLAINS SHIRE COUNCIL

From a road to a farm to a road

Mr E, a farmer near Moree, said that for the last five years he had experienced problems with the entrance road to his property, and that his representations to the local shire council had been unsuccessful in resolving the problem.

The road leading to Mr E's property runs through an adjoining owner's property. The road was a public road owned by the council and was about 1.5 km long and 60.35 metres wide. The

constructed section of the road was only a few metres in width and was made of black soil. The road could not be used in wet weather, except by four-wheel drive vehicle which damaged the surface of the road. Until five years previously, Mr E had used the 20 metre section on either side of the road to get to and from his property in wet weather. There were trees on this section of the road which held the soil together, even in wet weather. Over the five years, however, the adjoining property owner had cultivated all but 17 metres of the width of the road. Since then, the road had become completely impassable in wet weather.

Mr E considered that the public road should be put to its real purpose and that the unused sides of the road were useful areas for natural flora to grow unimpeded. After this Office began preliminary enquiries the council said that it had resolved to serve notice on the land holder adjoining the road to require him to cease farming the public road. The council said that, as a result of this case, it was giving consideration to implementing a policy throughout the shire about the private use of sections of public roads, so that, in the future, ratepayers would be aware of council's position.

MUDGEE SHIRE COUNCIL

Development Applications

Mr and Mrs S complained that Mudgee Shire Council would not renew a development approval for part of their land, even though council had invited them to seek such renewal. When Mr and Mrs S bought their land, development approval had been granted for the erection of a dwelling on both portions of their property. They later built a house on one portion and renewed the development approval for the second portion. In 1984 the development consent for the second portion of land lapsed, and the council notified Mr and Mrs S of this fact, stating that if they wished to obtain a new development approval they should complete development application forms and pay the prescribed fee of $50.00.

When Mr and Mrs S sent in their development application, the council refused it, because the rules applying to their land had been changed and second dwellings on land in one ownership were not permitted.

After enquiries from this Office as to why the complainants were not informed that their development application could no longer be approved, the council changed the system for dealing with similar applications. The new system allows an applicant, for a fee of $20, to obtain written confirmation of the right to erect a dwelling, but requires a full development application and building application to be submitted before a house can be built on the land. In view of the council's action, the matter was considered to be resolved.

MULWAREE SHIRE COUNCIL

Failure to act fairly

Mr E was nominated by the Mulwaree Shire East Group of Brigades to be one of its representatives on the Mulwaree Shire Bush Fire Advisory Committee. The nomination was approved by the council and Mr E served on the Committee from 1981 until 27 April 1984.

The function of the Committee, which consisted of council and Bush Fire Brigade representatives, was to advise council about all matters relating to bush fires and to make recommendations about the purchase of fire fighting equipment.

In March 1984 the Goulburn Post published a letter sent to it by Mr E. The letter criticised council decisions in purchasing equipment for the local bush fire brigade. The letter was strongly worded and condemned council for failing to contribute extra funds for the purchase of equipment, thereby denying it the maximum subsidy available from the New South Wales Bush Fire Council. The letter was published over Mr E's name but did not note or make reference to his membership of the Advisory Committee.

On 27 April 1984 the Shire Clerk, on behalf of the council, wrote to Mr E and told him that council had met the previous day and had resolved to exclude him from membership of all council committees from that date. No reasons for the decision were given to Mr E, apart from the statement that the decision had been made "as a result of discussion emanating from your letter ...".

Council did not notify Mr E of its intention to meet and discuss his exclusion from the Committee, and did not provide him with an opportunity to address the meeting or make a submission to it.

On 14 May 1984 the Shire President forwarded a letter concerning Mr E's exclusion from the Committee to all members of that Committee except Mr E. The purpose of the letter, it was said, was to "more clearly explain Council's decision".

On 26 October 1984, after making representations to council through the Bush Fire Brigades and to the Minister of Local Government through his local Member of Parliament, to no avail, Mr E complained to this Office.

During the course of the investigation of Mr E's complaint, council confirmed that the information disclosed in Mr E's letter to the newspaper was available to "any member of the public upon request and through attendance at open council meetings". The council told this Office that its decision to exclude Mr E came after it had formed the view that Mr E had "abused his position as a member of the Bush Fire Advisory Committee". Further, council advised that it was under no legal obligation to notify Mr E of its proposal to exclude him, to permit him to address the meeting or make submissions to it, or to give him reasons for its decision.

This Office found that, whilst the council's conduct may not have been unlawful, it was unreasonable. It is the responsibility of any public authority, when considering a matter which could affect the rights of an individual, to act fairly, in good faith and without bias. This duty includes allowing parties to state their case and reply to the opposing case.

The Deputy Ombudsman recommended that the council formally apologise in writing to Mr E, and that it institute administrative procedures to ensure that any person whom council is considering excluding from a committee or position be notified of that consideration and be given the opportunity of making submissions in person or in writing. It was also recommended that council should always give adequate reasons for its decisions in such matters.

The Shire Clerk advised this Office in February 1986 that the council had considered the Deputy Ombudsman's report and resolved that its recommendations not be adopted. In view of the council's response, the Deputy Ombudsman made its conduct the subject of a Report to Parliament. That Report was tabled on 14 April 1986.

NAMBUCCA SHIRE COUNCIL

Exclusive use of saleyards

Mr A, a stock and station agent, complained about the decision of Nambucca Shire Council to withdraw its consent for him to sell stock on the regular sale day at saleyards owned by the council.

The saleyards had been operated for approximately 30 years by a firm of stock and station agents. In 1984 the council extended the saleyards and installed modern weighing equipment. About this time, the firm of stock and station agents, which regularly used the saleyards, attempted to negotiate a 10 year contract with the council for exclusive use of the saleyards on the regular sale day, namely every second Wednesday. The council decided not to enter into a contract for exclusive use because it wished to leave open the option of another agent trading on the regular sale day, if one were to apply.

Early in 1985 Mr A applied to sell at the yards and the council subsequently gave him approval, in principle, to use the saleyards in conjunction with the longstanding agent. Council's

approval was subject to both agents reaching agreement about joint use of the facilities. The longstanding agent refused to negotiate with Mr A and made strong representations to the council, in private. Following those representations, and without giving Mr A any opportunity to address it, the council revoked its approval for Mr A to use the saleyards on the regular sale day.

Ordinance 65 of the Local Government Act, which sets out the procedures which should be followed by a council in controlling public cattle markets, provides that a council should appoint a manager to supervise the sales; the Ordinance also provides that the sole use of the saleyards shall not be granted to any agent for the purpose of holding a regular sale. Officers of the Department of Agriculture and the Meat Industry Authority told this Office that it was usual for councils owning or controlling saleyards to conduct a regular sale in which a number of stock and station agents participated. The local branch of the Livestock and Grain Producers Association of New South Wales said that, in the circumstances applying in this case, it would be to everyone's advantage if one big sale day, open to any agent who wished to apply, were held each fortnight.

The Deputy Ombudsman found that the council's decision, which effectively gave rights of exclusive use to one agent to operate the saleyards on the regular sale day, was in breach of the Local Government Act. He also found that the council's procedures in allowing the existing agent to make submissions to the Council in private, without giving Mr A the opportunity to make counter submissions before a final decision was made, was unreasonable.

The council later adopted the Deputy Ombudsman's recommendations that it allow the right of sale on the regular sale day to all agents who wished to sell. It is understood that two agents now operate from the saleyards. This practice conforms with that in the greater part of New South Wales.

NARRABRI SHIRE COUNCIL

Postponements postponed

Two people living in the commercial district of Narrabri complained that, for the previous two years, their applications for postponement of part of their local rates, under Section 160C of the Local Government Act, had not been granted by Narrabri Shire Council. The postponement provision in the Act was intended to give relief to ratepayers who lived in commercially zoned areas and whose properties were accordingly rated on a higher basis. The residents said that the council had given no specific reasons for its inability to grant postponement and that postponement had been routinely granted in earlier years.

Preliminary enquiries with the council established that a prerequisite for the granting of postponement of rates was the existence of a planning instrument covering the area in which the properties were located: it had been discovered that no instrument existed for the town. Accordingly, the council had asked the Minister for Local Government to enact validating legislation to enable it to continue granting postponement of rates in the absence of a planning instrument. The Department of Local Government told the Ombudsman that the Minister had approved a recommendation to Cabinet to validate the past rate postponements granted by the council, but that it was a matter for council to decide how and when it might be able to re-institute its past practice of granting rate postponements.

The council later told the Ombudsman that a draft planning instrument had been prepared and had been sent to the Government for approval; once the necessary approvals had been given, it would seek validating legislation to regularise the position for all outstanding applications for postponement, from 1985 onwards. All residents in the area, in the meantime, had been encouraged to continue to make applications for postponement, so that they could be processed once the technicality was removed.

The Ombudsman decided to discontinue his enquiries, on the basis that the council had done all in its power to resolve the problem.

NEWCASTLE CITY COUNCIL

Faulty drain

In 1981 Mr and Mrs M bought a new house, and soon became aware of drainage problems in the rumpus room, which was on the lower level. The rumpus room had been built by the previous owners, with the approval of the local council, as an extension to the main house. The council had approved the extension after inspecting the building work, but imposed a condition that it be notified before the drainage was covered, so that the drains could be inspected. That condition was not complied with and when the council officer made the final inspection, he was not able to inspect the drains, because they were already covered. He thus could not determine whether the drains had been laid in accordance with the approved plans. Instead of noting this fact, the inspector decided that the work was satisfactory, on the basis of an oral guarantee given to him by the then owners of the property.

Mr and Mrs M's house suffered considerable damage and constant flooding whenever there were extended periods of rain. They eventually sought the advice of a specialist building consultant, who confirmed that the drains had been set too low to offer adequate drainage.

In finding the conduct of the council to be wrong, the Ombudsman concluded that the council had a responsibility to prospective purchasers of property to maintain building files and reports accurately and in detail. A prospective purchaser of this property could only assume from the inspector's report that council's requirements and conditions had been satisfactorily complied with, even though that was not the case. The Ombudsman recommended that the council change its administrative procedures and deal with the drainage problem at Mr and Mrs M's property.

Several months after the Ombudsman issued his report, council advised that it had complied with all recommendations. Changes

had been made to ensure that building inspectors recorded accurately on their reports the stage at which they inspected. Further, where inspectors could not be sure of compliance with the approved plans, that fact would be noted on their reports. Rectification of the drainage problems had been discussed, and plans for improvements had been drawn up. The estimated cost of the work was $6,500 and would be paid by council. Work started during early April 1986.

It is good to see a public authority respond so quickly and fully to recommendations.

PARRAMATTA CITY COUNCIL

A look at some plans

A home unit management company complained on behalf of a client about an impasse which had developed between Parramatta City Council and themselves. The body corporate of a block of home units had decided to carry out certain repairs to their building. One of the builders who quoted for the job wished to view the original building plans for the units, to establish the position of certain unexposed parts of the building. The builders approached Parramatta City Council, requesting permission to view the plans. The council said that, before permission could be given, the body corporate would have to sign a release in the following terms:

> [The owner] hereby further releases Parramatta City Council from all or any claim for damages and waives all and every claim to compensation which it otherwise might have in the event of its being found the said building or any part thereof have been constructed otherwise than in accordance with the building plans as approved by the council or any officer or servant acting on its behalf.

The form of release purported to release the council from liability, even if the council had been negligent in carrying out its duties. The council had acted on the advice of its solicitors in requiring the release to be signed before the plans could be viewed.

After this Office began an investigation, the council sought legal advice from Queen's Counsel. Counsel recommended that, in place of the release, council use a letter of acknowledgement. This set out that the council did not represent that a building had been constructed strictly in accordance with the building plans and specifications. It was explained that the council does not check every building at every stage of its construction, but relies on certificates given by structural engineers saying that the building has been erected in accordance with approved plans. Following a recent decision of the High Court of Australia, it is clear that a council is not required to supervise the construction of a building, but is merely empowered to require that the Local Government Act and the Ordinances be complied with. Accordingly, the letter of acknowledgement proposed by Counsel merely advises an enquirer of the true position regarding council's knowledge of the particular building.

The council advised this office that it was using the letter of acknowledgment in place of the form of release which gave rise to the complaint, and the investigation was discontinued.

SUTHERLAND SHIRE COUNCIL

Fine for partying past midnight

Mr J hired Sutherland Shire Council's Loftus Community Hall for a 21st birthday party. He signed a hiring agreement which, among other things, provided that the music should cease by midnight. The agreement also provided for a bond of $100 which would be used to make good any damage caused to the Hall. Mr J wrote in his complaint that "unfortunately it took half an hour to get the youngsters to stop the music and dancing, but we had shut all the music down by 12.30". His complaint was that the council's Community Hall Management Committee had deducted $20 from the bond for his failure to make the music stop at 12 pm, when in fact the hiring agreement he had signed made no provision for any deduction other than for payment for any damage caused.

The hiring agreement, upon examination, did not provide for a fine for exceeding the agreed finishing time. This Office found that council's action, through its Committee, in deducting the $20 from the bond paid by Mr J, was contrary to the terms of the signed hiring agreement and wrong in terms of the Ombudsman Act.

The Shire President commented in a letter to this Office: "I am appalled and amazed to find that staff in your Office can spend so much time on an issue as trivial as the one before us". The issue was not trivial: this Office was concerned that a committee acting with the council's authority had exceeded its power.

Notwithstanding the Shire President's comments, council complied with this Office's recommendations to reimburse Mr J the $20 deducted from the bond and to review the hiring agreement to make provision for a fine or additional hiring fee, should a function exceed the agreed finishing time.

SYDNEY CITY COUNCIL

Rates bill out of the blue

Mr P complained that Sydney City Council demanded that he pay rates which the council had written off years before. In March 1985 he was asked to pay outstanding rates and extra charges totalling $1,849.75 within 14 days. When he approached a council officer about the matter, he was told to write to council setting out his financial circumstances, but he was afraid that providing this information to council might be interpreted as an offer to pay.

Enquiries disclosed that the rates in question had accrued on a shop that Mr P had leased between 1959 and 1967. Because Mr P received advice that he was not liable to pay the rates, he had not paid them during the early years of the lease. In 1963 he began to pay, by instalment, the outstanding amount, and by 1966 had cleared his debt for the first years of the lease. Rates continued to accrue and, when the business was sold in 1967, rates and extra charges were owing for the years 1964 to 1967.

For five years Mr P made regular payments towards the arrears, despite financial difficulties, but the payments were only sufficient to cover the accrued interest. In April 1972 Mr P wrote to council and asked that, because of his financial situation, the rates be written off. In July 1972 council resolved to write off the accrued statutory charges and the outstanding rates of $850.85, subject to the necessary approval of the Auditor-General.

The Auditor-General told the council in September 1972 that he was not prepared to approve of the rates being written off, but Mr P was not advised of this. Council obtained advice from the City Solicitor in November 1972 and June 1973 about Mr P's rates, but no further action was taken until council wrote to Mr P in March 1985, demanding that the rates and charges be paid within 14 days.

Council's conduct was found to be wrong, because Mr P had not been told in 1972 that the rates had not been written off. In fact, Mr P was not told that the rates were owing until 1985, even though he had appeared as a debtor in council's records since 1973. The Ombudsman recommended that council write off the accrued extra charges, and make an ex gratia payment of $850.85 to Mr P to enable him to pay the outstanding debt.

On 16 September 1985 council resolved to write off the statutory extra charges, which by then amounted to $1,034.35, and, with the concurrence of the Auditor-General, to write off the outstanding rates under the provisions of Ordinance 26. The matter was referred to the Auditor-General and on 1 November 1985, council told this Office that the Auditor-General's approval had been given and the rates had been written off.

Harassment by council?

A complainant alleged that since 1970 he had been harassed by the former South Sydney Municipal Council and, since the amalgamation of the two councils, by the Sydney City Council. He maintained that the councils had in effect ensured that all premises owned

by him in the Redfern area remained vacant; he said that over the years this had resulted in over 20 court cases between himself and the councils.

It was decided to investigate several specific allegations, including:

(i) that over a period of six years between 1977 and 1983, during which time the subject premises could be used as a refreshment room, council allegedly failed to make sure that prospective tenants were informed that such use was authorised;

(ii) that after October 1983, when the subject premises could no longer be used as a refreshment room, council allegedly failed to ensure that prospective tenants were advised that such use was unauthorised;

(iii) that between 1977 and 1983 council allegedly failed to ensure that its servants adopted reasonable and acceptable management practices in dealing with applications for refreshment room licences.

As to the first allegation, the complainant provided various documents to show that, when enquiries were made by two prospective tenants (in February 1980 and August 1983) and the employee of a private inquiry agency (in August 1983), about possible uses for the premises, they were not told that use as a refreshment room was authorised, but that the land was zoned residential: in effect, a refreshment room was not authorised.

In relation to the second allegation, it was found that on 5 December 1983, when the use of the premises as a refreshment room was no longer authorised, a council servant accepted the sum of $20 as payment of the fee for the transfer from the complainant to his tenants of the licence for use of the premises as a refreshment room. One month later, a council servant accepted the payment of $216 for an application for a licence to use the premises as an Amusement Parlour, even though such use was not authorised.

It was also relevant that in a Minute dated 18 March 1985 the Director, City Health and Community Services, stated that until 29 October 1984 his Department's records showed that the premises could be used as a refreshment room.

Use of the premises for a refreshment room was authorised when the Local Government Appeals Tribunal issued a conditional consent for six years; this was made very plain in the judgement. The complainant was aware of this limitation and should have been aware when the six year period had expired. In the circumstances, it could be argued that it was the complainant's responsibility to ensure that any prospective tenant of his premises was made aware of this situation.

On the first occasion (5 December 1983) the refreshment room licence issued by council on 30 November 1982 was valid until 31 December 1983, two and a half months after the expiry of the Tribunal's consent. It could therefore be argued that this could have led the complainant (and possibly his tenants) to believe that the use of the premises was in fact so authorised until 31 December 1983.

The council argued that the tenants approached the council to make applications only, that there was no obligation on the council to check immediately on whether the premises could be used as a refreshment room or an amusement parlour, and that the appropriate time for such checks was after the lodging of the applications, and prior to any determination being made.

When the council became aware that licences could not be issued, the fees that had been paid (in one case $20 and in the other $216) were not refunded. The Deputy Ombudsman found that this was unreasonable: if the council's policy was not to make refunds when licences could not be issued, then council should make preliminary enquiries to ensure that it was reasonable for council to accept applications.

As to the third allegation, between 10 October 1977 and 10 October 1983 the complainant made five separate applications to the council for a Refreshment Room Licence. None of the three

applications up to 1 January 1982, when the councils were amalgamated, was successful:

a) The first application, made on 2 November 1977, was effectively left in abeyance for six months, until a clerk advised the Municipal Health Surveyor that, as the application had been made in 1977, it lapsed at the end of that year and therefore no licence could be issued.

The Deputy Ombudsman found it difficult to believe that this manifestly invalid argument could have been the operative reason behind the decision to refuse the application. That such strange reasoning could be used to defeat the complainant's application could only lend weight to the complainant's contention that he was being harassed by the council. On the basis of council records it does not appear that the complainant was advised that his application was unsuccessful, or the reasons why no licence was to be issued.

b) The second application, made on 13 May 1980, lapsed completely. The complainant, after waiting almost eight months for information, made a fresh application and paid another application fee (for which he was issued a receipt said to be for the use of the premises as a refreshment room).

c) As to the third application, this Office was advised that, although the complainant had paid the correct application fee and been issued with a receipt, this did not constitute a formal application for a refreshment room licence, and thus no such licence could be issued. The information on the receipt did not include the applicant's address, but was sufficient for the council to have filled in the blanks in the application form, had it wished. The Deputy Ombudsman concluded it was the responsibility of council, in accepting the complainant's money and issuing the receipt, to advise him also to complete a formal application form.

The two applications made after the council amalgamation resulted in licences being issued, each within two and a half months of the application.

The evidence showed that between 1977 and 1983 the council failed to ensure that its servants adopted reasonable and acceptable management practices in dealing with licence applications. Extraordinary delays occurred in the consideration of the first three applications by council's servants, and the decisions not to issue licences appeared questionable. The complainant was not advised of council's decisions nor of the reasons for them. Where the applications were said to be invalid, the application fees were not refunded.

The complainant was unable to obtain a licence to use the premises as a refreshment room for three and a half out of the six years authorised by the conditional consent granted by the Local Government Appeals Tribunal. Moreover, the licence issued by the council on 10 October 1983 was either invalid for at least part of its duration or a misstatement of the true position. However, the evidence did not substantiate the complainant's claims that he was the victim of sustained and intentional harassment.

The Deputy Ombudsman recommended that:

1. if the complainant's appeal to the Land and Environment Court (against council's refusal to grant a consent to use the premises as a refreshment room) were dismissed, the council invite the complainant to lodge a further development application for consent to use the premises as a refreshment room, and that council consider this application on its merits;

2. when applications are made for a licence for a purpose which is unauthorised, the council resolve to refund the application fees, in whole or in part; and

3. that either:

   a) council's Amusement Parlour resolution be amended to bring it more into line with Ordinance 69, so that fees are refunded when an application is refused; or

b) council give consideration to amending its procedures so that, prior to amusement parlour licence or transfer and application fees being accepted by council, enquiries are made to determine whether or not it is reasonable to accept such applications.

Council later advised this Office that:

1. the complaint's appeal to the Land and Environment Court had been set down for hearing on 18 August 1986;

2. on 26 May 1986 council adopted a policy of automatically refunding licence fees in circumstances where a licence has not been issued and the applicant has not traded, in respect of licences issued by the City Health and Community Services Department, and that the fees paid by the complainant and his tenants had been refunded;

3. procedures had been adopted by the council so that, prior to licence or transfer application fees being accepted, enquiries would be made to determine whether acceptance was reasonable; where applications are accepted, the applicant would be advised to lodge a development application where council's records show that a development application is necessary and one has not been lodged; and where a development application has not been determined, the applicant be advised that the licence application will not be processed until such time as the development application is determined.

Paddington bizarre

In the early 1970s a bazaar was established in the grounds of what was then the Methodist Church at Oxford Street, Paddington. It became a regular event. Eventually an organization then known as the Paddington Methodist Trust applied to Sydney City Council for formal permission to carry on the bazaar. On 24 February 1975 the council gave consent for a three-month trial of the use of the church grounds for what the consent termed "church bazaar purposes". An investigation by this Office in 1985 showed that the bazaar had still not been given permanent approval by the


...KEEP IT COOL, GO WITH THE CASH FLOW...

council, thus marking what is perhaps one of the longest trial periods on record. In the meantime, the "church bazaar" had taken on all the appearances of a "flea market" or "paddy's market", had spilled through the grounds of the adjoining Paddington Public School, had taken over the car park of the Overseas Telecommunications Commission on Saturdays and had caused streets in the area to be comprehensively clogged with traffic as stallholders arrived and departed on Saturday mornings and evenings. For the rest of Saturdays, parking in nearby streets was at a premium for residents, and there were rumours of drug selling and related problems among those who came to the bazaar. To is supporters, the bazaar added a further Bohemian touch to what was already an attractive suburb and provided invaluable finance, from stall rentals, to the church and the school.

The complainant in this case had made numerous complaints to Sydney City Council over the years about the consequences of the bazaar's activities, particularly when the organizers held a pop concert and when stall holders used amplified music to attract customers, and she had long been labelled a trouble-maker by the council and by the bazaar's supporters; she showed considerable courage in persisting with her complaints. In a very detailed letter to this Office, she set out what she claimed to be the inaction of the council and the lack of accountability for the money paid to the school by way of rent. An examination of the council file on the matter confirmed everything that the complainant had said. There is no point in detailing the inaction by the council: it was clear that no one had really wanted to know; that the matter had been regularly and systematically placed in the "too hard" basket. Correspondence with the Department of Education and a talk with the Principal of the school showed that the bazaar had taken on the character of the mythical goose: who would wish to inquire too closely into such golden offerings? A fairly rough check of the Principal's account books suggested that, since the bazaar had begun to use the school grounds, the amount of "rental" paid to the school totalled something like $70,000!

Prescribed procedures were followed by this Office in finding wrong conduct on the part of Sydney City Council, and it was recommended on 7 November 1985 that the council should deal rapidly with a development application for the bazaar and that, if it were unable to approve the application because of the provisions of the relevant legislation, then it should require the bazaar to close by 31 March 1986. As is the practice, these recommendations were made known to the affected parties, and produced a small shower of letters and petitions in protest. Those from stallholder interests suggested that the closing of the bazaar would be yet another blow to the economy and the national employment statistics, while representations from people associated with the school hinted at dire consequences for the future of Australian youth.

The council referred the matter to its legal advisers, who agreed with the conclusion of the Deputy Ombudsman that the bazaar was no longer ancillary to the use of the site as a church, and could not be approved on a site zoned for Special Uses (Church). Council also noted that there had been no concurrence from the Department of Education or from the Overseas Telecommunications Commission. On 25 November 1985 council resolved that, if the bazaar could not operate within the provisions of a development consent, it should close by 31 March 1986. Council decided that it would not rezone the land.

The Deputy Ombudsman was mildly surprised at this ready concurrence by the council with what was a very controversial recommendation, and awaited developments. In mid-March 1986 it was reported in the eastern suburbs press that the Lord Mayor, Alderman Sutherland, had approached the Minister for Planning and Environment on the question of the Paddington Bazaar. The Minister, Mr Carr, was quoted as saying that Alderman Sutherland "was sympathetic to the arguments for retention of the markets, but said resolving the issue was difficult". In the press reports Mr Carr continued:

> I have decided to issue a direction under section 101 of the Environmental Planning and Assessment Act to ensure that all development applications for the continued operation of the Paddington Markets must be referred to me ...

> Paddington markets are not only an important and colourful part of the city's weekend life, but they also play a prominent role in Sydney's tourist industry.
>
> Because of their significance to regional planning, I have directed the city council that all development applications for the market site be referred to me.

The Deputy Ombudsman's observations of the bazaar were that its "significance" for tourism lay in its capacity to attract citizens of the western suburbs and north shore to Paddington. A radio program quoted the Minister as saying that the bazaar should not be closed, and concluded with words to the effect that if that were to happen Australia would next be issuing food coupons, as they do in Poland.

The draft report on this matter was sent to the responsible Minister, the Minister for Local Government, who did not wish to consult. It was then made final, with a recommendation that it be sent by Sydney City Council to the Ministers of Planning and Environment and Education, and to their respective Departments, so that the Ministers' advisers would know of the development of the Paddington bazaar over the preceding decade - or - more.

Restoration of Queen Victoria Building

A complaint alleged that Sydney City Council had failed to comply with the requirements to the Environmental Planning and Assessment Act when it purported to amend the development consent for the restoration of the Queen Victoria Building. This purported amendment provided that it was no longer necessary for an awning to be provided on the footways adjacent to the building.

After investigation it was determined that no application in the prescribed form (as required by section 102(1) of the Act) had been made to the council to amend the development consent, and that council's decision to amend the consent was therefore of no effect. It was recommended that council advise the developer that the development consent for the restoration of the Queen

Victoria Building had not been amended to delete the street awning and that a formal application (as prescribed in the Act and Regulation) would have to be made before the council could give consideration to, and at its discretion amend, the consent. These recommendations were accepted by council, and when a formal application was subsequently lodged it was approved.

The significance of this matter lies in the fact that section 102 of the Act provides protection to the holder of a development consent against any arbitrary action by a council to vary that consent.

Under that section, a council may only vary a development consent on the receipt of a formal application made by the original applicant, or by any other person entitled to act upon the original consent.

If a council wishes to vary or revoke a consent, without the approval of the applicant, it must do so in accordance with the requirements of section 103 of the Act. This section gives the applicant the right to appeal against the council's decision to the Land and Environment Court, and makes the council liable to pay compensation for expenditure incurred pursuant to the consent.

Noise problems

A group of City residents complained about the noise from the Old Treasury Building site during the construction of the Intercontinental Hotel. The relevant building application had been approved by the council subject to certain conditions; these included that no work be carried out on Sundays, public holidays or outside the stipulated hours of 7 am to 5 pm Mondays to Fridays and 7 am to 3 pm on Saturdays. Council had suggested this restriction, among others, as it believed it to be in the public interest. Complaints to council maintained, however, that work was starting at 5.40 am on some occasions and was continuing on Sundays. The residents asked the council to take action.

After council had received several complaints, it instructed the builder to "cease all work outside the hours approved by council". Three "Notices to Comply" were served on the company but, until the intervention of this Office, no direct action was taken. Investigation revealed that, while council's planning department was serving Notices to Comply on the company, council's engineer's department was issuing permits for "maintenance" work to be done outside the stipulated work hours on a large crane on-site. Complaints had thus been pursued about the breaching of restrictions, even while permission was being given to create the noise which had led to the complaints. This Office recognised that certain work must be done on weekends; but in this case there was little respite for the nearby residents, given the regular issuing of permits by the council, and the developer's enthusiasm for "maintaining" cranes on weekends.

The Deputy Ombudsman found that there was unreasonable delay by the council in taking action over an apparent breach of conditions, and that the council had failed to ensure that action taken by the planning department was not undermined by the engineer's department.

It was recommended that, in future, the engineer's department consult with the planning department before issuing permits, and that matters the subject of legal proceedings be monitored to ensure that they are followed up promptly. The council was asked to notify this Office of the steps taken to comply with the recommendations. Despite several requests it was eight months before council told this Office that it had taken action to amend its standard condition for building and demolition work. The new condition would be:

> That building/demolition work in connection with the proposed development shall only be carried out between the hours of 7.30 am and 5.00 pm on Mondays to Fridays, inclusive, and 7.30 am and 3.00 pm on Saturdays, and no such work shall be carried out on Sundays or Public Holidays. Where applicable, these restrictions do not apply to the maintenance of site cranes nor to the use of mobile cranes which stand and operate from a public road, provided that a permit has been obtained from the City Engineer's Department for the use of a mobile crane.

Council's action was not considered to constitute compliance with the recommendations made by this Office. Additionally, the failure of council to define the phrase "maintenance of site cranes" did nothing to resolve the controversy surrounding the questions of what constituted "work" as opposed to "maintenance". The Ombudsman decided not to make a report to Parliament on the matter, however.

The application was a sham

An investigation was conducted into a decision of Sydney City Council to allow the attics of certain town houses recently constructed near Centennial Park to be used as habitable rooms.

In February 1981 the council approved a development application to build the town houses, subject to a condition that no windows be installed in the attics, the applicant having sought approval for dormer windows. Council decided to impose this condition because the relevant planning instrument limited the height of buildings to two storeys above ground level and placed a minimum site area requirement on the proposed development; on this basis, the plans complied, providing that the attics were not considered as habitable rooms.

The developer lodged an appeal against the corresponding building condition, which called for the deletion of any roof lights in the attics and provided that the attics could not be used for any habitable purpose. The assessor of the Land and Environment Court, when handing down his decision, commented that the floor area of each attic was considerably larger than that provided in any one of the two or three bedrooms in each unit. The assessor dismissed the appeal and upheld council's decision not to allow roof lights, as he considered that the roof lights were actually windows, that their installation in the roof was contrary to the spirit and letter of the development consent, and that the application for roof lights had the appearance of a sham to circumvent the terms of the consent.

Approximately two years later, the owners of the town houses (now constructed) lodged a development application with the council to convert the attics to habitable rooms. The representative of the owners submitted that, as the attic spaces existed, they should be properly utilised. The council consented to the application, relying on State Environmental Planning Policy No 1, as the application did not comply with the planning instrument. Consequently, windows were constructed in the roof of the town houses, effectively turning them into a three storey building.

This Office concluded that the council had been inconsistent, in that it had defended its original decision not to allow the attics as habitable space before the Land and Environment Court, and had used considerable funds in doing so. A little over two years later, it allowed the use of the attics as habitable space. The Deputy Ombudsman found that the council had failed to give due consideration to the public benefit of maintaining the restrictions in the planning instrument: the council had effectively sanctioned a proposal which an assessor of the Land and Environment Court had considered to be a sham. He also concluded that the council failed to consider adequately the possible traffic and parking problems generated by 12 additional habitable rooms in an already densely populated area.

This Office recommended that no further development or expansion of the town houses be allowed, so as to prevent the further expansion of the attic spaces by, for instance, the addition of dormer windows. The council resolved to implement the recommendations contained in the report.

WARRINGAH SHIRE COUNCIL

"Exclusive" rights on public land

In July 1983 Warringah Shire Council awarded exclusive coaching rights at the Warringah Acquatic Centre to a particular coach, L. The Aquatic Centre is the only year-round, all-weather diving facility in Sydney. Prior to the council's formal arrangement with L, most members of the Warringah Diving Club had been

coached by Q or by employees of Q, including L. Under this informal arrangement, which had existed for several years, coaching by other people was unrestricted.

The council called tenders for coaching and accepted L's proposal because it promised the greatest financial return for the council. The resulting contract stipulated that L had exclusive coaching rights for divers using the Centre; a member of the Warringah Diving Club who did not wish to train with L was effectively denied access to the Centre, and thus prevented from training in winter.

An important question about the use of Crown Reserve Land arose in this case: the Aquatic Centre was built on Reserve land dedicated for public recreation. The complainant argued:

> Successive judgements have clearly established the principle of the unfettered right of the public to access to public reserves. Council's actions have effectively denied members of the public that right.

The council, as trustee, could lease the land, provided that it obtained the written consent of the Minister. The council telephoned the Legal Branch of the Lands Department to ask whether the Minister's consent was needed in this instance. The officer there did not know, and the council did not seek the Minister's consent, nor obtain legal advice.

Five months after the council granted L exclusive rights, and in response to public demand, the council considered the meaning of "exclusive". A motion to allow other coaches to train at the Centre outside L's allocated hours was defeated, and the council decided that "exclusive use" meant that only L could use the facility.

This Office found that the council's decision to lease the facilities exclusively to L was unreasonable, because it effectively excluded divers who did not wish to be trained by L. The council's conduct was found to be wrong for granting an "exclusive" arrangement without first clarifying the meaning of "exclusive", and for failing to find out whether the Minister's

consent was needed: indeed, to investigate the very legality of a lease granting exclusive rights.

The Ombudsman made a number of recommendations in the draft report, the first being that the council seek legal advice as to the legality of it agreement with Mr W. The council did this and in June 1985 it granted access to other coaches and divers who were to compete in two imminent high level competitions. In December 1985 the council rescinded the exclusive arrangement for diving coaching and made new arrangements by which now any coach could teach at the Centre by paying a booking fee and obtaining public insurance indemnifying the council.

WAVERLEY MUNICIPAL COUNCIL

Taxi depot or park?

Several complaints were received about the operation of a 24-hour-a-day, seven-day-a-week taxi depot on the corner of Ebley and Lawson Streets, Bondi Junction. The complaints alleged that Waverley Municipal Council had wrongly approved the operation of the taxi depot in an area zoned residential, on a site which was formerly a petrol station operating only during daylight hours.

Investigation showed that the council had purchased the petrol station site for use as a park for public recreation. The council hoped to acquire Clementson Park from the State government, and believed that the site would be a useful addition to it. Having purchased the site, the council decided to allow it to be used for commercial purposes for at least two years. The council called for tenders and accepted the highest tender; this was from a local cab company which proposed to use the site to service and repair 21 taxi cabs.

The Ombudsman found that the council had approved the development application for use of the site as a taxi depot without notifying affected residents of the application and without seeking their comments. He found this action of the council to be unreasonable.

Serious allegations were made that the site was being regularly used by more than 21 taxi cabs and that petrol was being sold to the general public 24 hours a day. Both of these activities were in breach of the conditions attached to the development consent, and it was claimed that the council had failed to enforce compliance with the conditions of consent. The council relied on the advice of its solicitors that the breaches were of such a nature that a court would be unlikely to grant an injunction restraining the taxi cab company from further breaches of the conditions. The Ombudsman accepted that a council is entitled to rely on the legal advice which it receives in good faith, and concluded that the council had not acted wrongly in failing to enforce compliance with the conditions of consent.

Nevertheless, the Ombudsman concluded, the continued operation of the taxi depot on the site, in breach of the conditions of consent, was entirely unsatisfactory. He recommended that, as soon as possible, the council take steps to implement its original plans for use of the site as a park. The council resolved to give the taxi cab company notice to vacate the premises at the end of the lease (30 August 1986) and then to make the site available for public recreation.

The Ombudsman said that, in the meantime, the council could assist the cab company to find a more suitable location.

COMPLAINTS AGAINST DEPARTMENT OF CORRECTIVE SERVICES

Delay on prisoner's applications

A prisoner at the Metropolitan Remand Centre believed that the Department of Corrective Services had wrongly calculated his release date. He made five applications seeking resources and legal aid to take action against the Department. The Superintendent of the gaol sent the applications to a legal officer at the Department's head office and asked that he be advised on the procedure to follow. When, after six weeks, the prisoner had received no response, he complained to this Office.

The Department took two months to reply to preliminary enquiries, apparently because no note of the prisoner's applications had been made on his files or gaol warrant. An inspection of the files showed that no copies of the applications had been kept.

Investigation showed that the prisoner's applications were received in the Legal Section of the Department in October 1984, and that the Legal Section had not sought the advice of the Prisoner Index Section until January 1985. The Prisoner Index Section, on the day after receiving the applications, had prepared a report and had referred the matter back to the Senior Legal Officer. A week later, the Chief Administrative Officer had written to the Chief Court Reporter seeking the remarks of the trial Judge. As it happened, this was a totally unnecessary step; in any event the Judge's remarks were never received and were not used in drafting the Department's response. The Department's final response was not received by the prisoner until May 1985, some eight months after he had made the applications.

The Ombudsman concluded that it was not acceptable that the Department had taken such a long time to respond. He considered that, although staff shortages helped to explain the delay, they did not excuse it. Because the applications related to the proper calculation of a release date, an important function of the Department, the efficient operation of that function should not have been allowed to lapse for such a long period.

The Ombudsman made no recommendation about the Legal Section of the Department, because action had already been taken by the Department to establish a formal structure and appoint permanent Legal Officers. However, the Ombudsman recommended that, when a prisoner's application had to be referred to head office or to another department, or when an application required extensive consideration by an outside body, a photocopy of that application should be placed on the prisoner's warrant. He further recommended that these procedures be reviewed once a proposed computerised correspondence tracking system became fully operational in the Department's Secretariat, and that the

prisoner be contacted by an officer of the Legal Section about his original applications.

After receiving the draft report on the matter, the Chairman of the Corrective Services Commission advised the Ombudsman that Superintendents would be instructed to retain copies of applications, in accordance with the recommendations made in the report. The Chairman also agreed to implement the other recommendations made by the Ombudsman; his actions were regarded as a satisfactory response to the report.

Withdrawal of Contact Visits

A complaint on behalf of a prisoner alleged that the Superintendent of the prison had punished the prisoner by unjustifiedly withdrawing his contact visits. Following an incident in the contact visiting area of the gaol, the prisoner had been charged with open incitement to mutiny and disobeying a lawful order. The Superintendent had received some information that the prisoner's visitor might have passed contraband to him, and believed that the prisoner's behaviour might have resulted from drug-taking. On the basis of this belief, the Superintendent directed that the prisoner have no contact visits until further notice.

The matter was investigated and, in a report finding wrong conduct, the Ombudsman concluded that, whilst the Superintendent had a wide discretion to withdraw prisoners' contact visits, such discretion rested on the Superintendent's belief that contraband had been passed. Therefore, it seemed reasonable that he should have taken steps to ascertain whether his suspicion had any basis in fact; there was no evidence, in this instance, to support that suspicion.

In his report the Ombudsman recommended that all Superintendents be instructed of the need to follow proper procedures to ensure that a belief held by a Superintendent was reasonably based on fact.

The Corrective Services Commission later told this Office that the Prisons Regulations had been amended to provide that a visitor's physical contact with a prisoner could only be prohibited where a prison officer had "reasonable grounds to suspect that the person is likely to introduce into a prison contraband", and that "details of the reason for the refusal [must be] recorded and reported to the Commission".

COMPLAINTS AGAINST POLICE

Losses from the conveyor belt

The complainant, a doctor, was having problems with intruders at his house, possibly because of his occupation and the likelihood of his having drugs on the premises. He therefore installed an extensive security alarm system, which would alert police to a hold-up and included other monitoring facilities. Shortly after the system was installed a fault in the lines to the security company set off the alarm.

The security company alerted the police radio room, but police patrols did not respond. The complainant first became aware that the alarm had been activated when the security company telephoned him 13 minutes after the alarm had been triggered at their centre, asking whether the police had arrived. An investigation was carried out by the Police Department, and the telephonist and radio operators who had been on duty at the time were interviewed. The record of the call from the security firm was on a 24 hour continuous tape recording kept by the Communications Branch.

The radio operator who had been despatching jobs to police patrols at the time could not remember the security firm's call, but a telephonist remembered recording the details on the prescribed form and sending it to the radio operator. The radio operator and the telephonist are located some 10 to 12 metres from each other, and the messages are sent on a conveyor belt.

The radio operator and the telephonist were clearly responsible and efficient, and there was no suggestion during the investigation by the Police Department, or in the report by the Ombudsman, that they had neglected their duties in having police patrols respond to the alarm. In fact, messages have previously gone astray after being placed on the conveyor belt and before reaching the radio despatcher, and the system in the radio room was thought to be inefficient. The conveyor belt had been dismantled and inspected on a number of occasions, and on those occasions messages had been dislodged. Senior officers of the Communications Branch believed that the conveyer belt was to be replaced with a computerised system, but did not know when this would occur. The Police Department investigation ended at this point, and made no recommendations for improving the system.

The Ombudsman recommended that existing facilities, which were not being used at the time of the security firm's call, should be employed. These enable a telephonist who receives a call to alert the radio operator, who can listen to the caller and enter the conversation. An "alert" tone also goes to the supervisor, who can monitor the call and gain a clearer understanding of what is happening. The Ombudsman's recommendations were accepted, and the Commissioner of Police issued instructions that these facilities were to be utilised fully and exclusively for urgent messages, including hold-up alarms.

Alleged assault

The complainant alleged on behalf of her son, who had absconded from a children's shelter and stolen a motor vehicle, that he had been assaulted on three occasions by police: during his removal from the stolen motor vehicle; after he had been placed in the police car at the place of his arrest; and in a police station after his arrest. At the conclusion of the police investigation the Ombudsman was unable to be satisfied whether the complaint was sustained or not sustained, and it was reinvestigated by the Deputy Ombudsman. He took evidence from a large number of people, and one of the Ombudsman's seconded special officers

carried out extensive interviews and investigations prior to the taking of evidence.

The Deputy Ombudsman said that the complainant's son had suffered facial injuries on the night of his arrest. This was clear from his own evidence, that of his mother and sister, that of a doctor who subsequently examined him, and that of an officer on duty at the children's shelter, to which he was returned after his recapture. The Deputy Ombudsman concluded that, on the evidence available to him, it appeared that the youth's injuries were consistent with headlock-type pressure applied to him by the arresting police at the time of his arrest. The use of a headlock had been admitted by police. The Deputy Ombudsman did not accept, because of reservations about the youth's truthfulness, his accounts of the alleged assaults upon him in the cabin of the stolen vehicle, immediately after his removal from it, upon his placement in the police vehicle, and again after the departure of two civilians who had been in that vehicle. The evidence of the two civilian occupants of the police vehicle in relation to the third alleged assault, and the failure of numerous bystanders to observe any of the alleged assaults, reinforced this view.

The Deputy Ombudsman said that the accounts given of the alleged assault at the police station by the complainant's son and his accomplice conflicted in almost every material particular, and that there was no other evidence of such an assault taking place. The Deputy Ombudsman accepted that the evidence of two arresting police was essentially truthful, and had significant doubts about the veracity of the evidence of the complainant's son in general. He was thus not of the view that the youth had been assaulted in the police station, as alleged.

The Deputy Ombudsman took the view that excessive force had been used by the arresting police in removing the complainant's son from the stolen vehicle at the time of his arrest and that this had caused the injuries suffered by him. He said that the arresting police were mature men and experienced police officers of solid build, and that the complainant's son was, at the relevant time, a comparatively lightly built, 16 year old youth.

He believed that the use of excessive force was prompted by the police officers' irritation at the boy's attempts to evade capture, which had endangered their safety, particularly when he had recklessly reversed the stolen motor vehicle up a street as they chased it on foot. The Deputy Ombudsman found that, in using excessive force to effect the arrest of the boy, the two arresting police were acting unreasonably within the terms of Section 28 of the Police Regulation (Allegations of Misconduct) Act. Insofar as their actions were contrary to the provisions of a police instruction which provides that "a member of the Force will ... effect an arrest in as quiet a manner as possible, and use no more force or violence than is absolutely required", the police officers were acting in a manner which was contrary to law within the provisions of Subsection 28(1)(a) of that act. He recommended that the police be paraded before their District Superintendent and instructed as to the necessity to comply with the relevant police instruction in future.

"Bribes" offered by McDonald's restaurant

Mr A went to a nearby branch of the McDonald's restaurant chain. Outside the restaurant he saw a police truck, parked contrary to a "No Standing" sign; inside the restaurant he saw a male and female police officer ordering food from the attendant. The female officer ordered two hamburgers and some "french fries". Mr A did not notice what the male officer ordered, but observed that the officers paid $1.95 each for their meals. Mr A said that one of the hamburgers given to the female officer should alone have cost $1.45.

Mr A complained that the police truck had been illegally parked while the officers conducted private business, and that the discount on their food was a bribe by the restaurant to gain extra police protection.

In response to preliminary enquiries the Assistant Commissioner decided that all police within that district would be reminded about their responsibilities regarding the lawful parking of police vehicles.

The Ombudsman then sought the comments of the Commissioner as to whether the discounted food constituted a bribe. In his reply, the Assistant Commissioner cited Police Rule 57, which prohibits any police officer from soliciting a gift or concession, or placing the police in a position of obligation by accepting a gift or concession. A letter was produced from McDonald's Restaurants; this said that a discount was offered at most of their restaurants to police in uniform, but that, in return for this discount, the restaurants did not expect to obtain any special attention or co-operation from the police. On this basis, the Assistant Commissioner was satisfied that the concession offered at McDonald's did not infringe Police Rule 57, as it was not solicited; nor did it place police in a position of obligation to that restaurant.

The Assistant Ombudsman decided that, as there was no evidence that the discounts had been solicited, the complaint should not be made the subject of an investigation.

Bailed, but not out

The Redfern Legal Centre claimed that a client, a prisoner who had been granted bail on the charges which had brought him to prison in the first place, had been detained because police had noted on his prison file that he should be "held" for Maroubra Police. The entry on his prison file referred to a warrant which had been issued in respect of the same charges on which bail had been granted. Because of deficiencies in the system for cancelling warrants, that warrant had not been withdrawn. The Centre further complained that, when its client was eventually released from Long Bay Gaol after the intervention of officers of the Centre, Maroubra Police were waiting at the gates to arrest him on the warrant. As it happened, subsequent checks by police revealed another warrant for the complainant. After the initial police investigation of the complaint, the Ombudsman was unable to determine whether the complaint was sustained or not sustained, and he decided to reinvestigate it under the Ombudsman Act.

The Ombudsman concluded that as a result of negligence, carelessness, ill-luck, or a combination of any or all of the three, no action had been taken to ensure that, upon the complainant's arrest, the warrant issued as a result of the charges on which he had been arrested was appropriately dealt with. Further, it was clear from the evidence presented before the Ombudsman that the system used by the relevant responsible police officer to follow-up existing warrants and have them executed upon prisoners was, on the most charitable of assessments, desultory and lackadaisical. The Ombudsman expressed the view that the placing of notations such as "hold for Maroubra Police" on a prisoner's gaol record was objectionable; it invited prison officers to yield to the temptation to delay the release of prisoners until their new guardians arrived. In such circumstances, prison authorities have no legal authority to hold or delay the release of a prisoner, and to contrive delay in releasing a prisoner is clearly unlawful. Such a notation on prison files thus served to encourage improper acts by the prison authorities.

The Ombudsman was investigating the conduct of police officers, and so did not make any findings in his report about the conduct of prison officers and other employees of the Department of Corrective Services. He said that, on the evidence available, it appeared likely to him that the complainant's release had been intentionally delayed on the day on which he was actually released, and possible that this had also occurred at the times of his mother's previous attempts to have him admitted to bail. The Ombudsman said that the warrant issued by the Visiting Justice which set bail for the complainant was undoubtedly ambiguous, and it, and some of its predecessors, were sloppily completed; nevertheless, the time when such ambiguity should be elucidated was at the time of the receipt of the warrant by gaol authorities, and not later.

In a statement of provisional findings and recommendations, the Ombudsman said that the delay in arranging for the execution of the complainant's first instance warrant had been unreasonable, and that the officer responsible for executing this warrant had followed an established but unreasonable practice in making the

notation "hold for Maroubra Police" on the complainant's gaol file. The police officer made lengthy submissions that he did not act wrongly, because he was following established practice in making the notation on the prison file. He also maintained that, in attempting to have the warrants executed on the complainant, he was taking the only course of action open to him, because previous approaches made by him to the Police Department to streamline this procedure had been fruitless. The Ombudsman found the delay in executing the warrant and the making of the notation to be unreasonable, but he did not make such a finding in relation to that police officer. Rather, he found that the establishment and maintenance of the practices was unreasonable, particularly in the face of the police officer's recommendations to the Police Department to remedy the first practice.

The Ombudsman recommended that the making of notations of any kind by police officers on prisoners' gaol files cease immediately. He further recommended that the police force and the Departments of the Attorney General and Corrective Services develop an efficient system for the speedy execution of outstanding warrants upon prisoners. The system should, if necessary, incorporate legal safeguards against the release of prisoners with warrants outstanding.

The Ombudsman further recommended that the Commissioner of Police make an ex-gratia payment of $500 to the complainant to compensate him for the part which police officers played in his wrongful detention, and that he formally apologise to him for this. These latter recommendations have been accepted by the Commissioner of Police and the Ombudsman is satisfied with the new system introduced by the Commissioner. Further, following upon a request from the Premier, a working party is being formed of officers of the Police, Attorney General's and Corrective Services Departments to study warrant procedures relating to prisoners. The Ombudsman has yet to decide whether the Police Department's response to the first recommendation is satisfactory.

Examination blues

Mr C was driving to school in a country town to attend the HSC examination, when he was stopped for a traffic offence by Sergeant H. Mr C told the Sergeant that he was running late for the examination, whereupon he was required to remain at the scene while the Sergeant made a lengthy examination of the vehicle. Mr C attended the examination, but felt that he was disadvantaged because he was placed under stress, was upset and unduly nervous, and thus lost concentration, because of the actions of the Sergeant. The Sergeant was counselled to be more aware of individual circumstances in the future.

Malicious report and inadequate fine

The complainant maintained that a police officer had given confidential and defamatory information about her and her brother to a credit review officer of a major department store, who then made a computer entry outlining that information.

The complainant's de facto husband had been apprehended by the police officer while driving a motor vehicle, and asked to produce his licence. He had been unable to do so or to provide any form of identification. The police officer then accompanied the man to his house, and in the kitchen picked up a department store account in the name of the complainant. He then telephoned the department store and spoke to a credit review officer, telling her that the complainant no longer lived at the address shown on the account, but had moved to her de facto husband's address. The credit review officer reported to the investigating police that, as a result of the telephone conversation between herself and the police officer, she caused the address on the account of the complainant to be changed on the store's records from the address given by the complainant to that of her de facto husband. This entry was later reversed following a telephone call from the complainant. There is no record of the telephone conversation between the credit review officer and the police officer. However, as a result of that conversation the credit review officer made the following entry on the department store's computer under the complainant's name:

> Const J of M Police rang adv cust new add Appar a bunch of undesirables reside at A.[St.] residence, cust has collecting her mail from them - Const adv New Zealander - may take off - tracked cust down via her defacto, Const. has also arrested four people from [A.]St. this may have nothing to do with cust - but just in case!

As a result of the same telephone conversation, similar information was recorded against the account of the complainant's brother. The police officer also requested the name of the complainant's employer, which was supplied by the credit review officer.

The police officer admitted that the computer entry was an accurate reflection of his telephone conversation with the credit review officer. He said, however, that the reason for the call was to find out the current residential address of the complainant in order to interview her about ownership of the motor vehicle which her de facto husband had been driving. Later on the day of the call the complainant's brother and his wife sought credit at the department store and were refused it on the basis of the information supplied by the police officer. The refusal of credit caused considerable embarrassment to the complainant's brother and his wife. Their standing with the department store was later reinstated after they spoke to the credit manager.

The Ombudsman found sustained, on the basis of the police investigation, the complaint that the police officer had conveyed information which was private and defamatory to the credit review officer of the department store. This was contrary to police rules forbidding disclosure of information obtained in the course of duty, and was unreasonable in terms of Section 28(1)(b) of the Police Regulation (Allegations of Misconduct) Act.

A Departmental charge of "Misconduct" was preferred against the police officer and he was fined $50. The Ombudsman believed that the fine was unrealistic, because it did not reflect the seriousness of the offence by civil standards, and did not constitute serious disciplinary action by the Commissioner. The view of Mr J C Perrin, then Deputy Commissioner of Police, was

that it was his prerogative to decide on the nature of the penalty imposed. He said that a small monetary penalty did not "tell the complete story"; the record of such a charge and fine could have long-term effects on the officer's promotional prospects. He added that the proposal to review monetary penalties would require formulating specific penalties for particular types of transgressions and that he preferred to treat each case on its merits.

The Ombudsman, in his final report, said:

> This Office considers that it is important that justice be seen to be done. The imposition of small fines [implies] that a double standard applies to punishments handed out to police compared with members of the public. For example, a usual punishment for a police officer found to have committed an act of wrong conduct is $50, which happens to be the same amount as that levied on a motorist for driving in a transit lane. As a public document, a sustained wrong conduct report is subject to scrutiny by members of the public who might assume that a $50 fine indicates that an officer's misconduct has been treated lightly by the police force. To reassure members of the public that this is not the case, the Commissioner should clearly explain whether the wrong conduct of an officer is noted on his Service Register and any long-term consequences it may have on his career.

The Ombudsman recommended that the monetary penalties imposed by the Police Commissioner under Rule 11(g) of Part III of the Police Rules be reviewed in terms of the seriousness of the offence and in line with current values. He also recommended that, where the Police Department found an officer guilty of some wrong conduct, the Commissioner's notification of this should give an explanation of the seriousness of such a finding which would be acceptable to a reasonable member of the public.

The response of Deputy Commissioner Perrin to the report was in these terms:

> ... I do not consider it appropriate to establish a list of penalties for Departmental charges admitted by, or found proved, against members of the Force. I remain adamant that each matter should be dealt with on its merits and consequently, I do not propose adopting your recommendation that there be a review of monetary penalties. I will however, bear in mind the views you have expressed regarding such punishments.

Similarly, I do not propose to adopt your recommendation that I should justify or explain determinations reached in respect of penalties imposed. In that regard, I also believe it inappropriate to try and forecast possible long-term consequences. If you feel that complainants require an explanation of such matters then might I respectfully suggest that appropriate advice be included in your correspondence when you indicate your acceptance of the punishment imposed.

"Redfern riots"

In the early morning of 3 November 1983, 34 Aboriginals in Redfern were detained as intoxicated persons. Nineteen were taken to Redfern Police Station and the rest to other metropolitan police stations. Their detention arose out of two violent incidents which have been loosely referred to as the Redfern riots.

The first incident occurred at about midnight on 2 November 1983 at the Clifton Hotel, Botany Road, Redfern. Two Aboriginal bands had been playing at the hotel. Two passing police officers were pelted with missiles by patrons brawling outside the hotel. A short time later about thirty police arrived in response to urgent radio calls for assistance . The Aboriginals grouped at one end of a lane beside the Clifton Hotel. They continued to throw bottles, cans, rocks and bricks at police at the other end of the lane. The police then moved through the lane as a group in an effort to disperse the Aboriginals. Subsequently, a number of the Aboriginals were detained as intoxicated persons. A large number of Aboriginals then gathered outside the Redfern Police Station.

At about 1.20 am on the morning of 3 November 1983 a large group of Aboriginals were involved in a confrontation with taxi drivers around the Redfern Railway Station. Police were called and violence again erupted. Aboriginals detained as intoxicated persons were taken to various police stations, including Redfern. One Aboriginal claimed that he had been detained from inside a house and that he had consumed no alcohol.

Staff from the Aboriginal Medical and Legal Services went to Redfern Police Station to give assistance to the detainees. They later complained through the local Member of Parliament that there had been an unreasonable delay in allowing medical access to the detainees and that two officers at the station had been rude and intimidating to a doctor attempting to examine the patients. Blood samples were eventually taken from three of the detainees. Independent analysis of this blood showed that two of the detainees had no alcohol in their blood.

Following a Section 19 hearing, the Ombudsman found that the complaint that police had been rude and intimidating to the doctor was not sustained. He also found that the wholesale detention of the Aboriginals under the Intoxicated Persons Act, instead of the preferment of specific charges against any person who had offended against the law, had been a misuse of that Act. There was considerable evidence before the Ombudsman that police had been given a general direction that all persons taken into custody that night were to be detained as intoxicated persons; further, in two cases there was clear evidence that detainees had not consumed any alcohol, and in one of those cases the person had been detained from a private dwelling.

In a statement of provisional findings and recommendations, the Ombudsman recommended that:

1. those police officers against whom complaints were found to be sustained be paraded and counselled on the provisions of the Act and the appropriateness of alternatives, such as the preferment of charges;

2. the Police Department implement a policy in respect of doctors from Government funded medical aid programs, giving them reasonable access to detainees and allowing them to carry out medical tests which might be necessary or prudent in the circumstances. The policy should aim at avoiding delay in taking medical tests, particularly where alcohol is involved;

3. the Police Department should ensure that all police stations are equipped with McCartney bottles used for the taking

of blood samples, and that officers in charge of stations be instructed on their proper supply to and use by doctors proposing to take blood samples from people in custody;

4. the Police Department implement a policy for dealing with the preferment of charges where large numbers of people have been taken into custody;

5. the Police Department amend the Intoxicated Persons forms requiring the detaining officer to detail the behaviour which the intoxicated person was detained for and to provide that person with a copy of the forms.

Investigation of this matter is proceeding.

Detention on false grounds

A legal service complained that two Aboriginals had been wrongfully detained as intoxicated persons in a far north-west New South Wales country town. The complaint was initially investigated by the Police Department, and the Ombudsman decided to reinvestigate it, on the request of the legal service, because of conflicts in the evidence obtained by the police investigating officer.

Shortly after the detention of the two men, an Aboriginal Legal Service solicitor secured their release and arranged for blood tests to be performed on them. One of them had a blood alcohol reading of 0.04% and the other a blood alcohol reading of 0.116%. The Intoxicated Persons Act requires that, for persons to be legally detained as intoxicated, they must appear to be seriously affected, apparently by intoxicating liquor, to the detaining police officers, and to fulfil one of three other conditions. The one nominated by the detaining police in this case was that the two men were behaving in a disorderly manner. The men were detained when walking along the main street of the country town in question. They were accompanied by a friend. One of the complainants gave evidence to the Ombudsman that the men were pushing each other and joking when they came under police attention.

The Ombudsman had reservations about the evidence given by the two detaining police officers. Their version of the degree of the complainants' intoxication did not accord with the results of the blood alcohol tests, nor the evidence of the Legal Aboriginal Service lawyer who obtained their release, nor that of the station sergeant on duty at the police station where they were detained, nor of the sister on duty at the hospital when the blood tests were taken. Because of the credibility of these latter witnesses, the Ombudsman had significant doubts about whether the behaviour of the men was any different from the description given by one of them, that is, that they were pushing each other and joking. It was certainly not sufficient to ground a charge of causing serious alarm and affront, or even provide grounds for detention under the Intoxicated Persons Act. (One of the police officers had given evidence that he had originally intended to charge the men with causing serious alarm and affront.)

The Ombudsman thought it likely that the men were detained because of some view of the detaining police, resulting from recent civil disturbances in the town, that Aboriginals behaving in this manner should be kept off the streets in order to avoid as far as possible recurrences of what had been described as "riots", and perhaps because of a desire by the senior officer to demonstrate to his workmate, then new in the town, an appropriate style of policing for the area. The Ombudsman expressed the view that the use of the Intoxicated Persons Act for any such purpose would be illegal and a gross abuse of a police officer's power.

The Ombudsman expressed concern about opportunities for collaboration afforded by the investigating police officer to the police under investigation, and about unwarranted, biased and offensive remarks made by that officer in his report. He expressed the hope that recurrences of opportunities for collaboration would be rare, as a result of a recent agreement between him and the Police Commissioner.

The Ombudsman decided that, on the basis of the blood alcohol readings of the two complainants, he was satisfied that one of

them was not seriously affected by intoxicating liquor when detained but, because of the other's blood alcohol level (0.116%), he was not satisfied in that case. He recommended that the junior detaining officer be paraded before his District Superintendent and advised of the complete unacceptability of using the Intoxicated Persons Act to effect the detention of persons who do not, by reason of their condition and/or actions, come within its ambit.

He took a far more serious view of the conduct of the senior officer, who had decided to detain the men and who had considerably more police experience, particularly in the country town. The Ombudsman said that the Intoxicated Persons Act was open to abuse by unscrupulous police officers, because detained persons are not taken before the courts. The Act should not be used to detain persons thought likely to cause civil disturbances. The Ombudsman said that the detention of persons without any justification in a town with racial problems and a recent history of civil disturbance was sheer folly, and showed that the officer was unsuitable for this posting. He recommended that the senior officer be immediately transferred to duties outside any area with a significant Aboriginal population and that he never again be appointed in any such area. He recommended that independent legal advice be obtained as to whether a charge of misconduct against the officer would be likely to succeed before the Police Tribunal. He also recommended that, in the event of a charge being laid, it be prosecuted by the Solicitor for Public Prosecutions or by independent counsel. He further recommended that the Commissioner of Police formally apologise to the complainants for their unlawful detention, and that an ex gratia payment of $100 be made to each man by as compensation for deprivation of liberty.

Both police officers were charged with "Misconduct" by the Commissioner. Contrary to the recommendation of the Ombudsman, however, the proceedings before the Police Tribunal were

conducted on behalf of the Commissioner of Police, not by the Solicitor for Public Prosecutions or independent counsel, but by a Sergeant of police. The two Aboriginals who had been detained did not give evidence, as they had done at the Ombudsman's inquiry. The Station Sergeant who had given evidence before the Ombudsman that in his view one of the Aboriginals at least was not "seriously affected" by alcohol, similarly, was not called to give evidence before the Police Tribunal. The Ombudsman's inquiry appeared to have more evidence before it than was put to the Police Tribunal.

The Police Tribunal found the officers not guilty of misconduct.

Cop this lot

Mr H drove his two-seater sports car accompanied by three passengers, one seated in the passenger's seat and the other two sitting on the front of the boot lid with their feet behind the seats.

Constable S observed that the arms of the driver and the seated passenger protruded beyond each side of the vehicle. He issued two traffic infringements notices for the offence of "body protrudes" to Mr H, instead of one to him and one to the passenger who committed the offence. The Constable then issued two more traffic infringement notices to Mr H for the offence of "not carry passengers safely seated", because two passengers were sitting on the boot lid.

A letter was sent to the Police Department from this Office, asking why the tickets had been issued in such a fashion. The reply admitted that Constable S was wrong in issuing the tickets to the driver for the offence committed by the passenger, and that it would have been more appropriate to issue only one ticket for both the "unsafe passengers". Mr H was later told he would only be required to attend to two tickets instead of the previous four.

Theft

On 30 September 1984 Mr H purchased a number of betting tickets at the TAB Agency in Goulburn. One of the tickets won $68.20. Mr H was later detained as an intoxicated person and, when released at about 1.30 am on 1 October 1984, he signed for his property without checking it. Upon returning home he discovered that the winning ticket was missing and immediately returned to the police station, where he complained to the constable who had released him. The constable told Mr H that one of the detaining police officers must have been responsible, and that Mr H should return to the station later in the morning and lodge a complaint with the Officer in Charge. Mr H followed that advice.

Investigating police arranged for the missing ticket to be flagged on the TAB computer as "lost". On 3 October 1984 the constable attempted to cash the ticket at another agency. When the ticket was rejected by the pay-out-machine, the manager questioned the constable, who said that he had purchased the ticket at the Goulburn Agency and gave a false name and address. The manager retained the ticket and contacted the police and the manager of the Goulburn Agency.

The constable went to Mr H's home and told him that he had found the ticket in a drawer at the police station. He asked Mr H to go with him to the Goulburn Agency, where the constable would obtain the money for him. At that agency the constable told the manager he had attempted to cash the ticket and asked the manager to pay the money to Mr H without a claim form being submitted. The manager told him that the police had the ticket and advised him to got to the police station. The constable and Mr H went to the police station and the constable told the investigating detective that he had found the ticket in a drawer at the station with a number of other tickets. He also stated he had gone to the first agency to see if the ticket was, in fact, the one lost by Mr H.

The constable was subsequently charged with stealing the ticket. On advice from the Office of the Solicitor for Public Prosecutions, the charge of attempted false pretences was

substituted for the charge of stealing. The constable pleaded guilty to that charge; he was fined $500 and was dismissed from the police force.

Wrongful detention as intoxicated person

The complainant alleged that, after a party, he had been detained by a police officer in the front yard of his friend's house, even though he was not intoxicated. The Police Department, following its investigation, believed the complaint was not sustained. The Ombudsman decided to re-investigate the matter, taking evidence from the complainant, two people who had attended the party and five police officers.

The incident followed a series of visits by police to the friend's house during the course of the day and evening of 27 December 1983. The friend had invited a number of guests to a Boxing Day party. A neighbour had made several complaints to the police about noise and, later, apprehended violence. Following a visit by four police, including the officer who later detained the complainant, the complainant went outside to have a cigarette. He stood in the front yard and observed the police officers, two of whom were in their car and two of whom were talking to the neighbour. The police car was on the grass verge in front of the friend's house.

At the time the complainant first came to the notice of police he was inside the yard of his friend's house. In response to a question from one of the officers in the car, the complainant stepped outside of the yard to ask what had been said. Following this, the complainant loudly protested his rights and returned to the yard to finish his cigarette. He was again spoken to by the police officer in the car, and when he refused to go back inside the house, the police officer got out of the car and detained him as an intoxicated person.

The complainant's wife and friends were still inside the house. The police officer who detained the complainant did not attempt to take the complainant inside, where, if he were intoxicated, he

could have been put into the care of a responsible person, as provided for in the Intoxicated Persons Act. Nor were his wife and friends informed that he was being taken to a nearby police station.

At the police station the complainant asked that his wife and friends be notified. He did not know their telephone number, but a telephone directory was available. Instead of looking up the friend's telephone number, the detaining police officer tried to contact the complainant's home, despite being told that no one would be there.

The evidence obtained by the Ombudsman indicated that the complainant was not drunk, was not in a public place when detained, and was not behaving in a disorderly manner. These three aspects must occur concurrently before a person is detained under the Intoxicated Persons Act. The Ombudsman found that the complainant had been wrongly detained. He also found that the police officers responsible for the complainant at the police station were unaware of their obligations to allow a person detained under that Act either to make a telephone call or to have one made, in order to notify someone of his or her situation.

"Voluntary" escorts

The complainant firm of solicitors, on behalf of their client, Mr P, alleged that Australian Federal Police unlawfully detained Mr P in custody in the Australian Capital Territory pending the arrival of the New South Wales police, and that New South Wales police officers who arrested him had assaulted him.

Mr P was originally in the lawful custody of the Australian Federal Police after being granted bail, without police opposition, by the Court of Petty Sessions, Canberra, in relation to an assault charge. Mr P was escorted by these police to the local watch house. His return there was necessary, he was told, in order for him to pick up his belongings. He was there detained for some twenty minutes and his property not given to


OOPS - WE SEEM TO HAVE DRIVEN INTERSTATE...
OH...?

him for "all number of spurious reasons". Two New South Wales constables stationed at Queanbeyan then appeared, having been advised by their Federal counterparts that Mr P was in custody. These two constables escorted Mr P to their vehicle and took him to Queanbeyan, having said that they were executing New South Wales warrants for the non-payment of fines.

The Ombudsman reinvestigated the complaint, conducting a hearing under section 19 of the Ombudsman Act. The Ombudsman found evidence that there was a practice adopted by police of the "voluntary escort" of persons with outstanding warrants of commitment (and, apparently, persons upon whom process was to be served) across State lines, instead of adopting the somewhat lengthy procedure of having the out-of-jurisdiction warrant of commitment converted by a court into a warrant of apprehension which could be executed in another jurisdiction.

The Ombudsman was unable, on the evidence before him, to make any finding as to whether there had been any conspiracy between officers of the two police forces. However, the Ombudsman concluded that Mr P did not volunteer to cross the border with the two New South Wales police officers. He found that the complaint about the measures taken by the New South Wales police in escorting Mr P to Queanbeyan was sustained. He did so on the basis that, while this was done in accordance with an established practice, that practice was unreasonable and oppressive. The Ombudsman did not find it necessary to reach a firm conclusion as to whether there was any physical constraint on Mr P in his walk from the watch house to the police vehicle.

After the investigation of Mr P's complaint, both the Australian Federal Police and the New South Wales Police Force directed that the practice of escorting persons across State and Territory borders cease. The Ombudsman recommended that this direction be included in the New South Wales Police Instructions, and that a form be prepared and issued to all New South Wales police stations, to:

1. be given to all persons proposed to be "voluntarily" escorted, without sanction of law, across State and Territory borders by the escorting officers;

2. clearly set out that there is no obligation to be "voluntarily" escorted; and

3. provide for signature by the person, and by a witness other than a police officer or an employee of the police department.

The Ombudsman also recommended that the escorting officer should be obliged to give a clear explanation to the person whom it is proposed to escort across a border; the signature on the form should acknowledge that this had occurred. Moreover, because it appeared from the evidence that one of the inducements to the practice of "voluntary" escorting persons across borders was the delay in having warrants of commitment and other processes endorsed for service outside New South Wales, the Ombudsman recommended that the Planning and Development Section of the Police Force, in concert with the Department of the Attorney-General, urgently examine the law and practice in this area, with a view to streamlining the procedure.

On 10 June 1986 the then Deputy Commissioner of Police, Mr Perrin, told the Ombudsman that he did not propose to implement the Ombudsman's recommendation concerning instructions to police about "voluntary escorts", nor did he consider the proposed forms to be a viable proposition.

However, Mr Perrin approved a circular advising all police of the correct procedure to be followed in cases of this nature. He also referred the question of "voluntary escorts" to the Chief Superintendent, Research and Development Branch, and requested that a thorough review of the subject be undertaken. He also indicated to the Chief Superintendent that draft amendments to legislation should be prepared to facilitate execution of warrants and other processes outside New South Wales, if such action was considered appropriate.

To date the Ombudsman has not received advice on the result of the review undertaken by the Chief Superintendent, Research and Development Branch. The Ombudsman is considering the action to

be taken over the Police Department's refusal to comply with parts of his recommendations.

Fare to where?

In the early hours of the morning a taxi driver in the Eastern Suburbs picked up a passenger who asked to be driven home to French's Forest. The passenger asked that he be woken up when they reached French's Forest so that he could give the driver specific directions. The passenger was woken at French's Forest, where he gave a direction to turn left; he then fell asleep. When he woke up, he discovered that the driver had taken a wrong turn and was at Narrabeen. The meter had by this stage registered a fare of $25.

The driver and passenger argued about the extra fare from French's Forest to Narrabeen. The passenger decided that the driver was in error, and offered to pay $15.00. The taxi driver said that he would take the passenger to the police station to settle the dispute, and the passenger agreed. The driver then drove to North Sydney Police Station, although the passenger protested en route that French's Forest Police Station would surely be closer.

A police officer on duty at North Sydney was confronted with an angry taxi driver who insisted on recovering a $25.00 fare, and a weary passenger who would only agree to pay $15.00, which he estimated to be the appropriate fare from the Eastern Suburbs to French's Forest. The parties argued in the police officer's presence for about half an hour. The taxi driver wanted the police officer to charge the passenger with fare evasion. The police officer took the view that it was a civil matter between them. The passenger refused to give the taxi driver his name and address, and was allowed to leave the police station. He hailed another taxi and set off on his second attempt that evening to reach his home in French's Forest.

Some months after this incident, the taxi driver complained about the conduct of the police officer. Following an investigation

into this complaint, a Departmental charge of 'Neglect of Duty' was laid against the officer for his alleged failure to render assistance to the driver in accordance with the appropriate police rule. The matter was heard by the Police Tribunal in October 1985 and the charge was dismissed. The judge found that the police officer did all that he reasonably could do under the circumstances to assist the taxi driver.

The Ombudsman considered the details of this complaint and decided that, as the passenger was not necessarily guilty of any offence, the police officers was not obliged to require that the passenger provide his name and address to the driver: he decided that the dispute was a civil matter between the driver and the passenger.

The Ombudsman found the taxi driver's complaint against the police officer to be not sustained.

Vehicle located but not reported

The complainant alleged that police failed to inform him that they had received a report from a citizen concerning the whereabouts of his stolen motor vehicle. Following an investigation, the Police Department thought that the complaint was not sustained. The Ombudsman decided, however, that the evidence obtained during the Departmental investigation was conflicting and that the matter should be reinvestigated. The hearing was conducted by the Deputy Ombudsman.

It was not disputed that a citizen had reported the whereabouts of the complainant's vehicle to the Sutherland Police Station. The Deputy Ombudsman was unable to determine on the evidence before him the identity of the police officer who had received the call and failed to record or act on the citizen's information. It was apparent from the evidence of police officers working at that police station on the day that the way police take and record telephone messages at the station contravened Police Instruction 69-2 (b). The Deputy Ombudsman also concluded that the layout of the Sutherland Police Station

was not built for the purpose of servicing a growing and busy area like Sutherland Shire.

The Deputy Ombudsman recommended:

1. that a circular be issued to remind police of their duty in respect of all telephone messages and the necessity to record reports of stolen vehicles on the telephone message pad;

2. that the Police Properties Branch inspect Sutherland Police Station and discuss with police officers working there the problems associated with the layout of the station, and that a copy of the Police Properties Branch inspection report and suggestions be sent to this Office for further consideration.

On 9 August 1985 the then Minister for Police wrote to the Ombudsman and said that he already recognized the need for major improvements at Sutherland Police Station and had been liaising with the Treasurer in order to provide a new multi-million dollar police station and court complex for Sutherland.

On 24 October 1985 the Commissioner of Police issued a circular in compliance with recommendation 1. On 27 November 1985 the then Minister for Police advised the Ombudsman that, at his request, the Commissioner of Police had arranged an inspection of the Sutherland Police Station. Following this inspection it was proposed to modify the general office counter configuration and to display prominent signs reminding police not entitled to be behind the general office counter that they should not enter that area. The Minister said that these were measures, pending the establishment of a new police station at Sutherland, which he considered to be a top priority.

Service numbers

People frequently complain that police officers have not been wearing their service numbers. The Police Rules require that uniformed police below the rank of Sergeant wear their service numbers at all times.

Mr J made a number of complaints about the conduct of a Highway Patrol Officer when issuing a radar traffic infringement notice. One of these was that the officer was not wearing his service number at the time. The officer explained that he had commenced work that day with his jacket on, and with his service number pinned to the jacket. During his shift he had removed the jacket, he said, but had forgotten to transfer the number to his shirt. This part of the complaint was found sustained, but the officer had already been counselled by his superior to be more careful in future, and no further action was recommended.

A night in the cells

A citizen's complaint about the circumstances surrounding his detention as an intoxicated person at Darlinghurst Police Station was reinvestigated by the Ombudsman, who conducted a hearing in the matter.

Evidence given at the hearing revealed that, on the night in question, the complainant had attended a dinner connected with his employment and had later gone to a bar to drink with his workmates. He admitted that he had been intoxicated to a considerable degree when he left the bar. He began walking home (which was a relatively short distance from the bar) but was detained by police en route. The complainant agreed that he had been reasonably apprehended by police, but maintained that his subsequent detention had been unnecessary.

The complainant said that, when he got to the police station, he was "suitably embarrassed" and thought that he would be "ticked off", told to take a taxi home and not to be so stupid. After he had been searched and processed, he asked whether he could make a telephone call to his wife, who, at the time, was in an advanced stage of pregnancy; he asked again to make a telephone call when he was put in the cells, but his request was either ignored or refused.


PHONE CALLS?
WHAT
PHONE CALLS?

The complainant, an advertising executive, experienced "culture shock" when placed in the cells at Darlinghurst Police Station. He gave evidence that one of the other occupants appeared to be a derelict, who started to "take swings" at him and to swear at him. Some time later this man and the other occupants were removed from the cell and two others were placed in it. At these times he asked again to make a telephone call; after the two new detainees were placed in the cell, he started shouting to attract attention. He described various visits by police to the cell complex later in the night, including one when he asked to make a telephone call and explained about his pregnant wife, the police officer replying: "You shouldn't get drunk". He described another occasion when two officers came to the cell and, in response to his request to the senior officer to make a telephone call, that officer said, "You'll have to ask the station officer". When he asked to speak to the station officer, the senior officer turned to the officer next to him and said, "He is the station officer". This second officer refused his request to make a telephone call.

The complainant's wife gave evidence that she woke at 2.30 am and at about 3.00 or 3.30 am began to get worried about her husband's absence. She said that at about 5.00 am she rang the restaurant where her husband had been, but failed to locate him; she then telephoned St Vincent's Hospital and Paddington Police Station, but neither place had any record of her husband. She gave evidence that the staff at the Paddington Police Station were pleasant and sympathetic. She said that she telephoned Darlinghurst Police Station and asked whether anyone of her husband's name had been involved in an accident, and was told that there "had been no accidents". She described the manner of the officer who spoke to her at Darlinghurst as "abrupt". The complainant arrived home at about 7.30 or 8.00 am.

All police questioned by the investigating police and by the Ombudsman in his reinvestigation of the complaint denied refusing the complainant's request to telephone his wife. The officer on switchboard duty at Darlinghurst on the morning following his detention denied speaking to the complainant's wife. This officer gave evidence that, if a call such as that made by the

complainant's wife was received, his practice was to check the station accident card, to telephone the St Vincent's casualty section, and perhaps to check the accident car log book at the police station. The officer said that, if this type of inquiry was made, he would take the caller's name and number and ring back, if necessary. He said that he did not record such inquiries on the telephone message pad at the police station and that he would not check the station cell books or intoxicated persons register to determine whether the person inquired about had been taken into custody.

The Ombudsman accepted as accurate the evidence of the complainant and his wife, but, because the complainant's recall was affected by his intoxication at the time, the Ombudsman was unable to identify with the necessary degree of satisfaction any of the officers who had refused his requests to make a telephone call. He was unable, similarly, to identify the officer to whom the complainant's wife had spoken. The Ombudsman found the complaint sustained, in relation to both the refusal to allow the complainant to make a telephone call and the unreasonable manner in which the telephone query made by the complainant's wife had been dealt with.

The Ombudsman recommended that the Commissioner of Police formally apologise to the complainant and his wife. In addition, he made sweeping recommendations about amending police procedures for dealing with intoxicated persons to ensure that intoxicated persons are informed of their right to make a telephone call, and for this to be recorded. The Ombudsman further recommended that the Police Instructions be amended to make clear what sort of telephone calls were to be recorded on station documents provided for that purpose. The Police Department has refused to adopt the first and last of these recommendations. Changes to the Intoxicated Persons Act mean that intoxicated persons should now be able to have a friend or relative contacted. The Commissioner of Police has yet to decide on the remainder of the Ombudsman's recommendations.

Improper report about a teacher

A school teacher in a Catholic country school complained of various incidents of harassment and abuse of police power by his neighbour, a senior constable of police. The most serious allegation was that the police officer had gone, in uniform, during his lunch hour, to the head of the local Catholic Education Office to complain about a party held at the school teacher's house. When interviewed by the investigating police, the police officer said:

> [Mr A] ... is a single man and a school teacher employed at the Catholic School .... Shortly after [Mr A] moved into his home a male student of about 16 years of age moved in with [Mr A], and is still residing at this address. On a regular basis I have observed the two showering and [Mr A] shaving and "skylarking" together in the bathroom and at times filthy language coming from that residence .... Being of Catholic faith and my children attend the Catholic School in [B], I thought it only right to inform [Father C], a man whom I have known for many years. I informed him that [Mr A] had a male student living with him and that a number of other male students visited the house on occasions .... [Father C] then referred me to see [Mr D] at the Office of Catholic Education and acquaint him with his behaviour.... In the time he has lived at this address apart from his mother I have not seen another female person, only young male students entering the house.

The Ombudsman expressed concern, in his report about the matter, at certain misleading or inaccurate remarks made by the investigating police officer and by certain of his superiors about the complainant. The investigating police officer stated that:

> It is apparent that the complainant has carried on a vendetta against the Constable, since, as a concerned parent he informed the Catholic School Authorities of the action of the complainant and the fact that he has a male student residing with him. The complainant is a single man.

The Ombudsman said that it appeared to him that this remark carried the same implications as the report of the police officer the subject of complaint, namely that there might be an improper relationship between the complainant and the young man residing with him. Such a remark by an investigating police officer was discriminatory, gratuitous and offensive, particularly since he did not discuss it with the complainant.

The Ombudsman was concerned about another remark of the investigating officer:

> In his report the Constable strongly denies his allegations and from my knowledge of him I am of the opinion the version he has given of the incident is a truthful one. I am aware that the Constable partakes of alcohol only on very rare occasions away from his home.

The Ombudsman thought that this showed favour to the police officer who was supposed to be under investigation and a lamentable attitude towards matters which an impartial investigator should properly take into account.

The Ombudsman re-investigated the complaint and reported that he was not prepared to make any findings about allegations that the police officer drank alcohol during breaks from duty, took excessive breaks while on duty, and drove his wife to work in a police vehicle, nor about two incidents of alleged harassment. This was because the evidence given by the witnesses on these matters might have been affected by the hostility between the complainant's and police officer's households, and which apparently extended to their neighbours. The allegation that the police officer used his position to add weight to a malicious complaint was serious, and was supported by evidence independent of the domestic hostilities.

The Ombudsman concluded that there was a normal relationship between the households of the complainant and the police officer until the evening of a noisy card party at the complainant's house. The Ombudsman accepted the complainant's account of a heated exchange between him and the police officer on that evening, and concluded that a certain comment was taken by the police officer as a challenge to his authority. This and other difficulties between the households resulted in the police officer maliciously implying to the head of the local Catholic Education Office that the complainant and the student who boarded at his home were in a homosexual relationship. The Ombudsman concluded from the evidence of the police officer and his wife, that the police officer had no reasonable grounds for forming

this view. The police officer intended to damage the complainant's teaching career, and his report would have a greater tendency to affect opinions and actions than one made by a civilian.

The Ombudsman found that the police officer's visit to the head of the Catholic Education Office was unreasonable and based wholly on improper motives and was contrary to Police Rules.

The Ombudsman recommended that independent legal advice be sought as to whether a departmental charge of misconduct would be likely to succeed before the Police Tribunal. If so, a charge should be prosecuted by the Solicitor for Public Prosecutions or independent counsel. Otherwise, the officer should be paraded before the Assistant Commissioner (Internal Affairs) and informed of the complete unacceptability of his actions. The Ombudsman recommended that the police officer be transferred and counselled as to his attitudes to persons whom he believed to be homosexual, particularly insofar as this might affect his work as a police officer. All these recommendations were rejected by the delegate of the Commissioner of Police.