NEW SOUTH WALES OMBUDSMAN ANNUAL REPORT 1989

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Annual Report

OMBUDSMAN

of New South Wales

Year ended 30th June, 1989

THE OMBUDSMAN OF NEW SOUTH WALES

FOURTEENTH ANNUAL REPORT

1 JULY 1988 - 30 JUNE 1989

PART I

THE OMBUDSMAN OF NEW SOUTH WALES

FOURTEENTH ANNUAL REPORT

(1 July 1988 - 30 June 1989)

TABLE OF CONTENTS

PART I

PAGE NO.

NARRATIVE SUMMARY 1

INTRODUCTION 11

CHARTER 11

AIMS AND OBJECTIVES 13

ACCESS 13

MANAGEMENT AND STRUCTURE
- Principal Officers 14
- Committees 14

LEGAL CHANGES 16
- Proposals For Legislative Amendment 18
- Deferral of Incorporation 19

PROMOTION AND PUBLICITY
- Community awareness programme 22
- Talks to police 24
- Public speaking engagements 24
- Overseas visits 25
- Open discussion with Government departments 25
- Articles for "Police News" 26
- Independence of the office of Ombudsman 27

GENERAL AREA
- Complaints about departments and authorities (other than Department of Corrective Services) 29
- Need to protect the name "Ombudsman" 31
- Role of the Ombudsman 36
- Relocation of the Office of the Ombudsman 45

Freedom of Information 47
State Owned Corporations Bill : "privatisation" a popular catchword . . 49
Independent Commission Against Corruption 54
The Ombudsman's Telecommunications Interception Inspection Unit . . 58
Allegations of leaks from the Ombudsman's Office 60
Attempts to influence the Ombudsman ? 65
Secrecy: amendments still on " hold " 71
Opportunity to comment : Ombudsman's system fair 74
Complaints to Ombudsman privileged 77
Personal denigration of Investigation Officers (or, shooting the messenger) 79
Removal of " wrong conduct " from Ombudsman Act 82
Reports to Ministers and to Parliament 87
Natural Justice : right to be heard 90
Child abuse and " voluntary " foster care 93
Anonymous complaint uncovers serious misconduct 97
Furore at Fingal Head 102
Rates levied by Pastures Protection Boards 105
Rivers and Foreshores Improvement Act and the Department of Water Resources 106
Government Insurance Office : Big, safe . . . and unfriendly ! 111
SRA patrol officers : now members of the Transit Police Service . . . 113
A scoop for the Ombudsman 118
Vehicles towed from clearways: still some problems 121
Food inspection 122
Checking licensed builders 125
The Darling Harbour Authority 127
Stolen Sigmas : an update 130
Delays by the Department of Housing: Can there be worse to come? . . 133
Competing interests : use of pesticides 135
Accreditation problem at Macarthur Institute of Higher Education resolved 137
Pollution at Gosford 139
Inadequate drainage at Griffith : an update 140
Conversion of sub-standard buildings to Strata Title 141
Sydney Harbour foreshores management 141
Visits to residential youth centres 142

LOCAL GOVERNMENT AREA

Complaints about Local Government 143
Conflict of interest : a growth industry 145
Ashfield Municipal Council : the saga continues 150
Flood plain policy : the Grafton experience 154
Further investigation of Narrabri Shire Council and its tendering procedures 160
Need to give reasons : the problems continue 165
Drainage complaints 170
Notification of adjoining owners: the Ryde experience 174
The Ombudsman and citizens' rights of appeal in local government matters 180
Local government rates: a contentious area 184
Rural rates 191

Invalid publicity rate . . . 194
Water meters don't lie ! Well, sometimes . . maybe . . . 195
Public road ? Yes, and no ! . . . 198
Abandoned motor vehicles . . . 200

PRISONS AREA

Prison Statistics . . . 200
The Ombudsman and the Official Visitors Scheme . . . 208
Escapee policy . . . 212
Random urine testing in prisons . . . 214
Segregation . . . 215
Strip searches of visitors to prisons . . . 219
Forensic prisoners : Part IV . . . 220
A melancholy Christmas and an unhappy New Year . . . 223
Education of prison officer recruits . . . 228

CONSTRUCTIVE ACTION BY PUBLIC AUTHORITIES

Australian Gas Light Company . . . 230
Department of Corrective Services . . . 230
Government Insurance Office . . . 232
Department of Health . . . 232
Housing Department . . . 233
Department of Industrial Relations and Employment . . . 234
Department of Main Roads . . . 235
Office of State Revenue . . . 236
Roads and Traffic Authority . . . 237
Water Resources Department . . . 237
Sydney County Council . . . 238
Shoalhaven Shire Council . . . 238
Wollondilly Shire Council . . . 239
Police Department . . . 240

POLICE AREA

Police complaint statistics . . . 241
Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill 1988 . . . 246
The Police Board and the Ombudsman : Two different worlds ? . . . 253
Relationship between the Ombudsman's Office and the Internal Affairs Branch of the Police Department . . . 260
Misleading comments in Internal Affairs Branch Annual Report . . . 263
Ainsworth v The Ombudsman . . . 266
Police nominal complaints . . . 268
Complaints about off-duty police . . . 271
Investigation into events leading to the death of Mr D J Gundy . . . 274
Seconded police officers . . . 278
" Serious misconduct " reports . . . 280
Need for independent legal advice . . . 283
Justice - delayed, but just as sweet . . . 290
Operation " Blow Wave " . . . 294
Alleged suppression of previous convictions . . . 302
What a catch ! . . . 304
Strip-searches by police . . . 311

Domestic violence 314
Detention of Aboriginals 316
A photogenic constable 318
Delay in paying for car repairs 319

OPERATIONAL ASPECTS OF THE OFFICE OF THE OMBUDSMAN
Human resources 321
Numbers and categories of officers and employees 321
Second Assistant Ombudsman position made permanent 324
Organization Chart 325
Wage movements 326
Personnel policies and procedures 326
Recruitment 327
Regular meetings with staff 328
Occupational Health and Safety 328
Equal Employment Opportunity 330
Ethnic Affairs Policy Statement 332
Industrial relations 333
Staff training 335
Overseas visit by the Ombudsman 337
Overseas visitors to the Office 337
Consultants 338
Accounts payable policy 339

Financial summary 340
Major Assets on hand as at 30th June 1989 342
Stores and equipment expenditure 343
Group system on trial 344
Performance Indicators 346

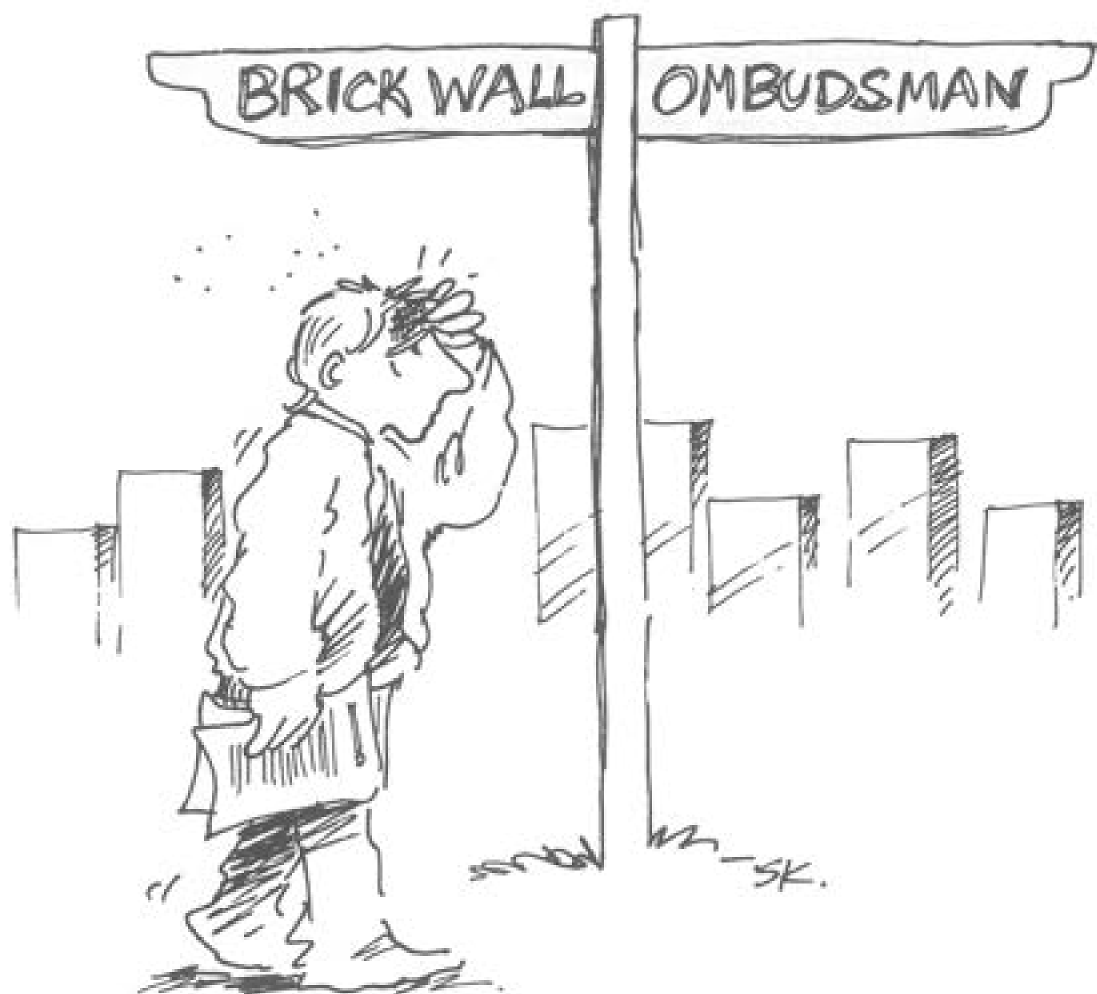
FINANCIAL STATEMENTS 356

STATISTICAL TABLES 369

PART II

CASE NOTES 389

NARRATIVE Summary.



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 Ombudsman, as well, has an inspection role in relation to those agencies able to seek warrants for the interception of telecommunications and performs an " external review " function under the Freedom of Information Act.

Mr D E Landa is the present New South Wales Ombudsman.

Complaints received

In the year ended 30 June 1989 the following written complaints were received:

Ombudsman Act

Departments and authorities (other than Corrective Services)	969
Local councils	633

Department of Corrective Services	321
Outside jurisdiction	345
Police Regulation (Allegations of Misconduct) Act	
Complaints against police	2231
	4499

Reports to Ministers

A total of 134 reports of wrong conduct were made to Ministers during 1988-89. Of these, 29 related to complaints against government departments and authorities, 14 to complaints against local councils and 91 to complaints about the conduct of police. Section 25 of the Act provides for consultation with Ministers about reports made by the Office.

Reports to Parliament

Eight reports to Parliament were made during the year, including reports on:

- Failure of Tallaganda Shire Council to comply with Acting Ombudsman's recommendation to levy only a nominal rate on vacant flood-liable land in the Shire.

- Two misleading and inaccurate newspaper articles which alleged that the Ombudsman was investigating Mr J. Hatton, MP.

- Failure of the Darling Harbour Authority to comply with Ombudsman's recommendations about consultation with and compensation for nearby residents.

- Inadequate training and procedures of the Special Weapons Operations Squad as demonstrated by incidents which occurred during a " mock " terrorist operation.

Royal Commission Inquiries

Section 19 of the Ombudsman Act confers the powers of a Royal Commissioner on the Ombudsman when making or holding inquiries. Eighteen inquiries were held during the year, thirteen in reinvestigating complaints against police, two in investigating the conduct of departments and authorities, and three in investigating the conduct of local councils.

Allegations of leaks from the Office

The Ombudsman refuted allegations made by the Premier that there had been " orchestrated leaks " from the Office of a special report which the Ombudsman sent to Parliament. Notwithstanding his belief that this had not occurred, the Ombudsman issued directions to all of his staff regarding the need for confidentiality and security of information within the Office.

Furore at Fingal Head

Not only the Independent Commission Against Corruption is interested

in the proposed Ocean Blue resort development at Fingal Head. The Ombudsman is investigating the conduct of three government departments involved in actions which caused work on the construction of four houses for the Aboriginal community to stop without warning.

Anonymous complaint uncovers serious misconduct

An Ombudsman "own motion" investigation of an anonymous complaint discovered that the superintendent of a juvenile institution had engaged in illegal and unethical activities. As a result of the Ombudsman's investigation, the superintendent was charged under the Public Sector Management Act with misconduct. As well, alleged breaches of the Liquor Act, the Crimes Act and the Public Finance and Audit Act have been referred to the Commissioner of Police for investigation.

Department of Water Resources

Complaints which raised concerns about the way in which the Department of Water Resources administers the Rivers and Foreshores Improvement Act have been investigated during the year. In one matter, the Department failed to prosecute a gravel extraction company for illegally removing gravel from the Murray River. In another case, the Department refused to prosecute a sand dredger operating on the Murrumbidgee River for clear breaches of the law.

Conflict of interest in local government

The Ombudsman has accepted an invitation from the Minister for Local Government that his Office be represented on a working party to

develop a detailed code of conduct for council members and staff. The working party will also include representatives of the Department of Local Government, the Independent Commission Against Corruption and the Local Government and Shires Associations.

Notification of adjoining owners

The Ombudsman's long-standing and oft-repeated recommendations that councils be required to notify people of building applications which affect them, and to consider objections from such people, have not been acted upon. The office continues to receive complaints about this issue. One complaint dealt with during the year involved Ryde Municipal Council's failure to take account of objections to building work or to properly supervise it. Contrary to approved plans, a property owner had turned a clerestory tower into an observation tower, replete with telescope. Council had given retrospective approval for work that had been carried out, even though it had no lawful power to do so.

Constructive action by public authorities

The Annual Report gives examples of constructive action by public authorities after they were contacted by this Office. These included:

- The Housing Department arranged for urgent repairs to be made to the home of one of its tenants after she complained to this Office that repairs, although promised six months earlier, had not been done.
- A courier driver who was unable to pay the Harbour Bridge toll, was refused permission to pay it the next day, even though procedures exist to

allow this. She later received a penalty notice, but the Department of Main Roads cancelled it.

- The Secretary of the Office of State Revenue agreed that a complainant had received " poor service " and arranged for the prompt issue of a refund cheque.

- Sydney County Council devised an alternative solution for one of its consumers after having told him he would have to re-route the electrical wiring to his home.

- The Police Department required a man to apply for a shooter's licence and pay a $25 fee before it would return to him a rifle he had surrendered during the firearms amnesty. The rifle, however, had been destroyed; but the man was refused a refund of the licence fee. After this Office took up the matter, the fee was refunded.

Proposal to change police complaints system

The Government withdrew proposals to amend the Police Regulation (Allegations of Misconduct) Act, which would have removed important complaints from the Ombudsman's oversight, after a Select Committee of the Legislative Council found that the proposed amendments were " contrary to the public interest ".

" Serious misconduct " reports

The Ombudsman made two reports about possible "serious misconduct" on the part of police during the year. These were reports about:

- The conduct of eleven police officers who had fraudulently completed documents, failed to

administer necessary tests and issued drivers licenses as favours.

- The unlawful arrest and detention and the assault of a citizen by two police officers.

Case Notes

Cases dealt with during the year included:

Retrospectively yours: The government passed legislation to retrospectively legalise fees that the Board of Fire Commissioners had collected for inspecting child care centres. This Office had found that the Board did not have the power to levy fees and had recommended that over $44,000 collected since July 1985 be refunded. The passing of retrospective legislation, however, put paid to the recommendation.

Adding insult to injury: When the Department of Education refused to return or pay for equipment that it had taken from a charitable organisation's premises, and refused to make good damage it had caused to the building, the organisation complained to the Ombudsman. An inquiry using the Ombudsman's Royal Commission powers was held and the organisation was ultimately paid over $6,000 for its missing equipment and for repairs to the building. The investigation showed that the Department had ignored letters that the organisation had sent to it about the problems.

Transformer problem: A couple who purchased land from Landcom were unable to build the house they wanted because an electricity substation had been erected where their driveway was supposed to go.

The location of the substation had not been shown on the sales plan when they bought the land. After this Office became involved, the Department of Housing paid the couple $6,000 for devaluation of their property and commenced negotiations about the payment of valuation and legal fees.

King-hit by a king pin: A man was compensated for loss of earnings after the Department of Motor Transport refused to register his truck because of alleged excessive movement in one of its king pins. This Office discovered that the Department's rules about the amount of movement allowed were conflicting and different officers were interpreting them differently. As well, the measurement of king-pin movement by departmental officers had been inaccurate because the standard measuring device used was a ruler. After an Ombudsman investigation, the rules were amended and new measuring devices were issued.

A nice walk, but . . . : A man complained that Byron Shire Council had produced 46,000 tourist booklets which said that the public could gain access to a mountain walking trail through his property, even though he had continually refused to allow access. The council not only erected an appropriate sign at the point of access to the complainant's property, but altered all of the remaining copies of the booklet as well.

Ombudsman invited to ignore illegality: After Canterbury Municipal Council suggested that the Ombudsman should agree to allowing an illegal use of public land to continue, a formal investigation was commenced. Council had allowed a local Rotary Club to operate a

community markets on Wiley Park for a number of years but such use of the land was not permissible. Even though council had originally said it would review the use after six months, no review had ever been carried out. After its conduct was found wrong, a new and legal site for the markets was found.

Methane in their madness? : Hastings Municipal Council had consistently refused to do anything to alleviate an odour problem caused by converting a large section of a natural drainage course into a covered concrete stormwater drain. This work had, in turn, caused a concentration of methane gas. The smell was so bad that it made the complainants ill and they alleged that their relatives even cut short their visits because of it. After this Office inspected the area and obtained expert advice from the Water Board, the council was eventually persuaded to construct vent stacks on the drain to disperse the noxious gases.

Strike remission overlooked: A prisoner had not been granted strike remission for a State-wide warders' strike which had occurred when he was in Maitland Gaol. Enquiries showed that none of the prisoners who had been at Maitland at the time had received the usual strike remission, because the necessary application from the Superintendent had arrived late, after applications from all of the other prisons had been processed, and had been overlooked. The error was corrected and strike remission was given to all who were entitled to receive it.

Complaint of assault rejected: A young man who had been involved in a brawl on licensed premises alleged that police had assaulted him when they arrested him and, again, when he was being held at Sydney

Police Centre. Police denied the allegations. Unfortunately for the young man, so did his companions at the time of the brawl. They said that he had been affected by drink, had behaved obnoxiously, had provoked the brawl and had assaulted an innocent bystander. The young man had violently resisted arrest and had bitten one of the arresting officers. One eye-witness said that the police had " . . . the patience of Solomon . . . " in dealing with the young man. The Ombudsman held the young man's complaint to be not sustained.

Under arrest, or voluntarily assisting with enquiries?: Police claimed that a seventeen year old youth whom they had questioned in relation to a suspected stealing offence, had detained and had taken to the police station in a police vehicle had not been " arrested ", but had " voluntarily " agreed to accompany them. The Ombudsman said that the young man could hardly have been described as " free to come and go as he pleases ", as set out in Police Instructions, and the complaint was found to be sustained. The arresting constable was counselled about arrest matters.

Lone constable shows the way and saves the day!: A number of police at two country police stations were the subject of disciplinary action. They had refused assistance to an officer from a one-man station who suspected that some escapees from a juvenile institution had broken into a farm house and stolen firearms and ammunition. The lone constable, with the help of some neighbouring farmers, later found and arrested the escapees, when his suspicions were well and truly confirmed. The Ombudsman recommended that the constable be commended for his perseverance and commitment to duty.

THE OMBUDSMAN OF NEW SOUTH WALES
FOURTEENTH ANNUAL REPORT
1 JULY 1988 - 30 JUNE 1989

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 fourteenth such Annual Report and contains an account of the work and activities of the Office of the Ombudsman for the twelve months ending 30 June 1989. This report also includes an account of the functions under the Police Regulation (Allegations of Misconduct) Act, as required under section 56 of that Act. Material required in terms of the Annual Reports (Departments) Act is included in the Report. Developments and issues current at the time of writing (September 1989) have been mentioned in some cases in the interests of bringing material up to date.

The Ombudsman during the period of this report was Mr D E Landa.

CHARTER

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, commenced on 12 May 1975. From 1 December 1976, the Ombudsman was empowered to investigate certain complaints against local government authorities and in December 1986

that power was extended to enable him to investigate the conduct of members and employees of 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 1978. A significant expansion of the role of the Ombudsman occurred in February 1984 when the Office of the Ombudsman was given the power to directly reinvestigate complaints about the conduct of police officers.

At the time it established the Office of the Ombudsman, the then Government said, " there is a need for an independent official who will approach in a consistent way, having regard to the justice and merits of each individual case, complaints made to him on administrative decisions " . The independence of the Office of the Ombudsman is paramount; this is formally recognised by the statutory appointment of the Ombudsman, his Deputy and Assistants, and was reinforced in February 1984 by the declaration of this Office as an " Administrative Office " under the then Public Service Act.

In more recent times, other functions have been imposed on the Office. The Ombudsman was declared to be an inspecting authority in terms of the Telecommunications (Interception) (New South Wales) Act. As such, he is required to regularly inspect the records of those authorities which are able to seek warrants to intercept telephone calls. His functions in this regard were set out in some detail in the 1987-88 Annual Report (pp23 - 27).

On 1 July 1989, the Freedom of Information Act commenced in New South Wales. Not only is the Office of the Ombudsman itself subject to the provisions of the Act, but it has an external review function as well. This is discussed in more detail later in this Report.

AIMS AND OBJECTIVES

The primary 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 about the conduct of police, and to report the findings of investigations to the authority concerned, to the responsible Minister and, if necessary, to Parliament.

The Office receives very many oral and written complaints. The Office employs four 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

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

By the time that this Report is made public, the official address and telephone number of the Office of the Ombudsman will be:

3rd Level
580 George Street
SYDNEY NSW 2000

Telephone: 286 - 1000

Toll free telephone: (008) 451 - 524

Fascimile number: (02) 283 - 2911

The office hours of the 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

Principal Officers

The principal officers of the Office of the Ombudsman are:

David Landa,	Attorney at Law	Ombudsman
John Pinnock,	BA LLM (Syd)	Deputy Ombudsman
Graham Chegwidden,	Dip Law (BAB) AAIB (Snr)	Assistant Ombudsman
Gregory Andrews,	BA (Hons)	Assistant Ombudsman
Gordon Smith,	Dip Crim (Syd)	Principal Investigation Officer
Sue Bullock,	B Soc Stud (Syd)	Executive Officer

No member of the staff of the Ombudsman's Office is a member of a significant statutory body by virtue of any association with this Office. The Assistant Ombudsman, Mr G Andrews, is a non-voting member of the Prisoners Legal Service Advisory Sub-Committee of the Legal Aid Commission.

Committees

The following Committees met throughout the reporting year. Further details of the activities of the Committees are

discussed in "Operational Aspects of the Office of the Ombudsman" later in this Report.

Equal Employment Opportunity (EEO) Committee

This Committee, first formed in 1985, is responsible for implementing the EEO Management Plan, monitoring and reviewing the EEO program and preparing the EEO Annual Report.

Ethnic Affairs Policy Statement (EAPS) Steering Committee

The Committee is responsible for implementing the Ethnic Affairs Policy Statement, monitoring and reviewing the EAPS programme and preparing the EAPS Annual Report. The Committee comprises the Personnel Officer, the Media Liaison Officer and a Senior Investigation Officer with particular experience in this area.

Restrictive Work Practices Committee

This Committee was established to identify work and management practices which could be changed to achieve cost savings, in order to receive the 4% second-tier wage increase granted in 1987-88.

The Committee was active in the identification of restrictive work and management practices and recommended changes to a number of practices. To achieve the salary increase, a saving of $48,000 per annum was required. The Committee identified an actual saving of $56,829.

The system of granting wage increases changed with the August 1988 National Wage Decision. As there is now a new approach to wage fixing (Structural Efficiency Principle), this Committee was disbanded.

Occupational Health and Safety (OH & S) Committee

The Occupational Health and Safety Committee was established in 1988 to assist the Ombudsman to put in place an occupational health and safety policy and programme to ensure the health, safety and welfare of all staff at the Office. All members of the OH & S Committee have received accredited training. The Committee comprises two management representatives appointed by the Ombudsman, and four staff representatives elected by their peers.

LEGAL CHANGES

Significant amendments were either made or proposed to both the Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act during the year. On 30 November 1988, the Premier introduced the Ombudsman (Amendment) Bill and the Police Regulation (Allegations of Misconduct) (Ombudsman) Amendment Bill. The central feature of the Ombudsman (Amendment) Bill was the establishment of the Office of the Ombudsman as a corporation. The Bill contained other important provisions, including provisions to:

- relax the secrecy provisions of the Ombudsman Act;
- enable the Ombudsman to delegate to an Assistant Ombudsman the power to make a report of wrong conduct or misconduct under either of the principal Acts;

- authorise statutory authorities to make ex-gratia payments where these had been recommended by the Ombudsman;

- enable the Ombudsman to pay expenses of witnesses attending section 19 Inquiries;

- change the definition of ' wrong conduct ' in the Ombudsman Act;

- enable the Ombudsman to obtain expert assistance in an investigation, without having to seek the approval of the Premier.

The fate of this legislation is discussed later in this Report; whilst the Premier withdrew the Bills after they had been amended in the Legislative Council, he later announced that they would be re-introduced in the Budget session of Parliament. More recently, however, he informed the Ombudsman that the Bills would not proceed.

The Police Regulation (Allegations of Misconduct) Amendment Bill 1988, introduced by the Minister for Police on 25 May 1988, was the subject of consideration and report by a Select Committee of the Legislative Council. This matter is also referred to in more detail later in this Report. The Bill has not proceeded.

The Statute Law (Miscellaneous Provisions) Act 1989 amended the Police Regulation (Allegations of Misconduct) Act by enabling the Commissioner of Police to delegate his powers and functions under the principal Act to an Assistant Commissioner, except for the power to

invoke s.26(1) relating to the suppression of documents and information.

Proposals For Legislative Amendment

The Ombudsman has asked the Government to amend the principal Act to:

- prohibit the passing off of the office of ' Ombudsman ' by other bodies in the public and private sectors;

- enable the Ombudsman, in certain cases, to delegate to the Deputy Ombudsman and to an Assistant Ombudsman his powers under section 19(2), including the power to compel the attendance of witnesses at a section 19 Inquiry;

- provide that all reports to Parliament by the Ombudsman be made to the Speaker of the Legislative Assembly for tabling, instead of to the Premier or Minister for Police;

- provide a statutory right to legal representation for all public authorities and police officers the subject of investigation who appear during section 19 Inquiries. At present, the Ombudsman guarantees such a right as a matter of normal procedure, but there is no legislative guarantee of the right.

Deferral of Incorporation

When introducing the Ombudsman (Amendment) Bill and the Police Regulation (Allegations of Misconduct) (Ombudsman) Amendment Bill in November 1988, the Premier in his second reading speech said:

> The main purpose of these Bills is to fulfil the Government's pre-election undertaking to enhance the powers of the Ombudsman and make him a more effective guardian of the public interest.

Schedule 2 of the Ombudsman (Amendment) Bill constituted the Office of the Ombudsman as a corporation. The Bill also provided that the corporation could employ such staff as might be necessary to enable the Ombudsman to exercise his functions. It enabled the corporation, with the concurrence of the Public Employment Industrial Relations Authority, to fix the salaries, wages, allowances and conditions of employment of any staff in so far as they were not fixed by or under another Act or law. In addition, officers of the Ombudsman were not to be subject to the Public Sector Management Act 1988. A further clause provided that no appeal would lie to the Government and Related Employees Appeal Tribunal in relation to promotional or disciplinary matters. Whilst the Ombudsman would remain subject to a number of constraints, the Ombudsman (Amendment) Bill represented a significant step in guaranteeing the independence of the Office.

The Bill contained important protections for existing staff, including the right to re-appointment of an officer to a position in the public service and the preservation of accrued entitlements, and contained a "sunset" clause providing that there would be a transition

period of three years. Provision for a transition period had been included in the Bill as a result of a request by the Ombudsman on behalf of existing staff.

The prospect of incorporation raised numerous industrial and other issues, and the Ombudsman met with staff representatives to consider these matters. Advice was sought from the Department of Industrial Relations on issues such as contracts of employment and the possibility of a specific industrial award for staff of the corporation. These discussions and negotiations had commenced early in 1989 and continued while the legislation was being debated. They had reached an advanced stage when the Premier, on 11 May 1989, wrote to the Ombudsman and said that the Bill was to be withdrawn because of amendments that had either been successfully moved or foreshadowed in the Legislative Council. The Premier said:

> During debate on the Bill, the A.L.P., the Democrats and Mrs Bignold of the Call to Australia Party all indicated their intention to move amendments to the Bill. Of particular concern were the proposals of the Democrats to remove provisions dealing with information which would pose a threat to prison security and proposals of the A.L.P. to remove provisions ousting rights of appeal to GREAT.
>
> The Government has seriously considered its position in relation to these matters and has reached the view that, with these amendments included, the Government cannot proceed further with the Bill. The sincere attempts of the Government to introduce a balanced set of amendments has been frustrated by the actions of the Legislative Council.

The Ombudsman immediately wrote to the Premier, as the Minister responsible for the legislation and for the Office of the Ombudsman,

and sought a meeting to discuss the future of the proposed legislation. Following that meeting, the Premier announced that it was the Government's intention to proceed with the original legislation in the Budget session of Parliament. The Premier wrote to the Leader of the Opposition and to the Leader of the Australian Democrats in the Legislative Council advising of his meeting with the Ombudsman and of the Ombudsman's view that the legislation should proceed.

On 29 August 1989, however, the Premier wrote to the Ombudsman and said:

> I refer to our recent discussion regarding the options available in relation to the Ombudsman (Amendment) Bill.
>
> You will recall that I indicated during that discussion my intention to write to the ALP and the Democrats regarding their proposed amendments to the Bill.
>
> I have now received replies from both Mr Carr and Ms Kirkby regarding this matter. They have both indicated that they are not prepared to withdraw their amendments to the Bill.
>
> You would appreciate that in light of this, the Government cannot now proceed with the Bill. I am obviously very disappointed with this outcome.
>
> As we discussed, the Government will now proceed with the more minor uncontroversial amendments which were contained in the Bill via the Statute Law Revision Programme.

PROMOTION AND PUBLICITY

Community awareness programme

The Ombudsman is aware of the difficulties that country residents have in dealing with offices based in Sydney and has continued a campaign of public awareness visits to centres throughout New South Wales. The Office has also introduced a toll-free telephone service for complainants living outside the Sydney metropolitan area in order to make the Office more accessible. The Ombudsman hopes that this service will encourage residents of country areas to contact his investigators to discuss their complaints.

The Ombudsman intends to change the emphasis of the community awareness programme to make more use of local media and to have more contact with local community groups and public authorities.
A more open relationship with local police during public awareness visits has already been encouraged. Ombudsman officers spoke to the police inspector in Orange and the police regional commander in Bathurst during visits to those centres. They discussed the types of complaints that had been received about police in the area, with the result that some matters were able to be dealt with at the local level, without the need for formal involvement by this Office. The police officers seemed pleased to have had the opportunity to speak to representatives from the Ombudsman's Office.

During 1988-89, Ombudsman Officers visited seventeen country centres. They were:

Broken Hill	14 July	1988
Merimbula	16 August	1988

Eden	16 August	1988
Batemans Bay	17 August	1988
Narooma	17 August	1988
Bega	17 August	1988
Moruya	18 August	1988
Armidale *	12 October	1988 & 26 April 1989
Tamworth *	13 October	1988 & 27 April 1989
Albury	19 October	1988
Nowra	20 October	1988
Wagga Wagga	21 October	1988
Lismore	23 November	1988
Grafton	25 November	1988
Dubbo	9 March	1989
Orange	9 May	1989
Bathurst	11 May	1989

* The Ombudsman took part in these visits

Ombudsman officers continue to visit Newcastle on a monthly basis and deal with an average of twenty complaints each month. The Community Centre in Newcastle has continued it's long-standing service to this Office by providing facilities, making appointments and arranging contact with other community groups in the Newcastle region.

Visits to Wollongong were interrupted during the year, when the rent on the usual venue for the visits, the Town Hall Conference Room, increased to $140.00 per day. New accommodation was sought, and in June 1989 the Ombudsman decided that the new premises of the Community Justice Centre in Wollongong would be used. The Community Justice Centre was able to provide an appointment system as well as separate interview rooms.

Talks to police

The Ombudsman has endeavoured to open up lines of communication with the Police Force during the year by addressing police in their workplace and at the Police Academy. He addressed police officers of all ranks at meetings at Chatswood, Port Macquarie, Newcastle and the Police Centre, Surry Hills.

The Assistant Ombudsmen have given a number of lectures to student police officers at the Police Academy in Goulburn, and the Assistant Ombudsman (Police) has been invited to address each of the Detective Training Courses there.

Public speaking engagements

During the year the Ombudsman gave talks to the following groups:

- The Association of Government Lawyers
- The Institute of Municipal Management in local government
- Hunter region combined community centres

The Assistant Ombudsman (Prisons) was a guest panellist at the Legal Insurance Issues Workshop at the Shires Association Annual Conference, and was a guest speaker at a seminar of Official Visitors at the Department of Corrective Services in June 1989.

Overseas visits

In September 1988 the Ombudsman attended the conference of the International Association of Civilian Oversight of Law Enforcement, in Canada.

Conference delegates included ombudsmen, senior police and members of civilian boards of review from many countries and states and the conference afforded the Ombudsman an opportunity to compare other systems for dealing with police complaints. The Ombudsman formed the opinion that the New South Wales police complaints system compares favourably with others and is superior in independence and effectiveness to systems operating in the United States, many European countries and the United Kingdom.

The International Conference of Ombudsmen was held in Canberra in October 1988. At the conclusion of the conference, a number of ombudsmen, particularly from Canada, visited the Sydney office. The Information and Privacy Commissioner of Ontario, Mr Sidney Linden, gave the office insight into the Freedom of Information and Protection of Privacy Act as it operates in Ontario, Canada; this was particularly useful with the introduction of Freedom of Information legislation in this State on 1 July 1989.

Open discussion with Government departments

The Ombudsman is conscious of the need for his officers to clearly inform public authorities of his powers, policies and procedures.

In April 1989 Ombudsman officers met with senior executives of the Department of Family and Community Services at the invitation of the

Director General, Mr Dalton, to present information about the office and its role, and to discuss any problems which might have arisen in dealings between the Office and the Department. The Director General later thanked the Ombudsman for the "well received" contribution by his officers to the meeting.

Articles for "Police News"

The Ombudsman is concerned that there remains a great deal of misunderstanding amongst police officers about the role of his Office. A number of incidents which occurred during the year reinforced this concern and highlighted the need for more information to reach police officers on all levels.

The Ombudsman has spoken to police in four police regions, and the Assistant Ombudsmen have lectured student police officers at the Police Academy in Goulburn; more talks are planned, but the Ombudsman wishes to reach officers working in the field who may not be able to attend the talks.

A regular column by the Ombudsman in the journal of the Police Association, "Police News", was considered to be the most effective way of reaching most police officers with a view to dispelling some of the misconceptions officers have about the Office. This has been arranged. The series of articles will outline the procedures used to investigate complaints under the Police Regulation (Allegations of Misconduct) Act. Case studies will be used to illustrate relevant sections of the Act and to explain how the Ombudsman's Office deals with complaints. The first article was published in the September issue of "Police News".

Independence of the office of Ombudsman

An Ombudsman must not only be independent; he must always be seen to be independent. Qualifications for the office of Ombudsman vary from State to State; usually they relate to restrictions about age and about holding no other forms of occupation. Only in Queensland and Western Australia are there statutory provisions that prevent a person who, within the preceeding three years, has been a member of a Parliament of a State (including the home State) or of the Commonwealth Parliament, from being appointed Ombudsman. Clearly, these provisions are designed to prevent a "jobs for the boys" approach to the appointment of an Ombudsman.

To date, even though similar statutory provisions do not exist, it has been the accepted convention in all other States that appointments to the position of Ombudsman should be free of any taint of "jobs for the boys".

It comes as a surprise, therefore, to learn of the proposal by the Tasmanian government to appoint as Ombudsman a former member of Parliament, the former Labour Leader, Mr Neil Batt. Mr Batt lost his seat in Parliament at the recent elections. Of the twenty-four Ombudsmen appointed in Australia by State and Federal Governments, Mr Batt would be the first former politician to be so appointed.

The Tasmanian proposal raises several issues. Appointments in Australia, New Zealand and the United Kingdom, until this point, have never been characterised as "political". There has been continual argument and debate about the best method of selecting Ombudsmen. Many observers advocate that appointments should be made by a Select Committee of Parliament, comprising representatives of all parties. Certainly, the credibility of the office will be adversely affected if there

is any possible perception that the Ombudsman might not be totally impartial in his dealings with all members of the Parliament. Similarly, complainants may be reluctant to approach an Ombudsman who has recent and close political associations. Many complaints involve the provision of sensitive, personal information relating to matters under investigation. It is clear that the integrity and impartiality of an Ombudsman must be seen to be of no less a standard than that expected of a Supreme Court Judge.

The proposed appointment in Tasmania has evoked a number of editorials in the press there. In criticism, The Examiner in Tasmania editorialised:

> The Ombudsman is appointed to deal with complaints by members of the public against government and its instrumentalities. For that reason it is in a very special position of trust. To work effectively, it must not only operate competently, but it must have the confidence of the community that it will right wrongs and give fair and impartial findings. Perceptions are important.

At the time of writing, Mr Batt's appointment has not been confirmed, and it appears that there is still some possibility of review.

It is hoped that the office of Ombudsman in Tasmania will not be compromised. There is no doubt that politics and the office of Ombudsman do not mix. The Ombudsman cannot be subject to any political influence in making his decisions, because he is always looking at issues which relate to the administration of government agencies. Irrespective of whether the proposed appointment in Tasmania is confirmed or reversed, public confidence in the office of Ombudsman in that State will need to be rebuilt, as will the Tasmanian government's commitment to maintaining for the public benefit a truly independent system of oversight of its administration.

GENERAL AREA

Complaints about departments and authorities (other than Department of Corrective Services)

New complaints

During the year 969 new complaints were received about departments and authorities. In addition, 227 complaints that were under enquiry or investigation were brought forward from 1987-88, creating a total of 1196 active matters.

Finalised complaints

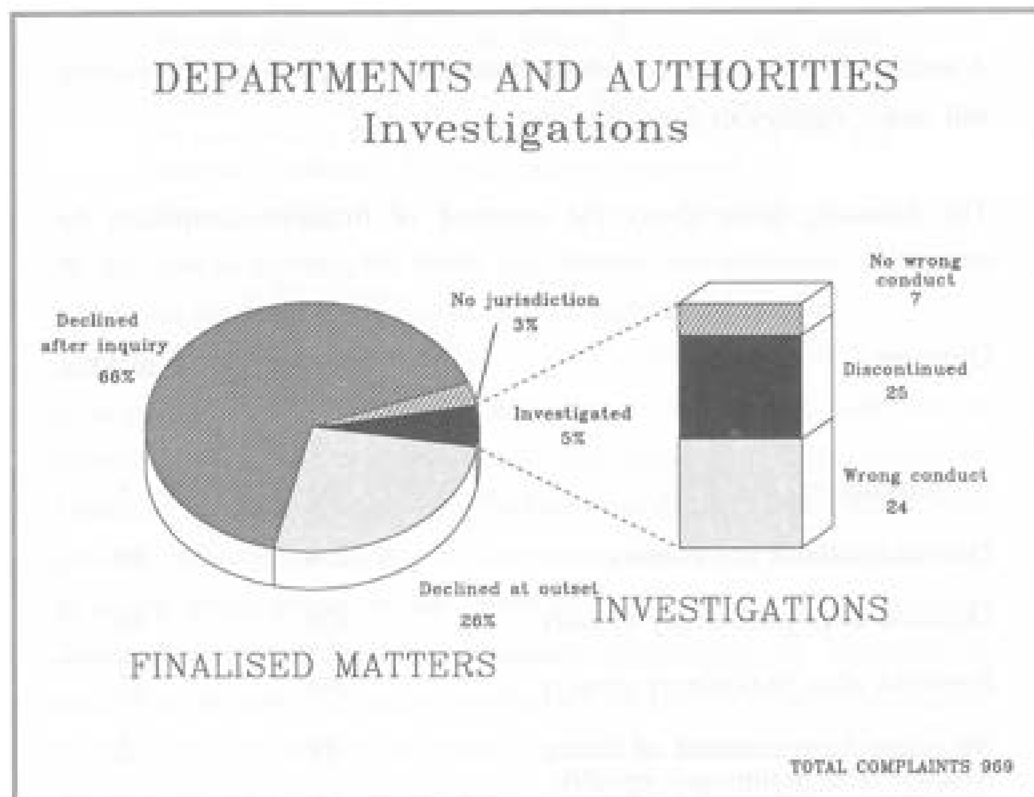
A total of 996 cases were finalised during the year, leaving 200 matters still under enquiry or investigation.

The following table shows the outcome of finalised complaints by category:

Outcome	Number	% of total
No jurisdiction	31	3
Declined without any enquiry	259	26
Declined after preliminary enquiry	479	48
Resolved after preliminary enquiry	146	15
No prima facie evidence of wrong conduct after preliminary enquiry	27	3
	942	95%

Investigation discontinued	23	2.3
" No wrong conduct " found	7	0.5
" Wrong conduct " found	24	2.2
	54	5%
TOTAL	996	100%

The following chart shows details of complaints that were investigated:



Need to protect the name "Ombudsman"

Not since 1977-78 has it been necessary for the Ombudsman to include in an Annual Report any comment on the need to protect his title. In that year, the then Ombudsman, Mr K Smithers, outlined his dealings with the University of New England over the issue and concluded his account:

> . . . I feel that it [would be] a pity if there [was] any proliferation of the use of the word "Ombudsman" as this would tend to confuse people as to the nature of the Office and detract to some extent from it (p.14, 1977-78 Annual Report).

This year, regrettably, proposals to use the name "Ombudsman" have surfaced with rapidity.

On 12 April 1989 the Ombudsman wrote to the Premier asking that action be considered to restrain the use of the name "Ombudsman" by commercial organisations and others. The Premier rejected the request, on the basis that the word had become part of the English language. After serious reflection, however, the Ombudsman decided to press the issue and to ask the Premier to reconsider the introduction of appropriate legislation to protect the title.

The Ombudsman wrote to the Premier on 31 July 1989 and said:

> Although disappointed by your response, I have been considering the points you made. Subsequent events lead me to raise the matter with you again. Recent developments in New Zealand and examination of what has become increasingly apparent in the United Kingdom

and in the USA show the need for legislative action here, I believe.

Your letter of 26 May 1989 notes that the word "Ombudsman" is now part of the English language. I agree, of course, but this is not to say that misuse of the word does not debase the institution set up by the government of this State, [or cause] confusion to the public.

The Sydney Morning Herald's use of George Masterman, QC, as its Ombudsman

(i) George Masterman said he would never call himself Ombudsman for the Herald but the paper, whenever it deals with the subject, uses the title "Ombudsman". It fails, conspicuously, to use any alternatives such as watchdog, arbitrator etc.

(ii) His appointment, if not designed to do so, certainly capitalises on the status and reputation of this Office. Clearly, it facilitates confusion.

Bank and Insurance Ombudsmen

(i) The organisations concerned are commercial undertakings.

(ii) The positions are industry-funded, and independence is by no means assured.

(iii) This will cause further confusion for the public, who may be diverted from established alternative recourse. Indeed, this office received a number

of calls from the public following the announcement by Westpac Bank on 12 July 1989, that an Ombudsman would be appointed to handle bank complaints. All of the callers assumed that the announcement meant my office would now be handling bank complaints. This type of confusion is bound to increase as the appointment date of a banking "Ombudsman" approaches.

University Ombudsman

(i) In setting up its Office of the Ombudsman, there was a deliberate passing off by the University of Technology Sydney. The students union brought into existence what purported to be an Ombudsman, with a variety of unlawful acts. These included passing off, breach of copyright, breach of Section 37(2) of the Ombudsman Act, and a probable breach of Section 52 of the Trade Practices Act.

I am enclosing a pamphlet describing the University of Technology's new Ombudsman which uses the "Lifesaver" image of our poster. Our poster has helped achieve wide familiarity with this Office throughout New South Wales, particularly in country areas, where we regularly visit. The University has of course breached the Ombudsman Act itself. I now have undertakings that the pamphlets will no longer be used, but I am concerned that 13,000 of them were distributed. The elements of confusion and unfulfilled expectations by the public concern me greatly.

These examples demonstrate the need for prompt action. This Office deals with the widest possible range of members of the public. The Office has a range of

programs to inform the public about the role of and access to the Ombudsman. What is now happening, as illustrated above, is plainly counter-productive.

In the United States of America, the name of the Ombudsman dignifies minor, petty complaint procedures on local levels administered by unpaid or part-time workers, usually with the most modest qualifications. They probably have more Ombudsmen in America than in any other place in the world, none of them having any significant power to effect meaningful protection or oversight as is provided in our system.

Although the early reaction in New Zealand to a request similar to mine was that legislative protection was not needed, the Government is currently completing legislation that will provide the kind of protection that I seek from the New South Wales Government. All States of Australia are now looking at the problem, and I have no doubt that action will need to be taken if the integrity of independent oversight, as established in New South Wales, is to maintain its credibility.

I would like the opportunity to discuss this matter further with you. I see the matter as being of sufficient importance for me to make reference to it in my forthcoming Annual Report. If the problem goes unchecked, the result is likely to be damage to this office of a magnitude which could then only require a report by me to the Parliament.

The New Zealand legislation referred to in the Ombudsman 's letter has since come into force.

The cover of the pamphlet distributed by the University of Technology, as well as the cover of the Ombudsman's poster, are reproduced on the following page.

REPRODUCTIONS OF POSTERS

Role of the Ombudsman

New South Wales has had an Ombudsman since April 1975. Regrettably, many citizens, and even some public authorities, continue to be confused about the Ombudsman's role and the powers that he can exercise. For this reason, it is worth repeating some of the basic information that has appeared in previous Annual Reports.

With the emergence of the modern welfare state, government intrusion into the lives of individuals has increased significantly. Associated with this development has been a growth in the number of government instrumentalities, with the concomitant increased potential for maladministration, abuse of authority and official insensitivity. The institution of Ombudsman has arisen from the need to address the problems people experience in dealing with this ever-expanding and increasingly complex bureaucracy.

Put simply, the role of the Ombudsman is to investigate complaints about the administrative conduct of New South Wales government departments, statutory authorities and local government authorities, and to exercise a civilian oversight role in respect of complaints about members of the Police Force. The Office of the Ombudsman is established by statute. The Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act prescribe in detail the primary functions and responsibilities of the Office.

Other, secondary, functions have also been given to the Ombudsman; these have been briefly discussed elsewhere in this Report.

Somewhere between the view of the Ombudsman as a kindly social worker referring people to the appropriate bureaucrat, and the perception that he is a "gung-ho" investigator seeking to apply the

blow torch to the belly of government authorities, lies the truth.

Like many other agencies, the Ombudsman is often able to offer suggestions about avenues of assistance which might help to solve a citizen's problem. More importantly, the Ombudsman aims to address the causes of maladministration and, if possible, to remove them, thereby "heading off" more complaints about the same sorts of problems. In the process, the Ombudsman can sometimes solve the individual's problem, but that is not his primary function.

The Ombudsman, however, does not have powers of compulsion; he can only achieve his goals indirectly, by way of recommendations to the public authority concerned, and, in some cases, by a report to Parliament. The only "sanction" available to the Ombudsman is publicity once an investigation is finalised and his report is made. As well, the Ombudsman's role is confined to the executive arm of government. He has no jurisdiction to investigate matters which involve either the legislature or the judiciary. In addition, he will usually only take up complaints when there is no other avenue of appeal or where the citizen has been unable to obtain remedial action through other means.

Within these parameters, the scope of the Ombudsman's role is quite broad. He has extensive and coercive powers to enable him to investigate complaints of "wrong conduct", which is defined in the Ombudsman Act as conduct that may be:

- contrary to law;
- unreasonable, unjust, oppressive or improperly discriminatory;

- in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory;

- based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations;

- based wholly or partly on a mistake of law or fact;

- conduct for which reasons should be given but are not given; or

- otherwise wrong.

The breadth of these definitions, although regarded by some as troublesome, has the advantage that it allows the most thorough investigation of complaints which raise issues about natural justice.

The Office of the Ombudsman is by its nature predominantly reactive rather than pro-active. An investigation is usually (but not always) initiated as a result of a citizen's complaint; this may be about any number of administrative matters, such as problems with departmental policies and procedures, unresponsiveness of bureaucrats or delays and inefficiencies.

In many cases, the problem causing the citizen concern can be resolved following preliminary enquiries by the Ombudsman's Investigation Officers. The officer assigned to a case does not act as an advocate for either the complainant or the public authority, but seeks to obtain the

facts of the matter. Sometimes a public authority will readily admit that there has been a mistake or that something has been overlooked, and will rectify the situation to everyone's satisfaction. Sometimes it is clear that the public authority has acted properly, but the complainant remains unhappy about the decision or the action taken. In these cases, the complainant may not always be satisfied with the outcome of an approach to the Ombudsman; but if preliminary enquiries show no evidence of wrong conduct, no further action will be taken by the Ombudsman's Office.

Formal investigations are commenced either in a response to a citizen's complaint or on the Ombudsman's own initiative when, after preliminary enquiries, there appears to be some prima facie evidence of wrong conduct and the matter has not been satisfactorily resolved.

The Ombudsman's findings and recommendations following an investigation are based solely on the evidence obtained from the investigation. In this process, the Ombudsman is not an aloof observer, as some seem to think, but an active participant, questioning, eliciting and testing evidence from all available sources. During the investigation process, complainants and public authorities are able to comment on each other's statements.

On completing an investigation, whether there has been a finding of wrong conduct or not, the Ombudsman reports his findings and, where appropriate, his recommendations, to the head of the public authority investigated, to the responsible Minister, and to the complainant.

In some cases, investigations take the form of Inquiries; these involve formal hearings in which the Ombudsman exercises powers similar to those granted to Royal Commissions. Nevertheless, the Ombudsman's Inquiries are not like court or tribunal proceedings, because they are

not adversarial in nature and are not held in public.

The key characteristics of the Office of the Ombudsman are informality, independence and impartiality.

Although many of the procedures associated with investigations may appear to be formal, they are quite informal when compared to other forms of investigation and, in particular, with court proceedings. This informality gives both the complainant and the public authority every opportunity to present information. Without sacrificing the principles of natural justice, procedures have evolved to the point where investigations and hearings can in most cases be conducted relatively quickly and informally.

The independence of the Office is formally recognised by the statutory appointment of the Ombudsman, his Deputy and Assistants, and was reinforced by its declaration in February 1984 as an "Administrative Office". Nevertheless, no agency of government should be beyond scrutiny. The New South Wales Ombudsman's Office has been created under a statute of the Parliament and is responsible ultimately to the Parliament. Special attention is given to Parliament's wishes in such matters as the Annual Report; this extends to the desirability of assessing the efficiency and effectiveness of the Office in a sensible manner.

The impartiality of the Ombudsman's Office, like its independence, is safe-guarded ultimately by its statutory appointments. However, it also rests upon the integrity of its investigating, interviewing and support staff. Impartiality, like independence, needs to be demonstrated. Thus the statutory office-holders are not part of the "network" of senior bureaucrats, while knowing a good deal about them. The staff are temporary or permanent public servants who must understand their

colleagues in other places, without identifying wholly with them. The Ombudsman's Office, more than any other, must resist being "captured" by those whom it is intended to regulate; investigations by this Office sometimes suggest that this fate has befallen certain "regulatory" agencies of government.

Impartiality can be protected within the Office, as well, by, among other things, keeping hierarchies to a minimum. Investigation officers are free to exercise their own initiative, within the framework of procedures set down under the Act; there is no impediment to pursuing a legitimate investigation to its end. The major controls are directed towards ensuring that complaints receive the full attention that they deserve; thus no complaint may be declined and no investigation discontinued without the approval of, at least, the Senior Investigation Officers. Investigation officers can discuss complaints and argue their views with each other, but each complaint is the responsibility of an individual, until such time as a report of wrong conduct is adopted (where appropriate) by the Ombudsman or Deputy Ombudsman. The aim is to ensure impartiality by imposing a minimum of internal pressure upon the person conducting an investigation. Formal checks are mostly located at the report stage, where the documents are scrutinised to ensure that they state a reasonable case, take into account the submissions of the parties concerned, and conform with the Act. Since individuals play such a large role in investigations, similar cases may sometimes be treated in a slightly different way by different officers, usually at the outset of the matter rather than in its later stages. By and large, this is preferable to creating elaborate hierarchies and "standard" responses, in the tradition of classic bureaucracies.

Some public authorities seem to regard the Ombudsman's Office as aggressive and obstructive. It is understandable that the Ombudsman

may come into conflict with some public administrators and their political masters, and that he will sometimes be regarded as a "disturbing element" in the system.

Traditionally, government departments have operated away from the public eye. To have their operations examined by outside investigators may, indeed, be disturbing to some officials and may even be perceived as an attack on the government of the day. Being questioned about administrative procedures and times and dates, and being exposed to close scrutiny, has at times caused disquiet within public authorities. Introduction of a Freedom of Information Act in July 1989 has further opened up the processes of government. The Ombudsman sees open, publicly accountable government as an ideal, and has made several, so far unsuccessful, requests to have the secrecy provisions surrounding his own investigations removed.

Misconceptions about the role and powers of the Ombudsman are common amongst complainants too. Many believe that the Office can issue directions to public authorities; some believe its function is to make representations on their behalf. But as already discussed, the Ombudsman cannot direct that any particular action be taken; he makes no declarations regarding "guilt"; he cannot impose sanctions as a court does; and it is not his role to act as an advocate for any party.

The Ombudsman's power lies in making public his findings after an investigation, and in recommending an appropriate course of action. The public authority cannot be compelled to comply, but most do because the Ombudsman often uncovers poor administrative procedures, and it is in the interests of the authority to change them. The benefits that flow from this far outweigh the understandable discomfort experienced by some public authorities when faced with evidence of their failings.

Many authorities do not recognise the potential value of the Ombudsman's investigations. Complaints to the Office of the Ombudsman are, in a sense, a barometer. They measure public response to existing procedures; they attract attention to possible failings within existing systems; and they have the potential to encourage solutions to problems which may not otherwise be addressed. When used in a positive manner, complaints and the reports that they generate can be valuable management tool for public authorities.

Public authorities might better respond to public dissatisfaction by dealing with aggrieved members of the public through improved counter staff recruitment methods, better public communication and the establishment of an internal complaints unit.

The fact that not all public authorities respond to this Office in a positive way stems partly from the past secretiveness of public administrators; 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.

Sometimes, people who ought to know better display a worrying ignorance of the role of the Ombudsman. When the Ombudsman issued his report on an investigation of the conduct of a metropolitan council, the Mayor was reported in the local press as saying that the Ombudsman's report had found "without any form of trial two people guilty", and "I hope that all citizens still have the basic right to be innocent until a proper trial determines their innocence or guilt".

The Mayor's comments, if they were accurately reported, demonstrate a lamentable misconception about the role of the Office of the Ombudsman; moreover, they appear to confuse that role with an adversarial function more at home in the courts. The Ombudsman is concerned with finding out facts and making judgements about them in

the context of possible maladministration. His role has nothing at all to do with finding guilt or innocence. And, of course, unlike the courts, the Ombudsman's powers are purely persuasive, relying ultimately on public scrutiny and awareness to persuade recalcitrant public authorities to act on his recommendations.

Relocation of the Office of the Ombudsman

The Office of the Ombudsman first occupied premises on the 14th Floor of Hooker House, 175 Pitt Street, Sydney in 1978. Since then, both the workload and the staff of the Office have increased. In recent times, the Ombudsman has been required to take on additional functions under both the Telecommunications (Interception) (New South Wales) Act and the Freedom of Information Act, and additional office space in George Street had to be obtained on a short term lease basis. Even this, however, failed to satisfy the accommodation needs of the Ombudsman's Office. Accordingly, action commenced in 1988 to relocate the Office.

The Ombudsman believed that it was essential that his office remain in the Central Business District, because this location was the most accessible to the people of New South Wales and is the area which contains most government authorities. The Premier approved of this and, in accord with government policy, responsibility for finding suitable premises, for negotiating, approving and executing the necessary lease and for arranging for the new premises to be fitted out rested with the Office Accommodation Bureau of the Department of Administrative Services. These arrangements, while part of the Government's commitment to reducing the cost of public sector management, have proved both frustrating and costly in terms of time and money.

Significant delay occurred in finalising the lease for the new Office at

580 George Street, Sydney. Repeated requests to expedite the lease negotiation process were made to the Office Accommodation Bureau and, finally, directly to the Secretary of the Department of Administrative Services. Delay was also experienced in attempting to negotiate an early release from the lease over the accommodation in Hooker House. Although the Office Accommodation Bureau assured the Ombudsman that the matter was being followed up, those assurances proved to be inaccurate. It was discovered, in fact, that the Office Accommodation Bureau had delayed, for twelve months, a reply to a letter from the Managing Agent for Hooker House, which had advised of a prospective tenant who might be interested in taking over the remainder of the lease, and which had sought instructions on the matter. Such administrative inaction left the Ombudsman's Office, through no fault of its own, facing the prospect of having to pay rent on three premises, namely Hooker House (the lease for which is current to February 1990), the short term accommodation in George Street (which is leased until early October 1989), and the new premises (where rental payments became the responsibility of this Office on and after 1 July 1989).

Once again, the matter was raised directly with the Secretary of the Department who has agreed that the Ombudsman's Office will not have to pay additional rent once it leaves Hooker House, and that, in the absence of another tenant being found, rent will be paid by the Department of Administrative Services. Although the much-needed funds of the Ombudsman's Office have been saved to be used for better purposes, there is nevertheless an added financial burden on public funds. This might have been avoided had the Office Accommodation Bureau acted more efficiently or if the Office of the Ombudsman had not been prevented from negotiating its own lease matters.

Regrettably, and for once through no fault of the Office Accommodation Bureau, the saga of delay and inefficiency continued with the actual fitout of the new premises. Industrial disputes unrelated to the fitout of the premises prevented the building contractor from gaining access to the building site and from depositing building materials there. The original time given for the fitout of the new premises was eight weeks; but at the time of writing, this has been increased to twelve weeks. It is now anticipated that the relocation of the Office of the Ombudsman will take place at the end of September 1989. Despite the many problems that have been encountered in relocating the Office, the Ombudsman and his staff look forward to the move.

Freedom of Information

The Freedom of Information Act 1989 (the Act) came into force on 1 July 1989. The Ombudsman has dual functions under the Act. On the one hand, he must consider requests for access to information held by this Office; on the other hand, he has an "external review" function.

Persons who are dissatisfied with the way their requests for information have been dealt with by other government agencies can seek an internal review of the matter by the relevant agency. If they remain dissatisfied after an internal review, they can request an external review by the Ombudsman. Such requests become complaints under the Ombudsman Act and are dealt with in the same way as other complaints made about the administrative conduct of public authorities.

The Office has established an internal Freedom of Information Unit which will deal with all requests, both for information sought from the Office and for external review by the Ombudsman of the decisions of other agencies. Two Investigation Officers, an Interviewing Officer and a Keyboard Operator have been appointed to staff the Unit.

The Ombudsman intends to take an informal approach, wherever possible, to requests for information held by his Office. In this way, he hopes to be able to dispense with the need for formal applications to be made, if the information requested is readily available and easily gathered by his officers. Similarly, in relation to his external review function, the Ombudsman hopes to adopt a "conciliation" approach to complaints about Freedom of Information matters, particularly at their preliminary stage. It is hoped that, in this way, disputes about information can be resolved, without the need for a formal investigation under the Ombudsman Act.

The benefit of taking an informal approach ought to be that much of the cost and paperwork, inevitably associated with a more formal attitude to Freedom of Information, will be avoided. As well, the Ombudsman believes that such an approach reflects the spirit of the legislation and is in keeping with the long-held philosophy of this Office that as much information as possible should be disclosed to complainants and, where relevant, to the public.

The operation of the Act in the Ombudsman's Office will be closely monitored and evaluated after its first year of operation. Attention will also be paid to the potential for any conflict which might arise out of the dual functions of the Office. Although not necessarily reflecting the situation in New South Wales, it is interesting to note that the Victorian Ombudsman's Office has been exempt from that State's Freedom of Information legislation since October 1987. The exemption was made because of the possibility of conflict with the Office's role in relation to the Administrative Appeals Tribunal. Even at this very early stage, it seems likely that there will be conflict between the Ombudsman's function as an investigator of public complaints and his functions in terms of the Freedom of Information Act.

State Owned Corporations Bill : "privatisation" a popular catchword

The New South Wales Government, in line with similar trends elsewhere in the world, particularly in the United Kingdom, and in other States of Australia, has announced that many government instrumentalities are to be privatised. To this end, in August 1989 the Government introduced into Parliament the State Owned Corporations Bill 1989. The Bill provided that those government enterprises which were corporatised would be exempt from the provisions of the Freedom of Information Act which commenced on 1 July 1989. More significantly, the Bill provided that any corporatised body would be immediately exempted from the provisions of the Ombudsman Act, and from the Equal Opportunity in Public Employment provisions of the Anti-Discrimination Act. The Bill was rushed through the Legislative Assembly on 3 August and was then sent to the Legislative Council.

The Ombudsman's Office only became aware of the Bill's existence

through press reports at the time the Bill was passed in the Legislative Assembly. The Premier was reported in the Sydney Morning Herald as saying that it was necessary to exempt State owned authorities from these laws to ensure that they would be able to compete on an equal basis with private sector corporations. Mr Greiner told the Parliament that the concept of the "level playing field" was a central element of corporatisation policy. The Bill, however, did not state which bodies were to be corporatised; these were to be "scheduled" as the process of corporatisation occurred.

The Ombudsman issued a press statement and said:

> The role of the Ombudsman is to provide an independent means of complaint about the bureaucracy. By attempting to reduce the Ombudsman's jurisdiction, the Government is robbing the NSW public of an important complaints mechanism.
>
> Over the past 15 years the Ombudsman's Office has played a crucial role as a watchdog, and there are many clear examples of the need for independent oversight of government agencies.
>
> The government has not given any concrete method or procedures for complaints against State owned corporations. Do they intend to establish a new complaints body and thereby duplicate the work done by this Office? Rather than retreating behind the rhetoric that market forces will make State owned corporations accountable, the government should be leading the way in public accountability.
>
> It is ironic that at a time when the banking industry in Australia is establishing an "Ombudsman" to deal with customer complaints, the NSW government is taking a step backward by attempting to limit the power of the NSW Ombudsman.
>
> The independent oversight of the Ombudsman has helped the NSW public gain access to information in the decision

> making process and has, in fact, improved the procedures of many government departments.
>
> The list of corporations could be unlimited and the public will not be served by placing State Owned Corporations outside the jurisdiction of the Ombudsman Act.

The essence of the corporation, a creature of statute, is government policy, and the function of the corporation is, therefore, to implement government policy. The government would not permit the corporation to exist if it did not abide by its implicit legislative mandate. The function of the Ombudsman is to investigate alleged maladministration on the part of government authorities. Traditionally, the legislature has relied upon the judiciary to determine the Ombudsman's jurisdiction when disputes arise about it, and to decide when an act or omission is a "matter of administration".

The proposed establishment of State Owned Corporations, exempt from the Ombudsman's oversight, raised a number of serious issues, including:

- the degree of protection available to the public in relation to the "business decisions" of such corporations in implementing government policy
- the public's right to scrutinise, through the Ombudsman, the operations of such corporations.

Governments, of course, are perfectly entitled to require their instrumentalities to operate as "businesses"; but those "businesses" must operate responsibly, and must conduct themselves with good faith and treat all parties involved fairly. That being the case, it would be incongruous to remove the Ombudsman's ability to investigate complaints about State Owned Corporations. In this context, it is

important to remember that the Ombudsman has no power to affect decisions; his role is to make recommendations arising from the findings he makes after an investigation.

The main argument advanced for taking statutory corporations outside the scrutiny of the Ombudsman was the "level playing field" concept; that is, why should a State Owned Corporation, for example, have to disclose information when its private sector competitors are not obliged to? The answers are:

- they are State Owned Corporations, and must have a constitutional accountability; private sector corporations are certainly accountable in one way or another;
- many of the contemplated State Owned Corporations will be monopolies in the area of public utility; they will have no competition from any source. A "level playing field" certainly does not exist in respect of this category of State Owned Corporation.

The Ombudsman's Office had no input to or knowledge of the proposed Bill. The Ombudsman felt it imperative that his views be publicly stated. Furthermore, it is the Ombudsman's belief that State Owned Corporations, acting in good faith and not being advantaged by monopolistic situations to the disadvantage of the public, should have nothing to fear from the Ombudsman. Section 13(4) of the Ombudsman Act provides:

> Where any person has complained to the Ombudsman under section 12 about the conduct of a public authority, the Ombudsman in deciding whether to make that conduct the subject of an investigation under this act, or whether

to discontinue an investigation commenced by him under this Act -

(a) may have regard to such matters as he thinks fit; and

(b) without limiting paragraph (a), may have regard to whether, in his opinion -

. . .

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

. . .

State Owned Corporations will be able to challenge the Ombudsman's jurisdiction in the courts if they believe that they are being unfairly prejudiced by the Ombudsman's scrutiny.

Fortunately, the Bill was amended in the Legislative Council to provide that State Owned Corporations would be "public authorities", for purposes of the Ombudsman's Act and, therefore, would remain subject to the Ombudsman's jurisdiction. The Ombudsman understands that the Government has accepted this amendment. If the Bill had not been amended in this way, the public would have been left without a forum through which to question the bureaucracy in those instances where the privatisation process had been put in place; the public would have been left without remedy, and a significant section of the administration would have been left largely unaccountable.

Independent Commission Against Corruption

The Independent Commission Against Corruption Act 1988, was proclaimed on 13 March 1989. Section 118 of that Act amends Schedule 1 of the Ombudsman Act to provide that the conduct of the Independent Commission Against Corruption (ICAC) and of its officers is outside the jurisdiction of the Ombudsman. At the same time, by virtue of the definitions of "public authority" and "public official" in section 3(1) of the ICAC Act, the Ombudsman and his officers are subject to the scrutiny of the ICAC.

The Ombudsman Act gives wide immunities to the Ombudsman. Section 35 of the Act provides that the Ombudsman and his officers are neither competent nor compellable, either to give evidence or to produce documents, in any legal proceedings in respect of information obtained by the Ombudsman in the course of his office, except in specific and strictly limited circumstances. Section 35A provides that the Ombudsman and his officers are immune from civil or criminal proceedings in respect of any matter or thing done or omitted to be done for the purpose of executing the Act, unless the act or omission was done or omitted to be done in bad faith.

Traditionally, the Ombudsman is responsible, in the widest sense, to Parliament. Whilst he is appointed by the Governor acting on the advice of the Executive Council, like justices of the Supreme Court he may only be removed from Office by the Governor upon the address of both Houses of Parliament. The Ombudsman has never suggested that he and his officers should not be accountable for their actions. The Ombudsman is concerned, however, that the operation of the ICAC Act and his discharge of the duties and responsibilities cast on him under that legislation may, in practical terms, affect his traditional independence and the operation of his Office.

In order to facilitate the development of mutually agreeable procedures and harmonious relations between the two organisations, and to address the concerns which he held, the Ombudsman met with the then Commissioner-designate, Mr Temby, prior to the proclamation of the ICAC Act. Further meetings have taken place between the Ombudsman and the Commissioner, as well as between senior officers of both organisations. Whilst these meetings have achieved a great deal, many of the Ombudsman's concerns remain.

As a preliminary matter, the Ombudsman notes that agreement has apparently been reached between the Commonwealth and New South Wales governments to declare the ICAC an "eligible authority" under the Telecommunications (Interception) Amendment Act 1987 (C'th) and the complementary State legislation, to enable the ICAC to intercept telephone conversations. The legislation requires an eligible authority to maintain records concerning every facet of its interception operations, and in New South Wales it is the Ombudsman's duty to inspect those records and report on any breach of the legislation to the State Attorney-General. He, in turn, must report to his Commonwealth counterpart. As an ultimate sanction, the Commonwealth Attorney-General may, pursuant to section 37(1)(b) of the Commonwealth Act, revoke a declaration of an eligible authority where he is satisfied that the extent of compliance with the legislation by the eligible authority has been unsatisfactory. The Ombudsman believes that it is inappropriate for his Office, in the exercise of such an important function under the interception legislation, to be subject to the scrutiny of an eligible authority whose records he is required to inspect and report on.

Another area in which problems have arisen concerns section 11(2) of the ICAC Act. This section requires the Ombudsman to report to the ICAC:

> . . . any matter that the [Ombudsman] suspects on reasonable grounds concerns or may concern corrupt conduct.

Section 11(4) provides that the duty to report has effect notwithstanding any duty of secrecy or other restriction on disclosure; this effectively overrides sections 17 and 34 of the Ombudsman Act.

Whilst the vast majority of complaints under the Ombudsman Act do not involve allegations of corrupt conduct, the position is somewhat different in the case of complaints against police under the Police Regulation (Allegations of Misconduct) Act. The definition of corrupt conduct in sections 7, 8 and 9 of the ICAC Act is extremely broad, as is the duty cast on the Ombudsman under section 11, a duty which is also cast on the Commissioner of Police. Under section 11(3) the ICAC may issue guidelines about which matters need or need not be reported. At his first meeting with the Ombudsman, Mr Temby made it clear that no guidelines would be issued until the ICAC had been operational for six months. In the meantime, a rather strange situation has developed. The Ombudsman tries to assess each complaint, irrespective of whether it is made under the Ombudsman Act or under the Police Regulation (Allegations of Misconduct) Act, in terms of section 11(2), and he notifies the ICAC where appropriate; the Commissioner of Police, on the other hand, notifies the ICAC of every complaint under the Police Regulation (Allegations of Misconduct) Act. The Ombudsman believes that the absence of guidelines under section 11(3) has contributed to this absurd situation. In the Ombudsman's view, the ICAC should now issue appropriate guidelines under section 11(3).

Yet another area of increasing concern to the Ombudsman relates to the operation of Part 5 of the ICAC Act and, in particular,

sections 53, 54, 55 and 56 of the Act. Under section 53(1) the ICAC may refer any matter for investigation or other action to any person or body ("relevant authority") considered by the Commission to be appropriate in the circumstances. Sections 53(3) and 54 empower the ICAC to impose conditions on the relevant authority about the nature of the action to be taken and about the time within which a report is to be submitted to the ICAC. Section 56 provides that it is the duty of the relevant authority to comply with any requirement or direction of the ICAC. Section 53(5) provides that the Commission shall not refer a matter to a relevant authority except after appropriate consultation with and after taking into account the views of the relevant authority.

The Ombudsman is concerned that, whilst this provision is sensible, it would nevertheless allow the ICAC to consult with and consider the views of a relevant authority, and to then refer a matter notwithstanding those views. The Ombudsman has held discussions with the Commissioner to establish procedures for the referral of matters and to ensure that referrals are dealt with co-operatively.

The Ombudsman's principal concern is that Part 5 of the ICAC Act appears to have been drafted in a legislative vacuum, so far as its relationship to the Ombudsman Act is concerned. Little or no consideration appears to have been given to the requirements on the Ombudsman to give notice of his investigations, to observe his own secrecy requirements and to observe the rules of natural justice.

The Ombudsman proposes to monitor closely any and all referrals to this Office under Part 5 and will report to Parliament if, in his opinion, there is substantial interference with the work of his Office.

Details of matters referred to the ICAC to 30 June 1989 are shown in the table below:

Complaints Referred to the Independent Commission Against Corruption - 13 March 1989 to 30 June 1989

	Number
Departments and Authorities (other than Corrective Services)	4
Local Councils	2
Department of Corrective Services	1
Police	149
TOTAL	156

The Ombudsman's Telecommunications Interception Inspection Unit

The 1987-88 Annual Report detailed the inspection functions imposed on the Ombudsman by the Telecommunications (Interception) (New South Wales) Act, and reported that recruitment action was being taken to staff a special Unit to carry out those functions.

The Telecommunications (Interception) (New South Wales) Act commenced on 20 January 1989 and on 30 January the Commonwealth Attorney-General declared the New South Wales Police Force and the State Drug Crime Commission to be eligible authorities under section 35 of the Commonwealth Telecommunications (Interception) Act. Since that date both the Police Force and the Commission have been able to apply for warrants authorising the interception of telephone conversations.

In June 1989, the Premier informed the Ombudsman that arrangements were in train to amend the Commonwealth Act to make the Independent Commission Against Corruption an eligible authority as well, but the necessary legislative steps have not yet been finalised.

The Ombudsman's Telecommunications Interception Inspection Unit commenced inspections under the Act shortly after 30 January 1989. The Unit is comprised of four people; a Senior Investigation Officer, an Investigation Officer, an Interviewing and Investigation Officer who also acts as Office Manager, and a Receptionist/Keyboard Operator.

As reported last year, considerations of space and security determined that the Unit would have to be located in separate premises. The Unit is not open to the public; when its staff perform functions under the Ombudsman Act or the Police Regulation (Allegations of Misconduct) Act, such as interviewing complainants and other members of the public, they do so at the main office premises. When the Office moves to new premises, the Unit will be located in a secure area on a separate floor from the main office.

Results of inspections carried out under the New South Wales legislation must be reported to the New South Wales Attorney-General as soon as practicable after 30 June each year and, in any case, within three months of that date. Reports have been prepared in relation to inspections of the records of both the New South Wales Police Force and the State Drug Crime Commission, and those reports have been delivered to the New South Wales Attorney-General as required by law.

At least one strange and somewhat unsatisfactory result will flow from the legislation. When the Independent Commission Against Corruption is declared an eligible authority and begins to intercept telephone conversations, this Office will have to exercise an inspection or

"audit" function in respect of the Commission's records, even though the Ombudsman and his officers are themselves subject to the Commission's jurisdiction in its role of investigating possible corrupt conduct. It remains to be seen how "comfortably" the respective functions of the two agencies will co-exist.

Allegations of leaks from the Ombudsman's Office

On 1 May 1989, a Special Report to Parliament under Section 32 of the Police Regulation (Allegations of Misconduct) Act was sent to the Premier for tabling in Parliament. The report was headed "Inadequate training and procedures of the Special Weapons Operations Squad (SWOS)". The subject matter of the report was controversial and of public interest, particularly as it followed shortly after the SWOS operation that resulted in the death of David Gundy. The Ombudsman's report had been prepared and sent to the Police Minister on 5 April 1989, which, of course, was before the operation that led to the death of David Gundy, and it is referred to in more detail later in this Report.

On 2 May 1989, in tabling the report, the Premier said:

> It is extraordinarily unfortunate for the integrity and reputation of the Ombudsman's Office that there have been from within that Office orchestrated leaks of this report prior to it being made available to me as the relevant Minister, and prior to its tabling in Parliament. That sort of thing can't possibly do anything for the Office of the Ombudsman or indeed the state as a whole (Hansard; 2 May 1989, p.7107).

Mr Greiner added:

> So, with the notable exception of the leak from the

> Ombudsman's Office, the matter has been very properly dealt with (Hansard; op cit).

The Ombudsman wrote to the Premier on 4 May 1989, taking issue with his comments, and said:

> I am deeply concerned that you may believe that my Report to Parliament in respect of the complaint by former Constable Blackshaw was leaked by this Office to the media. That did not happen. It would be an impossibility for anyone to receive our Report to Parliament prior to you, or the Police Minister. The time frame and the level of supervision enables me to make that statement quite unequivocally.

The Ombudsman's letter explained the process that was followed within the Office to protect the integrity of the report, and went on to say:

> I and my staff are conscious that the suggestion of leaks from this Office of sensitive material can be damaging to the perception of the Ombudsman's independence. I had no apprehension that you would withhold a report from this Office. Neither I, or my staff, had any doubt that you would act quite promptly and properly in tabling the report. There was no fear of delay or cover-up.
>
> I agree with you that the suggestion of leakage from this Office should not be taken lightly. The reality is that reports on sensitive issues frequently are surrounded by such controversy and the allegation has been made by previous governments at such times. Nonetheless, I am confident our procedures and the integrity of our duty has not been breached in this instance.
>
> I propose to forward a copy of this letter to the Speaker of the House.

On 11 May 1989 the Premier responded and concluded his letter by saying:

> In view of [the] circumstances I am not convinced that a leak from your Office did not in fact occur. I propose to table your letter in the Parliament today.

The Ombudsman regards the issue seriously. He recently issued a memorandum to all staff on the need for confidentiality and security. The memorandum restates the principles that govern the procedures adopted in the Office, and its terms are reproduced, in full, below:

> The Premier's recent accusation of leaks from this Office cannot be taken lightly. The reality is that reports on sensitive issues frequently are surrounded by such controversy. The allegations which have been made by governments in the past hardly differ from the current accusation. The suggestion of leaks from this Office of sensitive material can be damaging to the perception of the Ombudsman's independence. This memo is to restate some basic principles about the practice and the procedures of this Office concerning security and confidentiality.
>
> (a) Confidentiality
>
> All matters dealt with in the Office are to be treated as strictly confidential. Staff are reminded that they are bound by the secrecy provisions of the Ombudsman Act, the Police Regulation (Allegations of Misconduct) Act, the Independent Commission Against Corruption Act and the Telecommunications (Interception) (New South Wales) Act. Breaches of those provisions are criminal offences.
>
> (b) Media
>
> The media can be given no information about matters within this Office, unless they have been concluded by way of a report to Parliament. Statements should emanate from the Ombudsman or the Deputy Ombudsman and all enquiries should be channelled through [the media liaison officer].

Confirmations or denials that the Office is handling a matter can also be damaging and should be avoided.

(c) Misinformation

Where obvious misinformation is publicised, a correction may be called for and a statement by the Office could become necessary. Such matters, however, should always be referred to the Ombudsman or Deputy Ombudsman to consider the appropriate steps to be taken.

(d) Disclosure to complainants

Disclosure of information to complainants must only be for the purposes of gathering additional evidence or for communicating reasons for determinations. Investigation Officers should also be aware that, in dealing with complainants, there is a limit to the amount of procedural information that can be communicated. It would be, for example, damaging to indicate to a complainant or a party to an inquiry that a result has been determined and will issue subsequently in the form of a provisional report. Leakages from such communications invariably follow, and the only safe course is to reject all requests for advance information. The only method of communicating a result should be the report itself in the various forms [in which] it issues.

(e) Security

Security of all documentation is always important. Investigations containing sensitive material (for instance, some complaints in the prisons area or police area) must be treated with additional caution. Papers should not be taken from the Office in such matters except in exceptional circumstances

and only with the concurrence of a statutory officer. It would be outrageous, for example, to contemplate a file being inadvertently left in public transport or mislaid outside the Office in any circumstances. Highly sensitive documents must be kept under lock and key when not being worked on. There are safes and lockable cabinets available for this purpose.

(f) Reports to Parliament

Reports to Parliament are by their very nature sensitive. They are accompanied by procedures and security that have always been rigid and as far as I can determine, the Office has been successful in protecting the integrity of such reports. To reinforce these procedures, in future, all reports to Parliament will become the direct responsibility of an Assistant Ombudsman. It will be their duty to ensure that the established procedures are carried out to the letter. This is important to enable the Office to be in a position to rebut any accusations of leakage.

(g) Inaction on Reports to Parliament

In the past, reports to Parliament from this Office were often tabled at the leisure and pleasure of the Premier. Instances occurred where tabling was withheld for unreasonable periods and the act of tabling reports was itself designed to minimise publicity and exposure. Since I have held office, there has been no example of such conduct. I have no intention of usurping the Premier's prerogative to table reports from this Office and good faith is assumed. Short delays to enable the Minister or Department concerned to be briefed are not unreasonable in my view. The Office should not report the fact that a report to Parliament is pending or has been delivered, except where tabling has been withheld improperly. In such

> circumstances I believe it would be the Ombudsman's duty to deal with the matter in the appropriate way and that is a power not to be delegated.

The practice in many Ombudsman's jurisdictions is for Reports to Parliament to be made to the Speaker of the Legislative Assembly and not to a Minister or to the Premier. A proposal requesting amendment to the Ombudsman's Act to that effect has been forwarded to the Cabinet Office.

Attempts to influence the Ombudsman ?

The independence of the Office of the Ombudsman is of paramount importance and needs to be constantly guarded. Three incidents which could be construed as attempts to influence the functioning of the Office arose during the year.

In the first matter, the least serious of the three incidents, a complainant wrote to the Attorney General and complained that reports held by the Ombudsman's Office had been provided to the Minister for Police without the complainant's consent. An officer at the Attorney General's Department wrote to the Ombudsman about the matter. The concluding paragraph of the letter sought to pre-empt the exercise of the Ombudsman's discretion:

> Kindly investigate this matter and, within the limits of your authority to make available such information, please advise me of the results.

The Ombudsman wrote to the Secretary of the Department. He said

that, if the letter was a request for information, the secrecy provisions of both the Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act precluded him from providing that information. If the author of the letter was asking him to investigate a complaint that a member of the staff of the Office had improperly released information, then, the Ombudsman said, he was satisfied that this had not been the case. As well, the Ombudsman pointed out that a decision about whether or not to investigate a complaint is one that is made only within the Office of the Ombudsman, and that the tone of the final paragraph of the letter was both inappropriate and offensive.

In his response, the Secretary apologised for the letter and said that there had been no intention to infringe upon the discretion vested in the Ombudsman's Office.

The second and third incidents were of greater concern because they involved a Minister of the Crown.

In July 1986, a complaint was received about the approval by Maclean Shire Council of a development application for tennis courts. After preliminary enquiries had been conducted with council, the matter was concluded. A further complaint about the matter was received later that year, but it, too, was declined. There was no further involvement in the matter by the Office until April 1988, when the complainant spoke to an Ombudsman officer during a visit to the area and alleged that council had failed to enforce two development consent conditions relating to parking and tree planting.

Preliminary enquiries were made in relation to those issues only, and council's response was sent to the complainant for comment. Although council said that the relevant conditions had not been enforced because the Tennis Association did not have sufficient funds to complete the

work, information from one of the complainant's neighbours suggested that the Association had made an operating profit. On the basis of this information, further enquiries were made to determine the action taken by council to ascertain the Association's financial position, and whether proper procedures had been followed to vary the conditions of the development consent. A further reply was received from council, at which time the Office decided to conclude its enquiries.

In September 1988 the Ombudsman received a letter from Mr Ian Causley, Member for Clarence and the Minister for Natural Resources, on behalf of the Tennis Association. Mr Causley referred to "continued unnecessary letters" from this Office, and said:

> . . . the many hours spent by the Town Planner in constantly having to respond to unreasonable complaints of a minority is a complete waste of tax payers money and is to the detriment of other more important work.
>
> In fairness to the Lower Clarence Tennis Association and Maclean Shire Council, who have made every effort to keep harmony and cause no hindrance to the neighbours, I feel it is time that this intolerable situation was resolved and I, therefore, seek your agreement to a meeting with the parties involved at the earliest opportunity, in an endeavour to achieve this aim.

The Ombudsman told Mr Causley that the complaint was being handled in accordance with the established procedures within the Office, and that the secrecy provisions of the Ombudsman Act prevented him from providing any more information about the matter.

Several days later, another letter was received from Mr Causley, to which he attached a letter that he had received from the Council of the Lower Clarence County District. The council complained that copies of

letters from councils to the Ombudsman had been released to complainants. The council said that any correspondence between it and the Ombudsman must be treated confidentially, and it asked Mr Causley to make representations about this to the Ombudsman. Regrettably, Mr Causley's letter was addressed to the Ombudsman's predecessor who had ceased to hold office in September 1987.

The Ombudsman was away from the Office when this letter arrived. The Acting Ombudsman replied to Mr Causley and explained that it was important for the complainant to be given an opportunity to comment on the response received from a public authority, just as public authorities are initially given the opportunity to respond to a complainant's allegations. The Acting Ombudsman said:

> It has been the general practice of this Office for many years now to give as much information as possible to complainants during the early stages of an investigation or preliminary inquiries. The complainant's comments on the authority's response are an essential component of this Office's investigatory procedure and, as well, such a request for comments serves to ensure that the principles of natural justice are applied.
>
> > With respect, I can see no reason why the Council's correspondence should be treated any differently from that received from other public authorities. It would be very one-sided for this Office to base its determination on the authority's reply alone, particularly since authorities have been known to put forward a version of facts best suited to their cause, to omit certain details from their response and even to misrepresent matters.

When the Ombudsman returned to the Office, he wrote to Mr Causley and said:

I receive a considerable number of complaints from Ministers of the Crown on behalf of their local constituents on a vast range of matters. However, I take exception to representations relating to the handling of complaints in this Office, such as in this instance. I can only conclude that there has been a misconception about the functions of the New South Wales Ombudsman and this Office.

In October 1974, when the Ombudsman's Office was established, the then government said, "There is a need for an independent official who will approach in a consistent way, having regard to the justice and merits of each individual case, complaints made to him on administrative decisions." The independence of the Office of the Ombudsman is paramount; this is formally recognised by the statutory appointment of the Ombudsman, his Deputy and Assistants, and was reinforced in February 1984 by the declaration of this Office as an "Administrative Office" under the Public Service Act. You will no doubt be aware of the government's intention to transform this Office into a statutory corporation. This demonstrates clearly still-wider acceptance of the independence of this Office.

The function of the Office of the Ombudsman is to receive and investigate complaints about matters of administration within the N.S.W. public sector, and to report the findings of investigations to the authority concerned, to the responsible Minister and, if necessary, to Parliament.

As already indicated to you, the secrecy provisions would prevent me from providing any information to a Minister during the course of an investigation. . . . both the Ombudsman Act, 1974 and the Police Regulation (Allegations of Misconduct) Act, 1978 make it clear that the only input a Minister can have into an Ombudsman's investigation is where the responsible Minister seeks a consultation on an investigation or where a draft report has been prepared. The Minister responsible for the public authority subject to the investigation has the option of consulting with me before the report is finalised.

Finally, you will appreciate in the light of the above, that it is absolutely essential for the proper carrying out of the functions of the Ombudsman that he be free from outside

influence. Furthermore I consider that it would be most objectionable were a Minister to attempt to interfere in an Ombudsman investigation prior to any consultation which the Minister might have by virtue of the Ombudsman's legislation.

In your letter of 29 August, 1988 you state inter alia:

> In fairness to the Lower Clarence Tennis Association and Maclean Shire Council, who have made every effort to keep harmony and cause no hindrance to the neighbours, I feel it is time that this intolerable situation was resolved and I, therefore, seek your agreement to a meeting with the parties involved at the earliest opportunity, in an endeavour to achieve this aim.

With respect, it follows from what I have said above that your request amounts to an apparent attempt to influence me in the carrying out of my functions.

I assume your intentions were to assist your constituent and not in any way a deliberate attempt to bear influence on me in the exercise of my statutory duty.

I sincerely trust that the above information will dispel any misconceptions that may be had and will provide assistance in making representations to this Office, should the occasion arise in the future.

This Office does not expect that all members of the community will have a detailed knowledge of the Ombudsman's functions; it was extremely disappointing, however, to discover that a Minister of the Crown apparently misunderstood the function and role of the Ombudsman.

Secrecy: **amendments still on " hold "**

Section 34 of the Ombudsman Act provides, in broad terms, that the Ombudsman or an officer of the Ombudsman shall not disclose any information obtained by him in the course of his office, except in certain very restricted circumstances.

For many years, in its Annual Reports and in special reports to Parliament, this Office has urged that the secrecy provisions of the Ombudsman Act be amended to enable the Ombudsman, where it is in the public interest that he do so, and subject to adequate safeguards for public authorities who might otherwise be prejudiced, to make public statements concerning important matters which might be the subject of investigation. Until recently these requests went unheeded.

The Ombudsman (Amendment) Bill 1988, introduced in Parliament by the Premier on 30 November 1988, contained, at last, amendments to the secrecy provisions. In particular, the Bill proposed to amend the Act to enable the Ombudsman to disclose information or to make a statement to any person, or to the public, or to a section of the public, with respect to the exercise of his functions or an investigation under the Ombudsman Act or the Police Regulation (Allegations of Misconduct) Act, where it was in the interest of any public authority, department or person, or where it was otherwise in the public interest for the Ombudsman to do so.

The proposed amendments included a number of restrictions or qualifications on the power of the Ombudsman to release information or make statements. In particular, the Ombudsman would not be able to exercise such a power where it would be likely to:

- interfere with the carrying out of any investigation

under the Ombudsman Act;

- interfere with the making of any report under the Ombudsman Act or any other Act;

- endanger the life or physical safety of any person.

In addition, the Ombudsman would not be able to disclose the name of a complainant or any other matter that would enable the complainant to be identified, unless it was fair and reasonable to do so. Further, the Ombudsman would not be entitled to set out opinions that were either expressly or impliedly critical of any public authority, department or other person unless, as far as practicable, the Ombudsman had informed the public authority, department or person of the grounds of his opinion and had given the person informed an opportunity to make oral or written submissions.

In principle, the Ombudsman believes that these restrictions, some of which are similar to those in other Ombudsman jurisdictions, represent a reasonable balance of the public interest and the interests of complainants, public authorities and other persons who may be affected by any proposed release of information. A final judgement, however, will have to await the passage of the legislation, if this ever occurs, and a review of the practical working of the provisions (see "Legal Changes" elsewhere in this Report).

Another restriction contained in the proposed legislation would prohibit the Ombudsman from disclosing information where the Premier certified that such disclosure would be contrary to the public interest because it would involve the disclosure of:

- deliberations or decisions of Cabinet or any committee of Cabinet

- deliberations or advice of the Executive Council

- communications of a Minister with Ministers of other States, Territories or of the Commonwealth which may prejudice relations with other States, Territories or with the Commonwealth.

Whilst this proposed restriction is in somewhat broader terms than the current restriction in respect of Cabinet documents and proceedings, it relates to areas which are traditionally outside the jurisdiction of the Ombudsman; moreover, it relates to categories of documents which are "exempt" documents under the Freedom of Information Act. Accordingly, the Ombudsman does not object to the provision.

The Bill would also prohibit the Ombudsman from releasing information either to a complainant or to any other person, where to do so would be likely to pose a threat to prison security. This provision was the subject of debate and amendment when the Bill was in the Committee stage in the Legislative Council. In the 1987-88 Annual Report (p34) the Ombudsman said:

> In some cases, public authorities have asked that the information supplied to the Ombudsman not be forwarded to the complainant. This has occurred most often with prisoners' complaints, where the Department of Corrective Services has claimed that its conduct was based on sensitive security information which would have serious consequences if released to prisoners.

and further:

> The Ombudsman understands that consideration is being given to a legislative change to enable the Department of Corrective Services to resist attempts by this Office to obtain information about sensitive matters. Any change which restricts the Ombudsman's access to departmental files, beyond that already provided for in the Ombudsman Act, may have serious implications for the concept of accountability of public authorities, and for the independence of the Ombudsman.

The proposed amendment does not restrict the Ombudsman's access to documents or information held by the Department of Corrective Services or by its staff. Indeed, the Ombudsman retains all of his powers to gain access to such information, including his coercive powers should their use be required. Further, the amendment does not enable the Department of Corrective Services to embargo the release of information, as the Commissioner of Police is able to do under section 26 of the Police Regulation (Allegations of Misconduct) Act.

At the present time, the Office of the Ombudsman has internal procedures for reviewing sensitive information provided by the Department of Corrective Services, and by other Departments, before deciding whether the information should be released to, for example, a complainant. These procedures are working effectively and the Ombudsman expects that, in practice, the position will be little changed if the proposed amendment ever becomes law.

Opportunity to comment : Ombudsman's system fair

Many public authorities make a rod for their own backs by persisting

with the unintelligent policy of making decisions in secret, without seeking the comments of interested persons or organisations. Not only is it unfair to make decisions affecting people without giving them the opportunity to comment, but unless the people who are most closely connected with a matter are consulted, there can be no certainty that all of the relevant information has been obtained.

A great many complaints to the Ombudsman arise out of this misguided approach by public authorities. Public authorities could often save themselves, and the public, considerable time, money and irritation by adopting the simple and rational policy of seeking comments from those people who stand to be affected by their decisions. Sometimes, a public authority's failure to do this amounts to a breach of the principles of natural justice, because people are not given an opportunity to be heard. This problem is discussed elsewhere in this Report.

The Ombudsman's Office has long had a policy of seeking comments from interested parties. An Ombudsman investigator who takes up a complaint will normally send a copy of it to the public authority involved, and will seek comments and, perhaps, answers to some specific questions from the authority. Sometimes the authority's reply will resolve the matter completely; but where some doubt remains, the investigator will usually send a copy of the reply to the complainant and ask for his or her further comments. In this way, both parties to the complaint are made aware of the other's position, and the issues involved are crystallised. With comments from both sides, this Office is in a position to make an informed decision about whether to investigate the complaint. By law, a decision to investigate a complaint has to be notified to the public authority involved and to the complainant.

Perhaps the most important opportunity for comment arises when an

investigation is almost complete. If it appears that the conduct investigated was wrong, this Office issues a statement of provisional findings and recommendations; this sets out all of the relevant evidence obtained by the investigation as well as proposed findings and recommendations. Comments and/or further evidence are sought from the complainant and from the public authority. Any person about whom it is proposed to make adverse comment is advised of the terms of such comment in order to give them an opportunity to make comments or submissions or to produce further evidence.

There are several purposes in issuing this document. The primary purpose is to ensure that people whom the Ombudsman proposes to mention or criticise in his final report have the opportunity of putting their own case and of making comments or advancing further evidence before the report is made. The investigation also benefits from allowing the parties to review and comment on the evidence obtained; the process sometimes brings new evidence to light which advances the investigation or changes the proposed findings. The issue of a statement of provisional findings and recommendations also allows comments to be made on the effectiveness or practicability of the proposed recommendations.

The statement of provisional findings and recommendations is issued in confidence, as part of the investigation process. Most public authorities and most complainants appear to welcome the opportunity to contribute to the investigation process. The Police Department, by contrast, seems to adopt the view that it is better to wait until the report is made final and, then, to dispute its terms. In one recent case, the Ombudsman felt that the Commissioner's input into an investigation would have been especially useful and he went to considerable lengths to obtain the Commissioner's comments, regrettably without success.

Complaints to Ombudsman privileged

Where written enquiries are made with a public authority about a citizen's complaint, it is the usual practice for this Office to send a copy of the complaint to the public authority, seeking its version of events and, where appropriate, answers to questions raised by the complaint. This is done because public authorities are entitled to know about complaints that have been made about them, if they are to be expected to respond to the Ombudsman's enquiries in an informed and sensible way.

Some complainants say things in their letters which, in the ordinary course of events, might be defamatory; and sometimes public authorities become upset about these sorts of allegations; this tends to be particularly so in respect of complaints about local councils.

Section 17A of the Defamation Act provides:

> There is a defence of absolute privilege for a publication to or by the Ombudsman, as Ombudsman, or to any officer of the Ombudsman, as such an officer (emphasis added).

During the year an instance occurred which illustrated the problem, after a complaint was received from a developer about the way in which some aldermen on his local council were said to be dealing with his development application.

The complainant's wife, as well as being an official of his development company, was a council alderman. Although she had not taken part in any of the discussions in council regarding his application, the

complainant believed that a previous history of antagonism between his wife and four of the other aldermen had affected the decisions made by council. The complainant alleged that the four aldermen were attempting to impose conditions, which were different to those that would normally be imposed, on his development application. The complainant in his letter outlined a series of previous decisions given by the aldermen in question, and explained why he believed that those decisions showed bias and vindictive behaviour towards his wife and himself. He said that he felt that the aldermen were subverting the local government process to satisfy their own egos.

This Office made preliminary enquiries with council and sent it a copy of the complaint.

When the complaint was received by council there was considerable agitation and concern that, if the complaint was tabled at a council meeting, the four aldermen might become so incensed at the statements made in the complaint that they might be inclined to take legal action for defamation against the complainant or the council. It would have not been possible, of course, for the four aldermen to take legal action against the complainant on the basis of his letter to the Ombudsman, because that document was privileged under section 17A of the Defamation Act.

The law is clear that an officer of the Ombudsman, acting as such, who sends to a public authority a document containing statements which might be defamatory, cannot be sued for defamation for having done so. Neither can a complainant be sued for defamation for having made such statements in a complaint to the Ombudsman. This protection, however, does not necessarily flow to a public authority which, having received such a document from the Ombudsman's Office, proceeds itself to publish the document.

So that Council would not leave itself liable for defamation, it decided not to table the complaint, even though council's legal advice was to the effect that nothing in the letter provided grounds for action.

Personal denigration of Investigation Officers (or, shooting the messenger)

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 some 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 by 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 year; but there were two notable exceptions.

One incident arose following the issue in June 1989 of a statement of provisional findings and recommendations relating to an investigation of the way in which Grafton City Council had dealt with a controversial development in a high-hazard floodway[1]. The investigation raised

[1] See " Flood plain policy; the Grafton experience " elsewhere in this Report.

serious issues of public interest and the evidence obtained during it reflected adversely on the council's administration of its planning duties and responsibilities. The provisional statement was leaked to the local media despite the Ombudsman's request that it be kept confidential, and details of the provisional findings, including the revelation that the Ombudsman had referred the matter to the Independent Commission Against Corruption, were soon front page news in Grafton. The Mayor of Grafton released a ten-page commentary on the provisional statement, prepared by council's legal advisors, to the Grafton Examiner. In an article in the newspaper headed "Council hits back at report", that commentary was quoted as saying:

> It appears that the inference about corrupt dealings has resulted from a lack of awareness on the part of the Investigating Officer of the provisions of the Local Government Act and a background knowledge of the workings of the Environmental Planning and Assessment Act as well as the objectives of Council's Local Environmental Plan.

After the Independent Commissioner Against Corruption, Mr I Temby, decided not to investigate this matter, the Mayor issued a press statement, which was printed in the Grafton Examiner, and which said:

> [Mr Temby's] action would lay to rest the completely "groundless and unjustifiable inference drawn by an investigating officer in the Ombudsman's office".
>
> [The Mayor] said Council's legal advisers had assessed the Ombudsman's report as being seriously flawed and he believed it was a pity that an officer in the Ombudsman's office had drawn an inference that could not be supported by the facts.
>
> Everyone knows that council's principal motive in

> approving [this] development was to assist in establishing a business and creating employment on what would otherwise be a wasted parcel of land at South Grafton, Alderman Emerson said.
>
> It was a pity the investigating officer from the Ombudsman's office did not understand the problems towns such as Grafton faced in these difficult times.

When the Council responded to the provisional statement in July 1989, the Mayor again issued a statement to the Grafton Examiner; the statement said:

> [The] Mayor of Grafton, . . . said he believed the submission "clearly and effectively answers all matters raised by the Ombudsman including those alleging wrong conduct, which in the view of the council's solicitors were not open to him on the facts".
>
> "The report exposes glaring inaccuracies, deficiencies, misinformation and wrong conclusions on the part of the investigating officer," the Mayor said.
>
> "Council is encouraged by the advice of its solicitors and hopeful that the Ombudsman will recognise the deficiencies in the draft report of the investigating officer and reverse the findings when issuing his final report".

The Ombudsman values constructive comment upon statements of provisional findings and recommendations; but personal and, as in this case, highly defamatory denigration of the investigation officer under the guise of "advice" given by a reputable firm of solicitors, is to be deplored. Needless to say, such an approach does nothing to further the investigation, the only object of which is to establish the facts.

The other incident arose in response to the issue of a final report on

the investigation of a complaint by the Summer Hill Action Group about an alleged conflict of interest on the part of two aldermen of Ashfield Municipal Council. In this case, council had already made submissions in response to the provisional statement. When the final report was released, the Mayor of Ashfield, in an article in the Glebe Newspaper, was reported to have said:

> I am suggesting that someone in the Ombudsman's Office may have been linked to or been influenced by the Summer Hill Action Group.
>
> and:
>
> Lies have been told to us by the Ombudsman's Office.

The Ombudsman prepared a Report to Parliament to rebut these and a number of other claims made by the Mayor.

The Ombudsman believes that, in both of these cases, the reactions generated were not only regrettable, but unnecessary as well. This Office, from time to time, will be in conflict with persons in high public office. The dignity of the offices that they hold will not be enhanced by personal attacks on individuals who are required to carry out their duties under the Ombudsman Act and who cannot themselves respond directly to those attacks.

Removal of " wrong conduct " from Ombudsman Act

Many public authorities are highly sensitive to any suggestion that their conduct may be wrong; the more so when the Ombudsman is empowered by legislation to make a finding of "wrong conduct".

Section 5(2) of the Ombudsman Act provides:

> (2) For the purpose of this Act, conduct of a public authority is wrong if it is -
>
> (a) contrary to law;
>
> (b) unreasonable, unjust, oppressive or improperly discriminatory;
>
> (b1) in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory;
>
> (c) based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations;
>
> (d) based wholly or partly on a mistake of law or fact;
>
> (e) conduct for which reasons should be given but are not given; or
>
> (f) otherwise wrong.

One suspects that the directness and simplicity of the word "wrong" is particularly upsetting to some public authorities which frequently resort either to obfuscation or "bureaucratese" when dealing with members of the public.

The Ombudsman recognises, however, that some concerns of public authorities are genuine and can properly be addressed without interfering with or diminishing his independence. In a submission to government prepared in January 1988, the Local Government and Shires Associations of New South Wales argued that paragraph (b1) of section 5(2) operated unreasonably because it allowed the Ombudsman to find conduct wrong, even though a public authority might have acted

in accordance with a law by which it was bound. Rather, the Associations argued, the Ombudsman Act should be amended:

> . . . to enable the Ombudsman, in considering conduct of the kind contemplated in Section 5(2) (b1) of the Act, to find that a public authority has acted in accordance with the law but that the law should be changed. Such an amendment would, we submit, protect those public authorities which might otherwise face criticism for acting in the only way legally available to them, whilst leaving open to the Ombudsman the option of finding wrong conduct by a public authority which has taken a pedantic approach to its legal obligations when other more reasonable options were open to it.

The Associations went on to propose the insertion of the following provision in the Ombudsman Act:

> 26A (1) Notwithstanding any other provision of this Act, where, in an investigation under this Act, the Ombudsman finds that the conduct the subject of the investigation, or any part of the conduct, is in accordance with any law, the Ombudsman may find that the conduct does not amount to wrong conduct.
>
> (2) Where the Ombudsman makes the finding set out in subsection (1), the Ombudsman shall make a report accordingly, giving his reasons.
>
> (3) In a report under this section the Ombudsman may recommend -
>
> (a) that any law or practice relating to the conduct be changed; or
>
> (b) that any other step be taken.

On 18 July 1988, the Premier wrote to the Secretary of the Associations, Mr W.A. Henningham, advising that he was of the view

that there was not sufficient justification for such an amendment. In particular, the Premier said:

> More generally you should appreciate that in any report the Ombudsman invariably makes clear the basis for any finding of wrong conduct. Indeed, Section 26 of the Ombudsman Act clearly requires the Ombudsman to give reasons for any such finding and authorises the Ombudsman to recommend changes to any law or practice, should he form the view that this is necessary.
>
> I am accordingly of the view that any possible misinterpretation by the media of a finding of wrong conduct would be readily corrected by reference to the Ombudsman's recommendations and reasons for his findings in a particular case.

The Associations were quick to respond to the Premier, highlighting a case in which wrong conduct had been found by the Ombudsman but which the Associations considered had been dealt with in a misleading way in a local media report. They urged the Premier to reconsider his stance on the issue. The Premier, for the first time, sought the Ombudsman's comment on the Associations' proposals for amendment of the Ombudsman Act.

The Ombudsman wrote to the Premier and said that, in general terms, he had no objection to an amendment in terms similar to those suggested by the Associations. In particular, the Ombudsman said:

> Turning to the amendment suggested by the Associations, I believe that its terms should be modified. In many cases, an investigation which found that a public authority had acted in accordance with the law would not give rise to a need for any report to be made at all, or for any remedial recommendations to be made. It is suggested, therefore, that the amendment provide for a report to be made at the Ombudsman's discretion, where the public

> interest or the best interests of the complainant would be served by such a report being made.

The Ombudsman suggested that some consequential amendment of Section 5(2) (b1) might also be desirable.

The Ombudsman (Amendment) Bill 1988, when introduced into Parliament, however, incorporated neither the amendment that the Associations had suggested nor that suggested by the Ombudsman. Instead, the whole concept of "wrong" was removed from the Act by the repeal of that definition and the insertion of a new section 26(1), which provided:

> Where, in an investigation under this Act, the Ombudsman finds that the conduct the subject of the investigation, or any part of the conduct, is of any one or more of the following kinds:
>
> (the provisions of the definition of "wrong conduct" are then repeated).

The Ombudsman is unsure of the process which led from a proposal for a limited amendment to the Ombudsman Act to a provision removing the whole concept of "wrong" conduct from it. Perhaps it represented a more felicitous piece of draftsmanship. Possibly it represented a victory for those oversensitive public authorities mentioned earlier. Unlike those authorities, the Ombudsman has always believed that the force of his reports and findings derives from the detailed professional investigations conducted by his Office and that this fact is recognised by the public, irrespective of whether or not the word "wrong" is used.

In any event, as reported elsewhere in this Report, the amending Bill

was eventually withdrawn. At present, therefore, it remains open to the Ombudsman to find that conduct of a public authority has been "wrong".

Reports to Ministers and to Parliament

Report to Ministers

During the year the following reports of wrong conduct have been made to Ministers:

Ombudsman Act

Departments and authorities	29
Local councils	14
Total	43

Police Regulation (Allegations of Misconduct) Act.

Without reinvestigation	83
Following reinvestigation	8
Total	91

Draft reports are presented to the Minister responsible for a particular authority, and the Ombudsman asks whether the Minister wishes to consult with him before he makes the reports final.

As at 30 June 1989 there were 14 draft reports with Ministers, and the Ombudsman was awaiting advice whether the relevant Minister wished to consult with him, as follows:

Ombudsman Act

Departments and authorities	8
Local councils	-
Total	8

Police Regulation (Allegations of Misconduct) Act

Without reinvestigation	6
Following reinvestigation	-
Total	6

Reports to Parliament

The Ombudsman is able to present reports to Parliament, apart from the Annual Report. They are special reports under section 31 of the Ombudsman Act and section 32 of the Police Regulation (Allegations of Misconduct) Act, and "non-compliance" reports under section 27 of the Ombudsman Act.

During the year two special reports under section 31 of the Ombudsman Act were presented to Parliament. There were two reports under section 27 of the Ombudsman Act where recommendations made by the Office were not carried out by the relevant non-police public authority.

Two reports were made under section 32 of the Police Regulation (Allegations of Misconduct) Act, and two reports on police issues were made 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

- A misleading and inaccurate newspaper article alleging that the Ombudsman was investigating Mr J. Hatton, MP.

- Inaccurate media account concerning an investigation of the Ashfield Municipal Council.

Non-compliance reports under section 27 of the Ombudsman Act.

- Failure of Tallaganda Shire Council to implement the Ombudsman's recommendation to set a minimum rate for vacant flood-liable land.

- Failure of the Darling Harbour Authority fully to comply with recommendations that it consult with and pay compensation to local residents.

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

- Failure of the Commissioner of Police to obtain independent legal advice in order to

determine whether there was sufficient evidence to lay departmental charges against police officers.

- A second report regarding failure to obtain independent legal advice in relation to departmental charges and delay in police investigation.

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

- A decision by the Commissioner of Police, made on the basis of inadequate legal advice, not to make an ex-gratia payment.

- Inadequate training and procedures of the Special Weapons Operations Squad.

Natural Justice : right to be heard

The rules of natural justice require that a party whose rights, property or legitimate expectations may be affected by an administrative adjudication be afforded the fundamental right to be heard.

The 1987-88 Annual Report outlined two very different complaints which had raised the issue of the "right to be heard" . This year, the issue has again been raised in complaints concerning the Department of Family and Community Services and the often inextricably linked areas of child abuse and child care.

Child abuse

The Department had a policy which required that all child abuse notifications received which involved allegations of the commission of a criminal offence be referred promptly to police. Once a report had been made to the police, departmental officers were not permitted to interview the alleged perpetrator of the abuse. The Department said that one of the reasons for its policy was that the investigation of an alleged criminal offence was properly the responsibility of police.

Over recent years, this Office has received a number of complaints from parents who alleged that officers of the Department of Family and Community Services had removed their child from their care without first giving them an opportunity to put their side of the story. The law provides that an officer of the Department can remove a child from its parents' care, before commencing court action, if he or she believes that the child has been criminally abused. It is the Ombudsman's view, however, that, wherever practical, the parents should be given an opportunity to be heard before such action is taken, and he decided to investigate this issue.

In response to the Ombudsman's investigation, the Director-General of the Department directed that the policy be reviewed. In August 1988 new policy guidelines were released; these said, among other things, that "officers may interview alleged abusers without the police where a care application is imminent" . Wisely, the new policy emphasised that, if criminal proceedings were considered likely, it was preferable that interviews be conducted in conjunction with the police. This policy change should go some way towards ensuring that parents are given the right to be heard before departmental action is taken.

Child care

In 1987 new legislation was introduced to replace the Child Welfare and Community Welfare Acts. As well, regulations to introduce standard licensing procedures for child care centres and child carers are expected to be introduced late in 1989.

In one case investigated by the Ombudsman, it became apparent that local councils, Family Day Care Centres and carers who were registered or licensed to participate in Family Day Care Schemes were confused by the policies of the Department of Family and Community Services and the regulatory gap.

The Department had investigated a notification of possible child sexual assault in the home of Mrs M, a registered Family Day Carer. The result was a "stand-off" between Leichhardt Council and the Department. Mrs M was caught in the cross-fire, unable to answer all the allegations because both the council and the Department refused to accept responsibility for deciding whether she was a suitable person to care for children.

The Ombudsman believed that, since the Department had a responsibility to investigate complaints or notifications of alleged child sexual assault or other abuse, it was also responsible for making recommendations on the suitability of carers who had been investigated to remain in Family Day Care Schemes.

The Ombudsman found that the Department had not delayed unreasonably in conducting and reporting on its assessment of the allegations about child sexual assault against Mrs M. He found, however, that the Department had failed to make a decision about whether Mrs M should continue as a child carer, and had failed to

make a suitable recommendation to the Family Day Care Co-ordinator in this respect. This had led to delay in Mrs M being reinstated as a child carer by Leichhardt Council's Family Day Care Scheme.

The Department later advised the Ombudsman that remedial action had been taken. Apart from issuing an apology to Mrs M and her family, the Department said that guidelines for staff had been reformed, action had been taken to resolve the difficulties with councils and the new regulations were expected to be introduced before the end of the year.

Child abuse and " voluntary " foster care

Two officers of the Department of Family and Community Services received a notification that a four-and-a-half year old girl was at risk of abuse. They went to the kindergarten that the child was attending and one of the officers interviewed her in the presence of a child care worker.

At approximately 3.30 pm that day, a Friday, the girl's mother was informed of the notification. She went to the Department's local Community Welfare Centre where she was interviewed by the two officers. The officers told her that they believed that her husband had sexually abused her daughter. They said that the child had been excessively masturbating at pre-school and that this was a common behaviour exhibited by children who had been sexually abused. Details of the earlier conversation between the Department's officer and the child were not given to the mother. However, the officers made it clear that they believed that there was sufficient evidence to show that the child was in need of care and protection.

The mother asked the officers what options were available to her. The

officers gave her two options; they said that they could take the child before the court, or the mother could sign a form agreeing to voluntarily have her child placed under the Department's Temporary Foster Care Scheme.

The Department's policy relating to its Temporary Foster Care Scheme was contained in a field manual for departmental staff written in 1980. The manual said:

> . . . the Scheme, in essence, is aimed at temporary care in the community and is not a substitute for Court action . . . where that is appropriate.

The mother told this Office that she had signed the temporary foster care agreement form because she had felt "pressured" , and had not wanted her husband to have to go to court.

After she signed the form, she was asked to go home and get some clothes for the child. When she returned home at about 6.30 pm, she found that her husband had arrived home from an interstate business trip. The couple went back to the Community Welfare Centre where the Department's officers discussed the situation, including the temporary care arrangement, with the father. However, they did not show him the agreement nor make sure that he had seen the mother's copy.

The Department argued that its officers were entitled to assume that the mother had shown her husband her copy of the agreement. However, the officers did not make any attempt to ascertain whether the father, too, wished to sign the agreement. After the couple left the Centre, the child was placed in temporary foster care.

When the father eventually saw a photocopy of the temporary foster care agreement at home later that evening, he realised that he and his wife had the right to rescind the agreement. Sometime between 9 or 10 pm that Friday evening, he phoned the Department and said that he and his wife wished to revoke their consent to the agreement. However, it was not until approximately 3.15 am on the following Sunday that the child was returned home. By this time, the case had been reviewed and the Department had decided not to take court action.

The Ombudsman's investigation found:

- that the conduct of the Department's officers in telling the mother that she had the options of having the child brought before a Children's Court as a neglected child, or of signing a "voluntary" agreement to have her child placed in temporary foster care, was unreasonable and contrary to departmental guidelines. The Ombudsman expressed the view that, in those circumstances, it could not be said that the mother had entered into the agreement on a genuinely voluntary basis;

- that the delay by the Department's officers in deciding whether the child would be returned home or taken before the court, following the parents' revocation of the agreement, had been unreasonable;

- that the Department had failed to develop adequate guidelines for its staff with respect

> to the Temporary Foster Care Scheme. The Ombudsman said that the inadequacy of the guidelines had been demonstrated by their failure to make it clear that, in situations similar to those that had occurred in this case, both parents must sign the agreement form.

The Ombudsman recommended that the Department amend its guidelines in relation to the Temporary Foster Care Scheme to make it clear that, in situations where two persons have the daily care of a child and are either parents, guardians or such other persons having legal custody of the child, and where both persons can be reasonably located, a precondition to the Department admitting that child into the Scheme be that both persons sign the Voluntary Care Agreement. He further recommended that an apology be made to the mother and father of the child.

In responding to the Ombudsman's provisional findings and recommendations, the Director-General of Family and Community Services said:

> I concur with the findings and recommendations made in the report and will ensure that the Department's practices and procedures are reviewed to avoid similar circumstances arising in the future.

The Director-General later informed this Office that amended guidelines in relation to the Temporary Foster Care Scheme were published to all staff in the Departmental Bulletin on 12 January 1989 and that, in

October 1988, he had written a personal letter of apology to the parents of the child.

Anonymous complaint uncovers serious misconduct

The 1984-85 Annual Report explained the Ombudsman's attitude towards anonymous complaints and his ability to use his "own motion" powers to investigate them, where the nature of the allegations warrants such a course. Most anonymous complaints are referred for initial comment to the relevant public authority. Sometimes, however, the allegations are so serious that a different course must be followed.

An anonymous complaint received by this Office in April 1987 alleged that the Superintendent at Mount Penang Training School, a juvenile detention centre, was engaging in practices which were ethically or legally dubious, or both. It was alleged that money had been raised from the sale of liquor on Training School premises and credited to a bank account controlled by the Superintendent, and that he had used funds from the account to pay for overseas travel. It was further alleged that government property had been sold, misappropriated and misused. Discreet preliminary enquiries were commenced because of the serious nature of the allegations.

In September 1987, contemporaneously with the service of notice of investigation, an unannounced visit was paid to the Training School by three Investigation Officers. The Superintendent was interviewed, records were examined and various buildings in the grounds were inspected. A well-stocked bar was found to be operating in a building used as a recreation club and it was the practice for liquor to be sold at various functions that were held there. No licence to enable this to be done was held. The club building itself had not been approved by

the local council, nor had various other works at the Training School.

Funds raised from the illegal sale of liquor were paid into a bank account in the name of the Mount Penang Support Committee. Despite the name of the account and the fact that two other signatories besides the Superintendent were authorised to operate it, the account was very much under the Superintendent's control. Funds from the account had been used to purchase materials for the recreation and entertainment of the inmates, and this was the official reason for the account's existence. Nevertheless, travel by the Superintendent's wife to the value of $1304 had also been paid for from the account and about $2500 from the sale of sand from the grounds of the Training School to a private contractor had been deposited into it. The proceeds of other sales had been placed in the official amenities accounts of the inmates, where Commonwealth grant funds were also deposited.

The Superintendent at first said that he had arranged sales of sand to raise enough money to make good a misappropriation of $4000 from the "club" funds, which had occurred at a time when he was away from the Training School.

He said that he had paid a number of outstanding accounts from his own funds. Unfortunately, very few records of transactions on the bank account had been kept. In later written responses to questions asked by this Office, the Superintendent resiled from allegations that he had made to the effect that certain sporting clubs who had operated the bar in his absence had misappropriated funds.

The investigation found evidence to suggest that government stores and camping and boating equipment belonging to the Training School had been used for partially private recreation trips by the Superintendent, his family, other departmental staff, and friends.

A report of serious misconduct under section 28 of the Ombudsman Act was made immediately to the responsible Minister, the Public Service Board and the Director-General of the Department. Further analysis of bank statements, books of account and other records followed. The Superintendent and other departmental officers were asked for written information and the Superintendent's supervisor was interviewed.

No immediate response to the section 28 report was received from anybody except the Auditor-General. He objected to a comment, made by an Investigation Officer, which appeared in the transcript of the initial interview with the Superintendent, because he perceived the comment to be critical of his office. Correspondence with the Public Service Board on that point resolved the Auditor-General's concern.

In September 1988, however, the Acting Chairman of the Public Service Board told the Ombudsman that the Department of Family and Community Services had conducted a thorough investigation of the allegations against the Superintendent. As a result, the Board had charged him with a number of breaches of the Public Service Act in relation to:

- payment received from the clearing of sand and silt from a dam at the Training School;
- payment received from the sale of rock taken from the Training School; and
- the sale of liquor on the property.

The Acting Chairman said that the Department would hear the charges against the Superintendent.

A report on the investigation was issued in October 1988. The report said that most of the allegations that had been made were true; that the Superintendent's personal funds, various types of fund-raising monies and government funds had been mixed together over a number of years; and that the Superintendent was administering the Training School in a manner not befitting a responsible public servant.

In his report, the Acting Ombudsman said:

> Over time the distinction between the pursuit by [the Superintendent] of the best interests of the residents versus the personal interests of himself, his staff and their associates and friends has become blurred.
>
> With his undoubted goodwill in the community, his control over the availability of facilities at Mount Penang and the use of the Support Committee funds, [the Superintendent] seems to have enjoyed a position of power and influence much wider than his formal job description would imply. He was able to amply indulge his enthusiasm for sport (particularly Rugby, after the school adopted that sport) and associated social activities, in this environment. [He] has argued that this type of role was indispensable to a productive relationship between the School and the community, with benefits to both.
>
> It is not disputed that there are significant benefits from such interaction to both the wider community and the inmates. However, [the Superintendent's] style of leadership led to practices that were, where not clearly illegal or wrong, open to wrong interpretation by members of the public and which were possibly an intermediate step toward outright illegality. This is undesirable both in itself, and also for the poor example set to youthful residents and [to] staff by the representative of lawful authority who controls their daily activities.
>
> [The Superintendent] has breached the Public Service Code of Conduct and Ethics, the Public Finance and Audit Act and arguably has committed offences for which terms of imprisonment can be given under the [Liquor] Act and Crimes Act.

> The Department of [Family] and Community Services was aware of the sale of liquor, the legality of which was at best uncertain, and Senior Officers of the Department participated in the activities associated with it (including Departmental staff development courses). They were also aware of the unauthorised construction organised by [the Superintendent].

The Acting Ombudsman found that the Superintendent's conduct was wrong because he had failed to conduct himself and the School in a manner expected of a senior public servant, particularly one who is responsible for a large number of juvenile offenders and departmental staff; and because his conduct had been in part based on improper motives and had been in breach of the law.

The Department had failed to ensure the observance of law and proper conduct at the school, and this conduct, too, had been wrong, the Acting Ombudsman found.

The Acting Ombudsman recommended that the Superintendent be proceeded against by the Public Service Board under the Public Service Act for misconduct, that he be removed from his post, and that apparent breaches of the Liquor Act, Crimes Act and Public Finance and Audit Act be referred to the Director of Public Prosecutions.

He also recommended that the Department's supervision and internal audit procedures be adjusted so as to make clear that indications of non-compliance with ethical and legal standards by its officers were matters for audit staff and senior officers to enquire into and correct.

The Director-General in response to the report said that the Superintendent would not be removed from his post, but that he would be charged with misconduct under the Public Sector Management Act.

The alleged breaches of the Liquor Act, Crimes Act and Public Finance and Audit Act had been referred to the Director of Public Prosecutions who, in turn, had referred them to the Commissioner of Police for further investigation. No start had been made on that investigation as at May 1989. This Office will follow-up compliance with the remaining recommendations.

Furore at Fingal Head

Letitia Spit is one of the few areas on the Far North Coast which has been left untouched by modern tourist development. A few hundred white and Aboriginal residents live in the village there. During the year, the conduct of three government departments was made the subject of investigation by this Office after events occurred involving the future use of land there.

The Aboriginal community had successfully claimed Crown lands on Letitia Spit at Fingal Head. Four much-needed houses were being built there when, in November 1988, the Housing Department issued a stop-work order to the builder. The order came without warning. Reasons were not given for several days. The Aboriginal Land Council, the local residents and the builder had not been consulted beforehand. A newspaper report brought the situation to the attention of this Office and an investigation was commenced of the Ombudsman's own motion into the apparent failure by the Housing Department to consult the affected Aboriginal people, the Land Council and the builder.

Enquiries revealed that three of the four houses were on a site which was being studied by the Public Works Department as a possible location for a new mouth to the Tweed River. During the election

campaign which brought the present Government to power in March 1988, the then National Party leader and now Deputy Premier, Mr Murray, promised the Tweed Head fishing industry that, if elected, he would have the Public Works Department dredge the sandbar at the mouth of the river to improve its navigability.

The Public Works Department briefed its new Minister shortly after the election, and told him that dredging would be only a short-term solution. A new river mouth, paid for and accompanied by resort development of the whole of Letitia Spit, was the Department's preferred option. The Minister authorised a feasibility study. Unfortunately, the Public Works Department failed to notify the Housing Department, or the Aboriginal Land Council, that the proposed new river mouth could go right through the land on which three of the four Aboriginal houses were being constructed. An investigation of the Department's conduct was commenced as well.

In early 1989 complaints were received from the North Coast Environment Council about the procedures used by the Lands Department in granting a special lease over public reserves at Fingal Head to a resort developer, Ocean Blue Pty Ltd. It was concerned that the Lands Department was "disposing of public lands without reference to the public on whose behalf those lands are held in trust." The Tweed-Byron Aboriginal Land Council joined the Environment Council in this complaint and, for good measure, complained about the Lands Department's handling of a purported land claim at Letitia Spit and about the granting of an allegedly invalid lease to Ocean Blue Pty Ltd.

The Land Council in the meantime took the Lands Department to court to decide whether the land claim was validly made, and whether the lease was validly granted. This Office is not investigating those two issues.

After some months of preliminary enquiries with the Lands Department, yet another investigation has commenced into:

- the procedures used by the Department and departmental officers in dealing with development proposals by Ocean Blue Pty Ltd. for Fingal Head; and

- the procedures used by the Department to determine whether claimable Crown lands are required for "an essential public purpose" under the Aboriginal Land Rights Act.

Some of these matters, and some of the public figures involved in them,

are also being investigated by the Independent Commission Against Corruption. The roles of the Commission and of the Ombudsman's Office differ. Our brief is to investigate complaints concerning administrative conduct by public authorities, whereas the Commission is concerned with "corrupt conduct" as defined by its Act. Although there may be some overlap between the investigations, and some of the questions may even be the same, the focus and emphasis in each case is different.

Rates levied by Pastures Protection Boards

In recent years this Office has received an increasing number of complaints about the ways in which Pastures Protection Boards levy rates. Last year's Annual Report dealt with a complaint about retrospective rating by Moss Vale Pastures Protection Board.

It now seems clear that this Office was not the only recipient of complaints about Pastures Protection Board rating. Late in 1987 the Department of Agriculture, in response to a growing number of complaints that it had received, established a working party to review the minimum rating system which had been introduced in 1986.

This working party has now reported to the Minister. The report appears to be a thorough analysis of the problems facing Pastures Protection Boards and their ratepayers. In part, the report recommends that:

- the concept of minimum rates be retained;
- a standard minimum rating area of 10 hectares be introduced; any proposal by a Board for a smaller

minimum rating area be approved by the Minister after consideration by a special rating committee;

- minimum rates be assessed on a two-tier (general and animal health rates) basis, instead of by way of single assessment as currently prescribed.

The report makes other recommendations relating to the assessment of animal health rates and, as well, recommends that the feasibility of amalgamating several boards be considered as a means of reducing rates and improving services.

The recommendations, if adopted by the Government, should address many of the issues raised in the complaints made by ratepayers in recent years to both this office and the Minister for Agriculture.

Rivers and Foreshores Improvement Act and the Department of Water Resources

Section 23A of the Rivers and Foreshores Improvement Act provides:

> (1A) No person shall, except with the permission of the Constructing Authority -
>
> (a) make an excavation on, in or under protected river land; or
>
> (b) remove soil from protected river land.
>
> (2) (a) Application for a permit under this section shall be made in writing, in the prescribed form, to the Constructing Authority

and shall specify the land in respect of which the permit is desired and supply full particulars of the work proposed to be undertaken.

(b) . . .

Subsection 3 provides for a fine not exceeding $5,000 for a breach of this section of the Act; where a Corporation is involved, the fine prescribed is $10,000.

Two complaints which raised concerns about the Department's administration of these provisions were investigated during the year. The complaints related to the removal of sand and gravel from two of the State's most important river systems, the Murray and the Murrumbidgee.

In the first case, the complaint alleged that the Department had failed to prosecute a gravel extraction company for a breach of section 23A of the Act. According to one of the complainants, gravel had been removed from two sections of a bend on the northern banks of the Murray River. He alleged that heavy machinery had been excavating as much as forty metres from the bank and into the bed of the flowing river as well. He claimed that River Red Gums had been removed to allow clear access for the company's machinery. The complainants wrote to the Ombudsman after they had been told by the Minister for Water Resources that the Department did not intend to prosecute the company.

The Ombudsman's investigation disclosed that an officer of the Department had orally approved the excavation, without making any record on departmental files of the terms of his approval. The

Department told the Ombudsman that "it is customary for Departmental inspecting officers of the Catchment Management Unit to grant oral approval to landowners for small scale bank protection works which will protect their property from erosion".

The Department did not deny that a breach of the Rivers and Foreshores Improvement Act had occurred, and it admitted that the company could have used the extracted material, which had been stockpiled on the bank of the river, for commercial purposes. Although the department had directed that excavation cease and that the site be rehabilitated, it had not prosecuted the company. In defence of its position, the Department said:

> . . . the Department considered that a pragmatic approach should be taken and legal action not be pursued. The mounting of such action is extremely expensive and time consuming, and it is difficult to win a conviction, especially where it is considered the works have not detrimentally affected the stability of the river. It has been the Department's experience in similar cases, where a greater amount of evidence has been obtained against extractors, that prosecution action has failed miserably. Moreover, the provisions of the Act do not allow the Department to penalise extractors by confiscating the material illegally obtained.
>
> Additionally, it is considered to be of greater benefit to obtain the co-operation of sand and gravel extractors in order to manage the environment rather than to antagonise them with legal proceedings. This approach by the Department is achieving excellent results elsewhere in the State.

The Department added:

> Written advice on this particular matter was sought from the Department's Legal Section. However, due to the urgency involved, the matter was discussed orally and the decision was reached, in line with the legal advice.

Two other public authorities were involved in the matter and, after the Ombudsman's investigation had alerted them to the problem, they did not take such a casual attitude to the excavation. Hume Shire Council wrote to the company:

> A search of Council's records reveals that no development consent has been issued for this extraction of gravel from the Murray. As such you are in breach of the provisions of the Environmental Planning and Assessment Act, 1979, and you may be liable to a severe penalty.
>
> You are directed to submit to Council full details of the extent of gravel extraction that has occurred as soon as possible together with a development application and Environmental Impact Statement which should be submitted within 60 days of the date of this letter. No further extraction of material should occur from the river . . .
>
> Council views with great concern the apparent deliberate disregard of the planning regulations in this matter and reserves the right to institute legal action should this matter not be satisfactorily resolved.

Council actually commenced legal action against the company, but later discontinued it. However, the Department of Agriculture took action against the company for a breach of the Fisheries and Oyster Farms Act.

It was clear that, to satisfy all legal requirements, the company not only had to obtain development consent from council for the excavation; it also needed a permit under section 23A of the Rivers and Foreshores Improvement Act and, should there have been a need to lop or destroy any trees adjacent to the river, a permit under section 21D of the Soil Conservation Act.

The Ombudsman concluded that the Department's officer had dealt with the matter in an extraordinarily cavalier fashion. Nevertheless, he was disinclined to find the officer's conduct wrong because, at the time, the practice of giving oral approvals had had the Department's blessing. The Ombudsman found that the procedure of giving oral approvals was contrary to law, that the Department had acted wrongly in failing to properly consider its legal position relating to prosecution action in the matter, and that the Department's failure to monitor the work done under the approval, oral though it might have been, was also wrong.

In response to the Ombudsman's recommendations, the Department discontinued the practice of giving oral approvals and agreed to give consideration to amending the law to enable illegally excavated materials to be impounded. Other amendments are being drafted to increase penalties for breaches of the Act, to supplement existing powers to direct rehabilitation of damaged areas and to provide injunctive powers to restrain breaches of the Act.

The second complaint raised similar issues and concerned a sand dredging operation on the Murrumbidgee River, near Yass. In this case, the Department refused to prosecute the dredger for clear breaches of section 23A of the Rivers and Foreshores Improvement Act for bank disturbance associated with building settling ponds ancillary to the dredging. It has declined to issue permits to authorise the dredging operations, until legal doubts about the validity of a development consent granted by Yass Shire Council in 1974 have been resolved. The consent, which was granted before the environmental protections provided under the Environmental Planning and Assessment Act came into force, contains no sunset clauses and, arguably, does not authorise excavation and settling works on the banks of the river which the dredger is doing, but is merely for dredging from the bed of the river itself.

The complainant and the council took action in the Land and Environment Court to determine this question. The orders agreed to by the developer, however, have failed to settle the matter now that the developer has moved up the river to another site. For its part, council is not prepared to incur the further legal costs which would be involved in resolving the issue before the Land and Environment Court.

The Ombudsman's investigation of the Department, and of Yass Shire Council, is continuing.

Government Insurance Office : Big, safe . . . and unfriendly !

During the year the Managing Director of the GIO, Mr W Jocelyn, reprimanded GIO's Customer Relations Manager for assisting an Ombudsman enquiry.

The matter which gave rise to such extraordinary behaviour was, or should have been, a textbook case of co-operation between the Ombudsman and a public authority. An Ombudsman's investigator contacted the Customer Relations Manager when a man complained that the GIO had wrongly deprived him of his share of a 60% no claim discount that he and his father had accumulated together. The Customer Relations Manager investigated and found that the underwriters had been technically correct but a bit harsh in assessing the premium. The complainant was given his no claim discount and a refund of extra premiums that he had paid.

The complainant sent a thank-you card to the investigator, and the investigator wrote a letter of thanks to the Customer Relations Manager. Regrettably, in a spirit of goodwill, he sent a copy to Mr Jocelyn. Mr Jocelyn wrote back:

> I would like to point out that it is an unnecessary waste of the Ombudsman's resources to take any action whatsoever with regard to a complaint from the public where a choice as between insurers is available. The proper action of the Ombudsman in such cases should be to use clauses 13(4)(b)(iii) and (v) of the Ombudsman Act, 1974 to decline to pursue an investigation [on the grounds that the conduct complained of relates to a trading or commercial function or that there is an alternative and satisfactory means of redress available].
>
> I have reprimanded [the Customer Relations Manager] for dealing seriously with your enquiry.

Of course, Mr Jocelyn overlooked the fact that section 13(4) of the Ombudsman Act gives the Ombudsman a <u>discretion</u> to decline to investigate complaints. The section is not mandatory in its terms; and, in any event, the discretion afforded by the section is given only to the Ombudsman and is his, alone, to exercise.

Apparently Mr Jocelyn believes that the GIO should be "on a level playing field" with other insurance companies; and he thinks that, since other insurance companies are not subject to Ombudsman investigations, the GIO should not be either. Since other insurance companies are free to create public relations disasters, so, it appears, should the GIO be; although the GIO's shareholders, the people of New South Wales, might take a different view.

Contrary to Mr Jocelyn's view, the Ombudsman believes that State-owned corporations should exhibit the highest standards of corporate responsibility. The "level playing field" concept would not justify unethical behaviour by a government corporation, simply because its private-sector competitors were also unethical.

The Ombudsman wrote to Mr Jocelyn saying:

> In my view, the co-operation between the Investigation Officer and the Customer Relations Manager was a good example of the benefits of co-operation between this office and a public authority in the public interest. There was also a measure of enlightened self-interest in the exercise: we did not get bogged down in an investigation and the GIO retained a valued customer, who is now a satisfied customer.

He went on to point out that an attitude of belligerence between a public authority and the Ombudsman was more wasteful of time and resources than was co-operation. He concluded:

> Until such time as the GIO is removed from my jurisdiction, I and my staff will continue to do our duty in respect of complaints regarding it.

SRA patrol officers : now members of the Transit Police Service

The 1987-88 Annual Report dealt with the complexity, for this Office, of investigating complaints about State Rail Authority patrol officers, because the then government, in February 1988, had transfered administrative control of certain Transport Investigation Branch personnel, including patrol officers, from the Authority to the Police Department. However, the legislation governing those officers remained the Government Railways Act. Complaints about the conduct of railway patrol officers had to be dealt with under the Ombudsman Act, rather than under the Police Regulation (Allegations of Misconduct) Act, and involved both the Authority and the Commissioner of Police.

Fortunately, the Police Department (Transit Police) Act was passed recently. The principle objects of the Act are:

(a) to formalise the transfer of responsibility for certain officers of the Transport Investigation Branch of the State Rail Authority to the Commissioner of Police;

(b) to provide for the employment in the service of the Crown of the officers so transfered as members of an organisation (" the transit police service ") functioning in the Police Department;

(c) to provide for the Commissioner to be regarded as their employer in all but industrial matters;

(d) to ensure that the Commissioner may discipline them in the same way as they could be disciplined if they were members of the Police force;

(e) to make provision to preserve certain entitlements of the transfered officers.

The Act specifically provides (section 25) that complaints about members of the Transit Police Service shall be dealt with in exactly the same way that complaints about members of the Police Force are dealt with under the Police Regulation (Allegations of Misconduct) Act. That is, the initial investigation of complaints will be conducted by the Police Department and this Office will monitor the investigation; and, in appropriate cases, the Ombudsman will be able to reinvestigate complaints about the conduct of members of the Transit Police Service.

Unfortunately, at the time of writing the Act had not been proclaimed and no definite date for proclamation had been set. The Ombudsman believes that, in the public interest, the Act should be proclaimed without delay.

In the meantime, during the year this Office continued to deal with complaints about patrol officers. Details of two such cases follow.

Case 1.

Three men, including Mr A, complained that patrol officers had failed to properly investigate an assault on Mr A.

The circumstances were that a number of patrol officers, including two junior officers, had broken up a fight between Mr A and several unidentified men. Mr A's nose had been broken in the fight. The patrol officers had taken Mr A's details, but had not taken the details of the unidentified assailants and had allowed them to leave. This had denied Mr A the opportunity of taking civil proceedings for assault.

Even though the State Rail Authority was at the time conducting a blitz on violence on Sydney railway stations, the failure of the officers to take the details of the other participants in the fight meant that the Authority was unable to determine whether or not those men had been involved in other disturbances in the Sydney rail system.

During a hearing before an Assistant Ombudsman, it was disclosed that two senior patrol officers had taken the view that no action was required and that insufficient time had been available to take details of the other people involved, if the patrol officers were to catch the last train back to Central to finish their shift. The two junior officers

believed that the details of all the participants in the fight should have been taken, but they were obliged to abide by the decision of their senior officers.

The conduct of the two senior officers was held to be unreasonable; the Ombudsman recommended that both officers be counselled and that a notation be made in their employment records. One of the patrol officers later resigned.

Case 2.

A woman alleged that a patrol officer had removed her 13 year old son (together with his 14 year old companion) from a train; had detained and questioned the boys about graffiti found on the train; had slapped her son across the face; and had intimidated the boys and made them sign a false confession.

Investigation revealed that the patrol officer, in the company of two raw recruits, had found fresh graffiti on the train and, in an attempt to identify the culprits, had " asked " the boys to get off the train, accompany him to a meal-room on the station platform and answer questions.

The patrol officer claimed that he had acted in accordance with State Rail Authority Standing Orders and Instructions. This Office found that those instructions were confusing and hopelessly out of date. Within days of the incident occurring, the Children (Criminal Proceedings) Act had been proclaimed; section 113(1) of that Act provides:

> (1) Any statement, confession, admission or information made or given to a member of the police force by a child who is a party to criminal proceedings shall

not be admitted in evidence in those proceedings unless

(a) there was present at the place where, and throughout the period of time during which, it was made or given -

(i) a person responsible for the child;

(ii) an adult (other than a member of the police force) who was present with the consent of the person responsible for the child;

(iii) in the case of a child who is of or above the age of 16 years - an adult (other than a member of the police force) who was present with the consent of the child; or

(iv) a barrister or solicitor of the child's own choosing; OR

(b) the person acting judicially in those proceedings -

(i) is satisfied that there was proper and sufficient reason for the absence of such an adult from the place where, or throughout the period of time during which, the statement, confession, admission or information was made or given; and

(ii) considers that, in the particular circumstances of the case, the statement, confession, admission or information should be admitted in evidence in those proceedings.

The patrol officer said that he had had no knowledge of this legislation until some months after it had become law; nor had he known about guidelines for interviewing juveniles. The patrol officer's conduct was found to be wrong. However, the seriousness of his conduct was mitigated by the fact that his ignorance of the impending legislation and of the, then, current procedures for interviewing juveniles was primarily the fault of the Authority and of its poor training and instruction of patrol officers. The Deputy Ombudsman recommended that the patrol officer be counselled about the proper procedures to follow when interviewing juveniles.

The Authority's training of patrol officers was found to be inadequate and confused so far as dealing with juveniles was concerned. Given that administrative control of patrol officers had been transfered to the Police Department, it was recommended that the Commissioner of Police revise the Standing Orders and Instructions and review training procedures to ensure that the issue of dealing with juveniles was properly addressed.

A scoop for the Ombudsman

The 1987-88 Annual Report outlined a case in which there had been a four-and-a-half year delay by the State Rail Authority in deciding the successful tenderer for the supply of ice cream. Tenders were first called in September 1983 and again in November 1985. A decision was made by the Authority in September 1988.

Investigation by this Office disclosed that the delay in handling the tenders had been caused by inherent administrative problems between the Trading and Catering Branch and the Contracts Control Board of the Authority. Failure to reach a prompt decision caused further

problems for the Authority, because it had failed to keep the tenderers fully informed about what was happening. At all relevant times during the Authority's handling of the matter, the Trading and Catering Branch had been responsible for initiation and evaluation of the tenders and for recommending to the Contracts Control Board who the successful tenderer should be.

The Authority's policy was that, where a contract had expired and no decision had been reached about who the new tenderer should be, the previous supplier would continue to supply out of contract. In this case, Streets Ice Cream, whose previous contract had expired on 31 December 1983, continued to supply ice cream products to the Authority.

Because of the delays in both the Trading and Catering Branch and the Contracts Control Board, the Authority had only reached a decision about the successful tenderer when the supply period covered by the tenders was about to expire. In this situation, the Authority had to cancel the tenders submitted and reopen the tendering process. The Authority said that part of the reason for the delay was that staff had been off duty, injured. So the delay continued, to the detriment of Australian United Foods, whose tender, in fact, had been recommended for acceptance just before time ran out.

On the brighter side, in February 1988 the Authority decided to disband the Contracts Control Board. It was replaced by the Central Contracts Group which, as its name suggests, centralised the processing of tenders. New administrative procedures, which sought to ensure that a number of quality control checks of tenders would occur, and that any future cases of delay would be resolved, were put in place.

The Ombudsman found that the Authority had excessively delayed the

processing of the ice cream tenders and had failed to properly inform the tenderers of the progress of their tenders. The Ombudsman said that the actions of the Authority had denied Australian United Foods, and the public at large, the benefits of a competitive tendering system. Any tendering process is effective only when tenders are promptly considered and determined. The Ombudsman recommended that Australian United Foods be compensated for the out-of-pocket expenses it incurred in preparing tender documents that were never properly processed by the Authority; that the Central Contracts Group institute procedures for the proper evaluation and processing of tenders in a reasonable time, prior to the contract period commencing; and that tenderers be advised of any delays.

In his response to the report, the Chief Executive of the Authority said that he had written to Australian United Foods and had indicated that the Authority was prepared to pay the recommended compensation. In relation to the second recommendation, the Chief Executive was honest enough to say that the Central Contracts Group was experiencing problems similar to those experienced by the Contracts Control Board, which it had replaced. These problems were exacerbated by the fact that a number of business managers did not recognise their proper responsibilities. It was hoped that this would change. In this respect, the Chief Executive said, the corporate structure of the Authority was to be redefined, with management to have clearly defined areas of responsibility and to be accountable for their actions.

The Chief Executive went on to say:

> The Authority has been aware for several years of deficiencies in the management of the Trading and Catering Section formerly under the administration of the General Manager Passenger Services and in 1986, the Authority took action to remove the then Manager.

> Unfortunately, the situation has not improved and I have recently had cause to refer apparent clear evidence of the payment of secret commissions to senior management in the Section and the existence of a huge stock deficiency to both the Commissioner of Police and the Independent Commission Against Corruption. The Manager has recently resigned and another officer has been dismissed.

Vehicles towed from clearways: still some problems

The Annual Report for 1987-88 outlined some of the problems that were experienced when the then Department of Main Roads began to tow away vehicles illegally parked in clearways. Whilst initial teething problems with the scheme had been resolved, and a new system to notify vehicle owners of their vehicle's location had been introduced, further complaints had been received. Mention was made in the Report that this Office had made preliminary inquiries about a complaint received after the new notification system had been put in place. Those inquiries, however, discovered that a simple mistake had been made during the recording of the vehicle's registration number, when a " V " had been misread as a " U " ; therefore, enquiries were concluded.

Only one complaint was received during the year about an owner being unable to locate his vehicle after it had been towed away. Mr K parked his car in Moore Park Road, Paddington at 7.30 one morning. When he returned at 9.00 pm, his car was missing; he reported the vehicle stolen to police at Parramatta at 11.00 pm that evening.

About a week later, Mr K was notified by police from Redfern that his car had been located. When Mr K collected his car, it was undrivable.

Four weeks later, Mr K received a debit note from the Roads and

Traffic Authority (RTA) for the removal of his vehicle which the debit note described as having been "unattended" and "standing illegally in a clearway". The debit note indicated that the vehicle had been towed from the clearway at 4.12 pm on the day in question.

Inquiries by Mr K revealed that the RTA had notified Surry Hills police station by telex of the location of his vehicle, and had asked the police to contact the owner. As well, a fax had been sent to the Police Stolen Motor Vehicle Index; this had described the vehicles that had been towed and had given their locations.

Mr K complained to the Ombudsman that, although the Police Department had received information about the location of his vehicle, this information had not been given to him when he had reported the vehicle as stolen several hours later. Preliminary inquiries have been commenced in this matter.

It appears that, although the notification procedures have improved considerably since the RTA began towing vehicles illegally parked in clearways, it is still possible for owners to experience problems in establishing the location of their vehicles.

Food inspection

Some complaints dealt with by the Office raise complex issues, investigation of which is necessarily protracted. One such matter, which arose initially in July 1984, was completed during the year.

The Office received a complaint that the Department of Health had failed to properly discharge its responsibility to protect the health of persons who used food supplied by the Qantas Catering Centre at

Mascot. It was alleged that the Department had not inspected the centre on a regular basis and, at that time, had not inspected it at all for over a year. Inspections, when they had taken place, had been made with the prior agreement of the centre management, it was claimed.

In September 1985, after extensive preliminary enquiries had been made, the conduct of the Department was made the subject of an investigation. To assist in the investigation, approval was obtained for the Ombudsman to engage the services of a Senior Lecturer in the School of Food Science and Technology at the University of New South Wales to provide expert assistance.

The investigation included visits to the catering centre and consultation with senior executives of Qantas, and was widened to include the Department's performance in checking food service industries generally.

The Ombudsman found that inspections of the Qantas Catering Centre, for the purpose of determining whether its activities complied with the provisions of the Pure Food Act and regulations, had been inadequate because they had not been made often enough; because no records had been kept of the inspection activities; and because the Department had failed to conduct inspections outside normal working hours, particularly in the evenings and on weekends or in other times of peak activity.

The Ombudsman also found that inspections of food processing and food service establishments, in New South Wales generally, involved an unsatisfactorily low level of testing for possible microbiological contamination of foods.

In his report the Ombudsman, amongst other things, recommended that:

- detailed monthly inspections of the Qantas Catering Centre commence and such inspections cover all aspects of the Centre's activities;
- more frequent ad-hoc inspections be made of the Qantas Catering Centre, without prior arrangement with or knowledge of Qantas, and a significant proportion of such inspections be made outside normal working hours, particularly on weekends and at times of peak activity;
- samples obtained during inspections be submitted to the Department of Health's Analytical Laboratories for analysis;
- the Secretary arrange for a management audit of the staff structure, organisation and performance of the Pure Food Inspectorate;
- within two years, the Secretary arrange for the implementation of a system for classifying all food processing, food storage, food sale and food services establishments in New South Wales as to the risk to public health inherent in their operations.

The Secretary later informed the Ombudsman that detailed monthly inspections and more unannounced inspections had been made of the Qantas Catering Centre. He said that the results of those inspections would be carefully monitored and the situation would be reviewed after twelve months. As well, more frequent inspections of the Catering Centre without prior notice had been carried out and the Department had started to keep records of all of its inspections. The Secretary said

that procedures for the correct submission of food samples for microbiological examination had been reviewed and arrangements had been made for the publication of new procedures in pocket book form, for issue to each Food Inspector.

The Department had commenced discussions to determine the equipment needed by Food Inspectors and the procedures to be implemented by them to enable meaningful analysis of food samples to be undertaken and to, where necessary, allow prosecutions to be made. As well, the Department's Analytical Laboratories had undertaken to report immediately to the Secretary any deficiencies in the condition of samples to enable prompt action to be taken to remedy any deficiencies in equipment or procedures.

The Secretary reported that the entire administrative structure of the Department was under review and it was contemplated that Food Inspectors would be organised differently to achieve their more effective operation. The Chief Food Inspector had been asked to report to the Secretary about the suggested system for classifying food processing, storage, sale and service establishments, and to set out possible future changes in the Department's responsibilities.

After reviewing all of the action taken by the Department, the Ombudsman considered that sufficient steps had been taken to implement all of his recommendations and he concluded the matter.

Checking licensed builders

A homeowner contracted with a building firm to have house extensions done. The building firm had provided a builder's license number and the name of a builder who would allegedly do the work on behalf of the firm. These details, in fact, appeared on the firms stationery. The

homeowner rang the Building Services Corporation and asked if the builder named was licensed; having been assured that he was, the homeowner paid a deposit of $5,000 to the firm.

Some months later, after no work had been done despite many frustrating telephone calls, he made further enquiries and discovered that the builder nominated had absolutely no connection with the building firm; even worse, the principal of the firm was not licensed and had a history of not completing contracted work. The homeowner lodged an insurance claim under the House Purchasers Agreement with the Building Services Corporation for the loss of his deposit. However, because he had contracted with an unlicensed builder, he was not covered by the insurance scheme and his claim was rejected.

The homeowner complained to this Office. He was critical of the system provided by the Building Services Corporation for checking whether a builder was licensed. He claimed that, in his case, the system had lulled him into a false sense of security and had aided the proprietors of the firm to perpetrate fraud on himself and others.

Investigation of the homeowner's complaint disclosed that cases of misrepresentation, in which a licensed builder nominated by a firm, in fact, was totally unconnected with it, were quite rare; more importantly, such cases were very difficult to guard against. Legal action could be taken once the scheme was uncovered, but that was usually too late to help most people. In the case of the building firm involved with the homeowner, twenty six complaints had been made to the Building Services Corporation; but because the principals of the firm were unlicensed, none of the homeowners concerned were eligible to claim on the insurance fund. It transpired that a number of licence numbers had been used by the firm and all of them belonged to builders who were completely unconnected to it.

This Office accepted that, although the Corporation was able to indicate to enquirers whether or not a particular builder was licensed, it was not able to establish whether that licensed builder had any connection with a firm that a homeowner intended to use to have work carried out. This check could only be made by the customer by viewing the builder's licence or by sighting other evidence that satisfied the customer that the work was to be done by a properly licensed person.

The Corporation issued instructions to its staff, requiring them to warn enquirers to make sure that any proposed contract was drawn up in the name of the person holding the licence, because business names are not currently recorded by the Corporation; and that enquirers be advised to satisfy themselves about the quality of the licensee's work by inspecting other jobs that they have done.

A new licensing system is proposed whereby licensees will be issued with a credit card type licence which they will be required to show to customers before contracts are signed for building work. This change is designed to overcome false claims by builders that they are licensed and whose customers are left without insurance protection. The cards, in addition to identifying the licensee, will also contain trading or business names and a new, computerised register will link registered business names to the licence number displayed on contracts.

Given that the public relies on the Corporation as its only means of checking the status of a builder, these changes cannot come soon enough.

The Darling Harbour Authority

The 1987-88 Annual Report (pp.49-53) outlined the result of the Ombudsman's investigation of complaints that the Authority had failed

to inform or consult residents about the development of a site opposite them in Murray Street, Pyrmont. Originally proposed as a car park with a landscaped roof-top at street level, the development "developed" into two hotels; and one of these, ten storeys high and providing 400 rooms, was to be located directly opposite the residents' homes.

The Ombudsman's investigation found that the Authority, amongst other things, had misled the public about the development and had failed to inform and consult with the residents about changes to the carpark/hotel development.

The Ombudsman recommended that the Authority:

- consult with the owners of properties in Murray Street to ascertain whether any of them wished the Authority to resume their properties;
- compensate those owners who did not wish to sell their houses for the intrusion and adverse effect on their properties;
- provide resident parking in the northern carpark; and
- as a matter of policy, inform and consult with affected residents and property owners about any further changes to the development.

The Minister for Planning requested a consultation with the Ombudsman about this matter. At the consultation, the Minister raised no objections to the findings and recommendations made by this Office. The Minister later wrote to the Ombudsman and said that he had instructed the Authority to devise a system of consultation with affected residents and property owners adjoining the Darling Harbour Development Area. He also said that he had asked the Authority to pursue the issue of residents' parking with the Sydney City Council.

With regard to the Ombudsman's recommendations relating to resumption and compensation, however, the Minister said that he had " . . . received advice that the potential for resumption or compensation by an ex-gratia payment is of concern to a number of public agencies due to the precedent it may establish ".

The Ombudsman made a report to Parliament about the matter, but very little appears to have happened in the past year. The Minister met with one of the complainants in November 1988 and, according to her, undertook to make decisions on the Ombudsman's recommendations regarding compensation, permanent parking and consultation. In May

1989, the Authority wrote to the complainant offering the residents free parking in the Wilson Car Park; the complainant responded, raising a number of queries. However, despite two follow-up letters to him, she had heard nothing from the Minister about the other issues; this prompted her to write to the Premier saying:

> Needless to say I am angry at being kept waiting six months for even an acknowledgment to my correspondence let alone any action. I understood you had instigated new streamlined government procedures - Mr Hay's office must have been by-passed.

By June 1989, the residents had received cards authorising them to park their cars in the Northern Carpark. However, despite the fact that the Minister had responded to her letters, the complainant said that the issues of compensation and consultation remained unresolved.

Stolen Sigmas : an update

The 1987-88 Annual Report set out the facts of this matter in some detail. Briefly, the Office had received sixteen complaints that the Department of Motor Transport (DMT) had passed stolen cars for registration. The complainants had all been victims of the same car stealing racket, which had involved at least 52 cars. The thieves had modified the engine and chassis numbers and had defaced the compliance plate on each car. The cars were then presented to a variety of registry offices for registration, with the claim that they had come from another State. The DMT had registered all of the 52 cars.

After an investigation, the Ombudsman found that the conduct of the

DMT was wrong in two respects. Firstly, it had failed, over many years, to address and rectify identified deficiencies in its registration system. Secondly, it had failed to properly consider claims for compensation which, then, had been made by eighteen of the people who had purchased stolen vehicles.

In his report, the Ombudsman recommended:

- the appointment of a suitably qualified person with the responsibility of ensuring the integrity of the DMT's registration system on an ongoing basis, and that this person's role should include pro-active field and computer system reviews;
- that the DMT compensate the 52 victims for their financial loss because, given the circumstances, it was not reasonable to put the victims of the car stealing racket to the expense and inconvenience of having to seek compensation through the courts.

In June 1988, after the DMT decided not to implement his recommendations, the Ombudsman made a report to Parliament.

In a media release issued on 16 August 1988, the Minister for Transport announced that the issue of compensation for the stolen Sigma victims had been reviewed, and that a number of initiatives were to be introduced to help overcome the problem of innocent parties purchasing stolen motor vehicles.

In keeping with the Minister's promise, the Proof of Identity Scheme was introduced. The Scheme provides, amongst other things, that, when people are registering or transfering registration of a vehicle, they will be required to:

1. Provide proof of identity;

2. Provide proof of the origin of the vehicle; and

3. (a) Attend a motor registry in person to register a vehicle or transfer existing registration; or

   (b) If individuals cannot attend the motor registry or dealer, appoint an agent to sign the registration documents on their behalf.

In addition, the National Vehicle Identification Numbering (VIN) System came into effect on 1 January 1989 and is meant to act as an added safeguard against the possibility of stolen vehicles being presented for re-registration. Further, from 1 July 1989, access to vehicle information will be available by chassis number.

Finally, of the twenty eight claims for compensation received from the purchasers of the stolen Sigma vehicles, all but one have been settled.

Delays by the Department of Housing : Can there be worse to come ?

The 1987-88 Annual Report (pp36-39) gave details of a case in which the Department of Housing had excessively delayed its response to preliminary enquiries by this Office. Throughout the year further, persistent delays have been experienced in gaining replies to enquiries made to the Department.

It is customary for this Office to make preliminary enquiries of a Department, forwarding details of the complaint and requesting information within a reasonable time, usually twenty-eight days. Such a procedure assists in the expeditious processing of complaints and often circumvents the need for formal investigation, which is costly and time consuming for all concerned and, more often than not, simply unnecessary.

Officers of the Department of Housing, however, do not appear to have come to terms with the fact that a brisk and efficient response to

preliminary enquiries will often save their Department the trouble and expense of later responding to a formal investigation by this Office.

The Department's own register of Ombudsman Office complaints for the past year, which was examined during the course of one particular investigation, revealed that the Department routinely takes at least two months to reply to letters of preliminary enquiry from this Office, and on several occasions the delay was in the vicinity of five or six months.

In one particular case, the initial letter of enquiry was sent from this Office late in November 1988. Despite a flurry of reminder calls and letters, by April 1989 not even so much as an acknowledgment letter had been received concerning this enquiry. Prompted by this delay, notices under Section 16 of the Ombudsman Act, making the matter the subject of a formal investigation, were sent to the Department on 19 April 1989.

Despite the escalating severity of the matter, the first and only written response to our enquiries was not sent from the Department until 7 July 1989. The letter included a brief statement of " regret " for the delay and added " every endeavour is made to comply with deadlines set by your Office ". Regrettably, there is little evidence available to this Office to support that claim.

As a large number of the complaints received from members of the public concerning the Department allege that correspondence has been mishandled, delayed or ignored, the issue is of considerable relevance. At present, it seems that when one enters into correspondence with the Department of Housing, the consequent epistolary hiatus is likely to endure for a more extended period than most modern marriages.

Competing interests : use of pesticides

The Ombudsman investigated a complaint about unreasonable delays on the part of the Department of Agriculture and the Registrar of Pesticides in processing applications for permits to aerial spray chemicals on bananas. The complainant provided details of two specific cases where this had occurred. He alleged that chemicals which could be used in Queensland were not able to be used by aerial crop-dusters in New South Wales, and he claimed that the Department would not offer alternatives to the banned chemicals.

The result, according to the complainant, was that banana plantations were being sprayed illegally and field officers of the Department, who sympathised with the growers, were turning a blind eye to this. He argued that the disparity between the New South Wales and Queensland standards demonstrated a need for national standards in pesticides.

The Registrar of Pesticides is able to issue permits or pesticide orders under the Pesticides and Allied Chemicals Act. Important conditions must be satisfied by the person who applies to use a pesticide, and by the Registrar, before a chemical can be registered for use. Harm, or potential harm, to users of the chemicals, to consumers of the fruit or other produce to be treated, and to the environment generally, is the main issue that has to be addressed.

The Director-General of Agriculture in a report to this Office said:

> Permits and pesticide orders can only be issued where the interests of public safety, the general community and protection of the environment allows.
>
> You will appreciate that permit applications may fall into a large number of categories with varying permutations of

> requirements under the Act and similarly varying levels of inputs for the evaluation of such proposals. For example, at one end of the scale there may be the proposition of a scientifically trained and qualified research worker desiring to test a few grams of a new compound under strict laboratory conditions; whereas at the other extreme, large scale use of a relatively highly toxic pesticide by farmers, graziers and aerial applicators is proposed on crops grown over large parts of the State and which are destined for human consumption.

Section 24(2) of the Pesticides and Allied Chemicals Act provides:

> The Registrar shall refuse to issue, renew or register a [pesticide] permit in any case in which he thinks that -
>
> (a) the interest of public safety or the safety of any individual; or
>
> (b) the protection of the environment from unintended harm that might be caused by the pesticide, so requires.

Both the Department and the Registrar have onerous responsibilities in attempting to balance the sometimes conflicting interests of agricultural industries, those of the general public, and the protection of the environment. In recent years, public controversies in the cattle industry concerning pesticide residues in meat have highlighted the dangers of mismanagement of pesticides and other chemicals to agricultural industries and to consumers of their products. Environmental issues, too, have received greater attention in recent times.

The Department is responsible for preserving, as far as it is able, the agricultural industries of New South Wales. To do this, it must take a

broad overview, and a long-term view, of the interests of growers. On the other hand, in the interests of public safety it must take a conservative approach to the use of chemicals in agriculture, allowing their use only under strict controls and only where they have been properly evaluated.

The difficulties facing the Department in discharging its responsibilities are recognised. Nevertheless, the issue of delay is often important in practical terms. In the case of banana growers, they and the sprayers are reliant on pesticides to protect the banana plantations. They need to know, by certain critical times, that they can spray with the insecticide they wish to use or with an effective alternative. Alternatives are not always readily available. Undue delay in evaluating pesticides and processing applications is unacceptable.

The Ombudsman found that, in one of the two cases raised by the complainant, the Department and the Registrar had failed to process an application properly. In the other case, he found that the time taken by the Department and Registrar had been reasonable. He found, however, that a failure to provide progress reports to applicants during the long testing and evaluation period had been unreasonable.

The Department undertook to investigate the complainant's allegations of illegal spraying and to in future provide interim progress reports to applicants.

Accreditation problem at Macarthur Institute of Higher Education resolved

The problems experienced by graduates with accounting majors, who had completed the Bachelor of Business Degree at Macarthur

Institute of Higher Education in 1987, were set out in the 1987-88 Annual Report. Students at the Institute had been led to believe that the course was accredited by the Institute of Chartered Accountants (ICA) and the Australian Society of Accountants (ASA) but their applications for membership of these professional associations had been rejected.

When students complained to this Office, negotiations between the professional bodies and the Macarthur Institute commenced. As an interim measure, a professional upgrading programme was organised; this enabled graduates to obtain membership of the professional bodies, subject to satisfactory performance.

In October 1988 ASA and ICA jointly advised the Macarthur Institute that provisional accreditation had been granted to the Bachelor of Business (Accounting) Degree offered by it. This accreditation applied to students commencing a degree course in January 1989, and was subject to review in mid-August 1989. In granting provisional accreditation, the professional bodies indicated that they would be interested in seeing developments in such areas as:

- filling of staff positions with appropriately qualified and experienced persons;
- possible improvement in student/staff ratios;
- integration of computer studies into second and third year levels;
- maintenance of adequate autonomy for the Division of Professional Accountancy and

Commercial Administration within the Institute, to enable courses and assessments to continue to be of the standard required by ASA and ICA.

Pollution at Gosford

The 1986-87 and 1987-88 Annual Reports referred to an investigation of the State Pollution Control Commission's handling of a pollution problem at Gosford. It was alleged that the Commission was doing "too little, too late" about water and odour pollution from West Gosford meatworks. After complaints had been made by Gosford residents and businesses that had suffered odour nuisance, an investigation was commenced in August 1987 into the Commission's handling of the problem.

The investigation by this Office was discontinued in January 1989, because any mistakes that the Commission might have made previously in its choice of regulatory strategies had been overcome, and it was recognised that the Commission, in fact, had overseen considerable and effective remedial action to deal with the odour problem.

In particular, four waste water ponds were taken out of service after new waste treatment equipment was installed and connected to the sewer. This removed the major source of water pollution and odour generation. Later, more minor odour complaints, some of which related to the poor operation of the new equipment, were taken up and discussed with the company by the Commission.

In May 1989 the meatworks was closed down and the site was offered for sale. The Commission will continue to monitor the site and has

required the company to report to it about the continuing clean-up of the ponds.

Inadequate drainage at Griffith : an update

The 1987-88 Annual Report gave details of an investigation that revealed major deficiencies in the handling of some subdivision applications by both the Department of Water Resources and the Griffith Shire Council. The subdivision applications had been approved without either authority giving adequate consideration to the drainage implications involved in them; the area subdivided had been flooded shortly after some of the new houses there were occupied. Both authorities had failed to provide for the enlarged drainage works that the subdivisions necessitated, and each held the other responsible for the problem. The Ombudsman made twenty-two detailed recommendations in his final report, and all but two of them have been implemented.

The Department of Water Resources obtained a special Treasury allocation to enable it to commence works to enlarge the major drainage channel, D C Western, and planned to spend $300,000 in the 1988-89 financial year on those works. As well, it revised its policy on drainage contribution levies and took action to amend several pieces of legislation to enable such contributions to be sought from developers. Griffith Shire Council reviewed its development control procedures and investigated possible flood mitigation works in the affected area. Residents who previously had been forced to contribute towards the cost of a communal drain installed by the Council were offered refunds of their contributions.

Unfortunately, the subdivision area experienced more localised flooding

during the year. Some of the residents faced mortgagee sales of their houses when they were unable to privately sell their properties because of the flood-prone stigma attached to them.

If sufficient funds are made available to the Department of Water Resources to complete the enlargement of D C Western, the steps taken by the authorities following the Ombudsman's report should lead to the eventual resolution of the drainage problem in Griffith's west end.

Conversion of sub-standard buildings to Strata Title

As long ago as 1983 the Ombudsman first reported on difficulties in converting older buildings to Strata Title. The matter has been mentioned in every Annual Report since then except that for 1985-86.

An amendment to the Strata Titles Act, aimed at solving the problem, was expected to go to Parliament in 1987 . . . and then in 1988.

After being twice rejected by the previous government, Cabinet approved preparation of the amending legislation in April 1989. It is now hoped that the amendment will, at last, be put to Parliament sometime later this year.

Sydney Harbour foreshores management

The Ombudsman first made recommendations about the management of Sydney Harbour foreshores in 1982.

The recommendations followed investigation of a complaint about the

intensification of moorings in Sailors Bay. The major recommendation was that an inter-departmental review be carried out of the legislative and administrative framework for the planning, management and control of the Harbour.

The Department of Planning has prepared a Regional Environmental Plan, the Sydney and Middle Harbour REP, to address the problems identified. A similar plan for the Parramatta River was exhibited and has now been re-drafted to take into account matters raised in submissions made and to bring it into line with the plan for Sydney and Middle Harbours. Both plans went on exhibition for public comment in August 1989 and they are expected to be finalised in early 1990.

With any luck at all the plan might be finalised within ten years of the Ombudsman's recommendation having been made.

Visits to residential youth centres

Ombudsman officers regularly visit residential youth centres run by the Department of Family and Community Services. In 1988-89 twelve visits were made to nine centres and 146 oral complaints were dealt with; more information is provided in "Performance Indicators" later in this Report.

Visits to Residential Youth Centres
1 July 1988 to 30 June 1989

Youth Centre	Number of Visits
Endeavour House, Tamworth	1

Campbelltown Youth Centre	2
Cobham Youth Centre, St Marys	1
Keelong Youth Centre, Unanderra	2
Minda Youth Centre, Lidcombe	2
Mt Penang Youth Centre, Kariong	1
Ormond Youth Centre, Thornleigh	1
Riverina Youth Centre, Wagga Wagga	1
Worimi Youth Centre, Broadmeadow	1
	12

The majority of oral complaints received concerned aspects of daily institutional life, such as diet, smoking policy, or the availability of handicraft equipment. Invariably, Superintendents were prepared to discuss these issues and in many cases the problems were able to be resolved on the day of the visit.

Many complaints were received about matters that had nothing to do with the conduct of the centre. Such complaints related to the conduct of police or other government departments, or to matters which raised legal questions. Those complaints that were within the jurisdiction of this Office were dealt with, while others were referred to the appropriate authority.

LOCAL GOVERNMENT AREA

Complaints about Local Government

New Complaints

There were 633 new complaints about local councils received during the

year. In addition, 163 complaints that were under enquiry or investigation were brought forward from 1987-88, creating a total of 796 active matters.

Finalised complaints

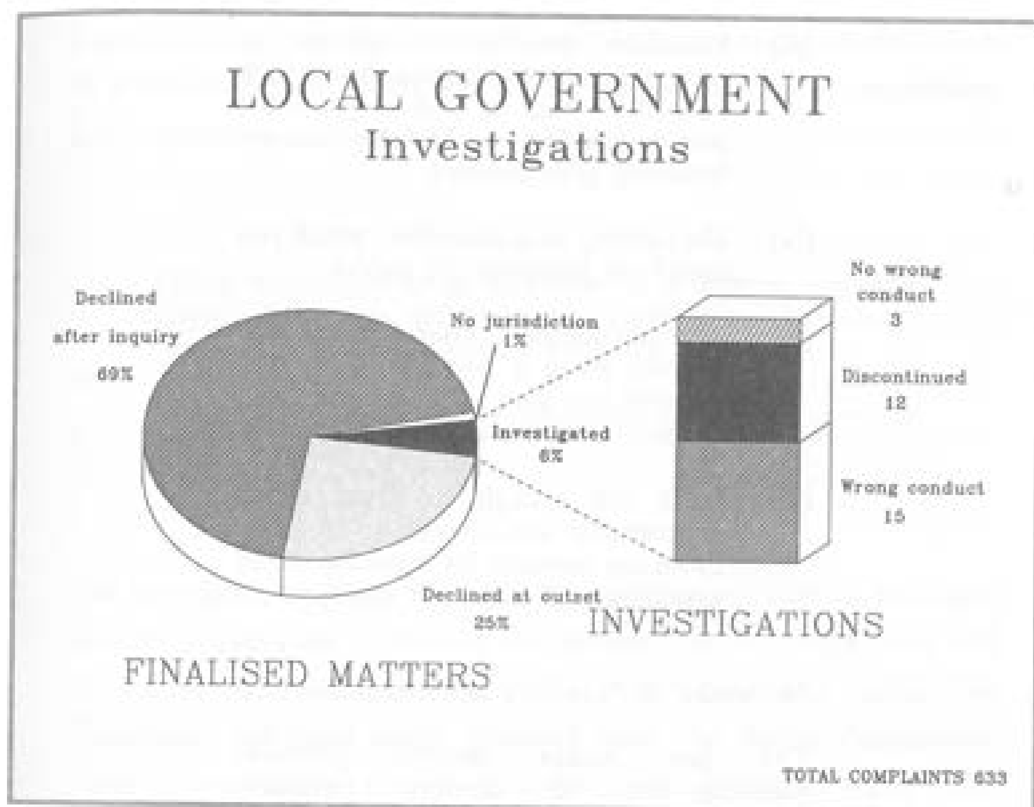
A total of 624 cases were finalised during the year, leaving 172 matters still under enquiry or investigation.

The following table shows the outcome of finalised complaints by category:

Outcome	Number	% of total
No jurisdiction	6	1
Declined without any enquiry	157	25
Declined after preliminary enquiry	347	56
Resolved after preliminary enquiry	50	8
No prima facie evidence of wrong conduct after preliminary enquiry	34	5
	594	95%
Investigation discontinued	12	2
" No wrong conduct " found	3	0.5
" Wrong conduct " found	15	2.5
	30	5%

TOTAL	624	100%

The following chart shows details of complaints that were investigated:



Conflict of interest : a growth industry

Since 1982[2], the Ombudsman has advocated the adoption of a code of conduct by members of councils. An appropriate code was developed after discussion between the Ombudsman and the Local Government and Shires Associations, and was circulated by the Associations to all councils as long ago as April 1984. The code provides:

[2] See Annual Reports 1982-83, pp62-63; 1983-84, pp72-73; 1984-85, pp74.

1. Public Duty and Private Interest

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

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

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

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

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

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

2. Disclosure of Pecuniary and Other Interests

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

The Ombudsman's Office has regarded the code as representing a reasonable standard of behaviour on the part of members of councils and has applied that standard to its assessment of complaints alleging a conflict of interest.

Public debate about disclosure of interests and about when members of councils ought to withdraw from discussing and voting on issues in which they have or might be seen to have a conflict of interest, financial or otherwise, has continued. The Commissioner for the Independent Commission Against Corruption was reported in the Sydney Morning Herald on 14 June 1989 to be concerned about possible conflicts of interest on the part of council officers. In commenting on the failure of a council officer to declare his private dealings, the Commissioner was reported to have said:

> [This] might appear to give rise to a further question about whether or not there is a code of conduct about potential conflicts of interest and their disclosure.
>
> If not, should there be one, and what should [its] contents be ?

The investigation by this Office of the handling by Ashfield Municipal Council of proposals to develop the Summer Hill Car Park dealt with the conflict of interest question. The matter generated considerable controversy and local media attention when the Acting Ombudsman made a report finding that the council's conduct had been wrong. This investigation was discussed in detail in the 1987-88 Annual Report (pp91-93), and more recent developments are set out elsewhere in this Report. The point needs to be made, however, that had the council and its members adhered to the code of conduct, the investigation would not have been necessary and considerable time and public resources would have been saved.

In April 1989 the Minister for Local Government invited this Office to be represented on a working party to develop a more detailed code of practice for council members and staff. The Ombudsman accepted the

Minister's invitation. The working party will also include representatives of the Department of Local Government, the Independent Commission Against Corruption and the Local Government and Shires Associations. Meetings of the working party have already commenced.

The Minister's letter referred to the fact that members of councils were uncertain about their obligations under section 46 of the Local Government Act, and about whether there were wider statutory and/or general ethical considerations than those set out in the Act and about which they should be concerned.

In 1987 section 46 of the Local Government Act was extensively amended to provide for compulsory disclosure of financial interests in land and companies of council members and staff, and of their relatives. Annual returns must be lodged by councillors and prescribed staff; these must detail their ownership or interests in land and buildings, shares in companies and positions held in unions or associations; and the holdings, interests and positions of near relatives of which they have knowledge must also be disclosed.

Officers must now disclose pecuniary interests in development or subdivision applications on which they may have to report or give consent under delegated authority. Provisions requiring council members to declare pecuniary interests in matters before councils, and that they not participate in consideration of such matters, are also set out in section 46.

Another matter concerning proper conduct by an alderman in relation to the proper separation of public and private business was dealt with during the year, first by this Office and then, in detail, by a Local Government Inspector. This matter concerned an allegation that the Mayor of a large metropolitan council had been using council vehicles,

food, and staff for private purposes, mainly for the benefit of his family.

The Local Government Inspector found that the allegation was true. The Mayor argued that having his family members chauffeured about, having council staff acting as removalists for his personal effects, and providing meals to his mother, all using council resources, constituted reasonable and justifiable assistance to him in the discharge of his time-consuming duties. While the degree of involvement in council affairs claimed by the Mayor was not disputed by the Inspector, the Mayor's dictatorial management style and his failure to observe the proprieties of his office were criticised, and appropriate recommendations were made.

Procedures to avoid perceptions of conflict of interest, however, have wider relevance than just to local government. This Office investigated a complaint which alleged biased assessment by the Building Services Corporation of a complaint about faults in a swimming pool. The Corporation and this Office have co-operated to produce guidelines to assist Corporation inspectors to avoid conflicts of interest. These conflicts, whether real or merely perceived, can sometimes arise, because many inspection staff were formerly licensed builders, and their building work can be complained about by consumers. The guidelines aim to ensure that:

- Corporation staff who assess the building work of another staff member are not subject to influence by that staff member;

- the staff assessing the work are seen by the consumer to be fully independent.

In the particular matter, whilst no evidence of actual bias was found , this Office took the view that the Corporation's procedures were insufficient to ensure that allegations or suspicions of bias could not arise.

There seems little doubt that issues involving real or perceived conflicts of interest will continue to arise. It is hoped that the working party set up by the Minister for Local Government will be able to devise an effective code of practice to which council members and staff will adhere. If necessary, the code should be given statutory force. In the meantime, however, this Office will continue to apply to its assessment of complaints on the issue the standards of behaviour inherent in the code of conduct set out above.

Ashfield Municipal Council : the saga continues

The [Mayor] doth protest too much methinks
(with apologies to Shakespeare; ' Hamlet ' ; Act III, scene 2).

The preceding topic, " Conflict of interest; a growth industry ", referred to the controversy and media attention that surrounded the Acting Ombudsman's report of an investigation of the way in which Ashfield Municipal Council had dealt with proposals to develop the Summer Hill Car Park.

On 12 April 1989 the Western Suburbs Courier reported that an Ashfield Council alderman had jumped onto the council table and had threatened to "do a strip" until another alderman apologised for making an obscene gesture towards the Secretary of the Summer Hill

Action Group. The threat was, perhaps, the only high spot in an extraordinary chain of events that followed the Acting Ombudsman's report. Full details of the investigation which led to the issue of the report, and of the terms of the report itself, were set out in the 1987-88 Annual Report (pp.91-93).

On 31 January 1989 the Town Clerk wrote to the Acting Ombudsman and said that council was taking action in accordance with the recommendations made in the report. This advice, however, was followed by a spate of articles in the local press, all of which indicated that the Mayor, Alderman Lewis Herman, was far from satisfied with the report, and by representations from the council to the Minister for Local Government.

In late March 1989 the Deputy Town Clerk wrote to the Ombudsman advising that council, on 21 March 1989, had resolved to forward the report to the Premier for his investigation of its alleged deficiencies. The council's resolution, in part, said:

> It is apparent that an in-depth and impartial investigation of all relevant facts by the Office of the Ombudsman without the presumption of guilt of the parties involved would have saved the Council of the Municipality of Ashfield and its members a significant amount of concern and its ratepayers a considerable amount of time, money and resources that, of necessity, had to be applied by the Council to the investigation by the Office of the Ombudsman.
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> Council believes somebody in the Office of the Ombudsman may have committed an error of judgement and as a result Parliament may have been misled. With a view to saving this or other authority's [sic] resources in the future, that the Council hereby resolve:
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> (1) To refer this matter to the Premier, the Hon N Greiner, for his investigation.
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> (2) That copies of the Council's representations be referred to the Minister for Local Government and Minister for Planning, the Hon David Hay, and the Council's state Parliamentary Members, Mr Paul Whelan, LLB and Mr John Murray, BA, together with the new State Ombudsman, Mr David Landa.

At about this time, the Ombudsman was made aware of an article published in "The Glebe" newspaper on 22 March 1989. The article reported Alderman Herman as having suggested that " . . . somebody in the Ombudsman's office may have been linked to or been influenced by the Summer Hill Action Group ". According to the press report, Alderman Herman had also accused the Office of denying natural

justice to the aldermen of the council and had said:

> The Office has acted as judge and executioner on this matter. It denied the aldermen of this council natural justice, the presumption of innocence until proven guilty.
>
> Lies have been told to us by the Ombudsman's Office.

The Ombudsman considered that Alderman Herman's reported remarks raised defamatory imputations about his office and his staff. On 31 March 1989, he made a special report to Parliament to refute the allegations which had appeared in the press article.

The report was tabled in Parliament on 12 April 1989 and in a media release issued that day, the Ombudsman called on Alderman Herman to publicly withdraw his statements. In an article published in the Western Suburbs Courier on 19 April 1989, under the heading "Mayor refuses to say sorry to Ombudsman", Alderman Herman was reported to have refused to apologise for his criticism of the Acting Ombudsman's report. The article went on to say:

> The Ombudsman has urged that the council gets "its house in order" and that Ald Herman "stops crying". He said that Ald Herman's comments were merely attacking the umpire.

In the meantime, on 10 April 1989, six Ashfield Council aldermen wrote to the Premier asking that the council's resolution of 21 March be disregarded because, in their view, the motion:

- had not been properly read out to the council meeting in question;
- had not been discussed;
- had not been correctly put;
- had been dealt with in the absence of a quorum; and
- represented an unbalanced view of the matter.

On 17 May 1989, Alderman Herman wrote to the Ombudsman and said that council had obtained legal advice and had resolved to have a Committee consider the matter with a view to formulating a draft council policy on pecuniary interest. No further advice has been received, and it remains to be seen whether council will fully implement the Acting Ombudsman's recommendations.

Flood plain policy : the Grafton experience

In 1984 the New South Wales Government introduced a flood plain management system based on merit; the system was implemented on a classic "carrot and stick" basis.

The "stick" was represented by the maxim of "duty of care" which, under the system, requires local councils to make planning decisions about development on flood plains in recognition of any potential

hazards that they should reasonably be expected to know about. If a decision is taken without due regard for public safety or potential property loss, a council can be sued in negligence. The "carrot" involved an amendment to the Local Government Act (now section 582A of the Act), which indemnifies councils against claims for damages, provided, firstly, that they act in good faith in relation to the planning decisions that they take; and, secondly, that they act substantially in accordance with guidelines established by the Public Works Department in its Flood Plain Development Manual. The Manual sets out the way in which councils should go about the decision making process.

During the year, an investigation of a complaint from a group of residents in South Grafton revealed some weaknesses in the "merits" approach to flood plain development.

The residents complained about the Grafton City Council's decision to approve a development application for a caryard, office and workshop to be built on a high-hazard floodway, only a few metres from their homes. Because of the hazardous nature of the floodway, the land on which the development was proposed had been zoned for Public Recreation under the council's Local Environmental Plan; the Plan had been gazetted only two months before the council approved the development. The residents claimed that a consulting engineer had told them that fill and buildings on the site would cause stronger currents to flow onto their properties at times of flood. They claimed that council had disregarded the advice of its own servants, and of outside experts, who had recommended refusal of the development application because of the high flood hazard involved.

The residents claimed that they had not been given notification of council's proposed consideration of the application and, therefore, had

not had an opportunity to voice their objections. Moreover, they believed that council aldermen had been misled in their deliberations because, in a report to council made by the Chief Town Planner, reference was made to a letter that had been received from the owner of "the adjoining land and dwelling" which said that he had no objection to the proposal. In fact, the residents said, the owner of the adjoining land did not live there and was in the process of selling the land to the developer at the time the letter was written; the land had actually been sold by the time the matter was considered by council.

They were also concerned that, after council had approved the new development, the developer had contended to council that he could not comply with a crucial condition of the council's approval. This condition required that a hydrological report be provided prior to building approval being granted, to enable council to assess the nature and extent of any adverse impacts on adjoining properties during flooding. That condition had later been waived in "consideration of" the applicant giving an indemnity protecting council from any claim. The residents were also concerned that the City Solicitor, who was responsible for providing legal advice to council in the matter, and for drafting the terms of the indemnity, had previously acted for the developer after he had bought several other blocks of land in the floodway, shortly before the application was dealt with by council.

After some preliminary enquiries had been made, the Ombudsman decided that the complaint should be investigated by way of an Inquiry under section 19 of the Ombudsman Act.

The Inquiry confirmed that the development was a prohibited use in the Public Recreation zoning under the council's Local Environmental Plan (LEP). However, a clause in the LEP, under which council could acquire land zoned for recreation purposes, also

allowed land in such zones to be developed for any purpose, prior to its acquisition by the council. The Chief Town Planner had warned council in his report that the purpose of the clause was to allow an acceptable use of the land in the period before it was put to its most desirable use (i.e. public recreation), and that "it was not intended to simply allow uses on land where normally they would be prohibited".

Council's officers had been concerned about the proposed development, mainly because the developer had not been able to fully satisfy them that the development met the guidelines set by the Public Works Department in the Flood Plain Development Manual. The Manual states:

> Whilst new development is not generally considered appropriate in a high hazard floodway area, it may be acceptable under special conditions. **Such conditions should involve a detailed review of the impact of new development on flooding and of the potential hazard to new or existing development** . . . the developer or property owner should demonstrate that any building or structure can withstand the force of flowing floodwaters, including debris and buoyancy forces as appropriate in floodway areas, the property owner or developer should be required to satisfactorily demonstrate to the consent authority that the development will not increase the flood hazard or flood damage to other properties or adversely affect flood behaviour . . . **A detailed report from an appropriate consulting engineer should be required in support of a development or building application** (emphasis added).

Evidence given to the Ombudsman by two government experts established that the floodway was, in the words of one of them, "as bad a floodway as you could get", and both agreed that the proposed

building, under the stress of the high velocities involved, had the potential to damage the South Grafton railway viaduct, a vital lifeline to the City during floods.

Council's Chief Town Planner had said in his report that it may have been difficult for a building which complied with the Manual to be erected on the site given the likely depth and velocity of flood flows involved. His report drew attention to the fact that the developer in his development application had provided no details of the nature of the materials to be used in the building, and he recommended that council refuse the application on the basis that the development was proposed in a high-hazard floodway.

Despite this adverse technical advice, council approved the development and issued a consent to which were attached nine conditions; chief among these was a condition that the developer, at the building application stage, provide council with a hydrological report and with a certificate from a structural engineer attesting to the stability of the proposed building under the stress of the flood flows involved on the site.

The structural engineer's certificate provided by the developer failed to satisfy the Chief Health Surveyor, who recommended refusal of the building application. The council decided to hold an on-site meeting of aldermen, council's servants, the developer and the residents; the latter, by then, had learned of council's approval of the development from the local press and had lodged objections. At the on-site meeting, the developer said that he could not find an engineer to do the hydrological study and that the cost involved in obtaining it would make the project a non-viable proposition; he threatened to withdraw the project. The Mayor, however, suggested to the developer that he might provide an indemnity to protect council and that, if he did, the council would look

again at the need for a hydrological report.

The Mayor sought legal advice on the indemnity issue from the City Solicitor. The City Solicitor in his advice to council said:

> It is noted that Council is not entitled to impose a condition requiring the Applicant to enter into a Deed of Indemnity and Charge and such condition would be a breach of the Environmental Planning and Assessment Act (see Galandon Pty Limited v. Narrabri Shire Council 51 L.G.R.A. 5 at pages 9 and 11).
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> However this is to be contrasted in this case where the Applicant **offers to enter into such an Indemnity and Charge and the requirements thereof are not a condition of the Development Approval or Building Approval**.
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> In our view, **in these circumstances Council is entitled to vary the Development Approval if the Applicant firstly enters into a Deed** of Indemnity and Charge and we are further of the opinion that such Deed and Charge would protect the Council to some extent from any damages caused to any person or property resulting from Council's approval of the development. **The extent of the Indemnity must of course be limited to the assets of the person giving the Indemnity or the value of the property** over which the Charge is held whichever is the greater (emphasis added).

Acting on this advice, council amended the development consent to remove the need for the developer to provide the hydrological study; following the receipt from the developer of the indemnity and an "updated" structural engineer's certificate, council issued the building permit.

The Ombudsman was concerned, not only about the way council's planning powers had been used to accommodate the developer, but also about the council's decision to seek an indemnity beyond that already

provided under Section 582A of the Local Government Act. The Ombudsman believed that council's conduct had serious implications for the "merits" approach to flood plain development; and that it could at least be argued that, in this case, council had not acted in good faith and, in seeking to exempt itself from civil liability, had attempted to jettison its public duty to ensure that development did not jeopardise the public safety. Notwithstanding the advice received by council from the City Solicitor, courts have generally been unwilling to allow authorities to use disclaimers to exempt themselves from a statutory duty. In the Ombudsman's view, using a device to make the indemnity silent to the consent did not validate council's conduct. The evidence given to the Inquiry indicated that the terms of the indemnity were such that they would not have protected council in any event.

The Ombudsman has received advice from Senior Counsel and from the Department of Planning on the issues raised in the complaint and is now considering submissions, including those from council's legal advisers, following the issue of a statement of provisional findings and recommendations. The outcome of the investigation will be reported in the next Annual Report.

Further investigation of Narrabri Shire Council and its tendering procedures.

In 1987 the then Deputy Ombudsman found that Narrabri Shire Council had failed to abide by the provisions of the Local Government Act relating to tendering for services. He made a number of recommendations to improve council's procedures and, at least partly as a result of his investigation, the Department of Local Government instituted a review which resulted in considerable changes being made to the relevant Local Government Ordinance. The new ordinance came

into effect on 1 April 1988 and covered procedures for tendering and the letting of contracts[3].

A principal provision of the original ordinance required councils to call tenders for the supply of goods or services in any case where the value of the contract for supply exceeded a prescribed amount. (The prescribed amount was originally $13,000; in September 1985 it was increased to $22,000; later still, it was increased to $50,000.) The Deputy Ombudsman found that Narrabri Shire Council had entered into an artificial arrangement to avoid these provisions. After he had completed his investigation, the Office received another complaint which alleged that council was avoiding these provisions in another area of its administration.

The complaint was about council's contracts for the supply of bitumen for road works. Investigation found that in the period 1983-1987, council's bitumen purchases represented an expenditure of close to half a million dollars each year. In one particular month expenditure on bitumen for one job, on one road, exceeded $50,000; this was almost four times more than the limit at which council was required by law to put the supply of bitumen to tender. Yet tenders had not been called.

It was only in 1987 that council had started to call tenders for the supply of bitumen. Up until then, council had been a party to artificial arrangements to avoid the provisions of the ordinance. The investigation showed that, where the value of an order for bitumen was expected to exceed the $13,000 limit, the order had been split into smaller orders whose individual values were lower than the limit. For example, where a job had been expected to take four days, four separate orders had been prepared, even though all of the bitumen

[3] For more detail refer to Annual Reports for 1985-86 (pp91-92), 1986-87 (pp49-51) and 1987-88 (p101).

ordered was to be supplied to the one operation on the one piece of road.

To complement council's "system", the supplier of bitumen had agreed not to submit invoices for amounts exceeding the $13,000 limit. In some cases, one job sheet would be prepared for spraying bitumen on one day on one section of road; but two separate invoices would be drawn up, each for half of the amount shown on the job sheet.

The investigation also showed that estimates prepared by council's engineers of the amount of bitumen that would be needed for a particular job had been frequently grossly understated. Again, this had been done in order to avoid the need to call tenders.

Eventually, in 1987, council resolved to call annual tenders for the supply of bitumen, but even then its procedures were found wanting by the Ombudsman's investigation. Three tenders for the annual supply of bitumen in 1987 had been received by the due date. Another tender had been received by telex; this set out the amount of the tender, and the formal documents and the security deposit associated with the tender followed the telex. The investigation was not able to determine whether the formal documents had been received by the due date, although council said that they had not. The Shire Engineer simply told council that the formal documents and the security deposit had not been included with the tender, even though they had been received, at the latest, one day after the date tenders closed, and by the time that council met. Although the tender was the lowest, it was rejected out of hand on the Engineer's advice. Of course, the price of a tender is not the only relevant consideration: the quality of service provided by the supplier is very important, and an experienced and accommodating supplier can save councils tens of thousands of dollars a year. But the Shire Engineer had not reported to council on any of these matters.

During the whole period, council had only purchased bitumen from one supplier, and that supplier was also the successful tenderer in 1987. Investigation did not obtain any evidence that council or any of its officers had dealt corruptly with the supplier; in fact, there was independent evidence to suggest that, because of the competence and helpfulness of the supplier's local manager, it was to council's advantage to purchase its bitumen from that supplier.

Nevertheless, it was clearly wrong of council to break the law and to adopt artificial and underhand means of evading it. Such conduct can only lead to perceptions and allegations of corruption (as had occurred in this case), and to a loss of confidence in council's procedures.

The Ombudsman found that the conduct of Narrabri Shire Council was wrong because it had:

- failed to adopt a proper policy of calling for tenders for the supply of bituminous products;
- failed to implement proper accounting procedures relating to the ordering, purchasing and supply of bituminous products; and
- improperly dealt with tenders for the supply of bituminous products during 1987.

Between the date of the conduct the subject of the investigation and the date of the Ombudsman's report, a new council had been elected at Narrabri. The Shire Clerk had directed that tenders in future be

called for the supply of bitumen and that orders not be split. The Ombudsman commented that there was nothing to indicate the effectiveness of that direction; nor was there anything to indicate that similar action had been taken with respect to the rest of council's purchasing activities. He said that the new council had a responsibility to ensure that its administrative procedures were thoroughly overhauled and that it should exert a closer supervision of council's staff than had been evident in the past.

The Ombudsman noted in his report that the Department of Local Government had set up a working party to review the relevant ordinance, as set out earlier in this topic; and that the Shire Clerk, in response to a statement of provisional findings and recommendations sent to council, had written, saying:

> Council considered the Provisional Findings and Recommendations of the Office of the Ombudsman in respect of the above matter and at its Ordinary Meeting, during a portion of the meeting held by Council in Committee of a Whole with the press and the public excluded, resolved to the effect:-
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> > " That the report of the Office of the Ombudsman in respect . . . of the tendering procedures for bituminous products be received and further that procedures be drawn up to ensure tendering procedures are strictly adhered to in the future and that Councillors, in the future, be better informed and further that Council is prepared to accept and adopt the recommendations as contained in the statement of Provisional Findings and Recommendations. "
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> A memo has been issued to Departmental heads of Council drawing their attention to the need and

> requirement of Council in the future in respect of tenders generally.

Later still, the Shire Clerk wrote to the Ombudsman and said:

> . . . [your] report was placed before Council at its meeting on the 19th April, 1988.
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> After giving consideration to the report in detail Council resolved as follows:-
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> > " That Council note the final report of the Ombudsman in respect of the procedures for bitumen tenders for council and that Council adopt the recommendations contained in that report. "
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> For your information I advise that an instruction has been issued to all staff involved in the ordering of goods and services, the receipting of goods and services, and the payment thereof that it is their responsibility to ensure that all procedures are carried out in strict accordance with Council's requirements and Ordinance 23 and that should there be any anomalies such anomalies are to be drawn directly to the attention of the Shire Clerk in writing as a matter of urgency.

The Ombudsman was satisfied that his recommendations had been complied with and he concluded his investigation.

Need to give reasons : the problems continue

The 1985-86 and 1986-87 Annual Reports set out the Ombudsman's belief that public authorities should give reasons for their decisions, because to do so is a sensible and desirable administrative practice:

> When people are given reasons for decisions they are able to make their own assessment 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.
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> 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. (1985-86 Annual Report; pp26-28)

The Ombudsman Act itself recognises that conduct " for which reasons should be given but are not given " is " wrong conduct " [section 5(2)].

A case which arose during the year well demonstrated that, when public authorities fail or, even worse, refuse to give reasons for their decisions, citizens invariably feel that they have been unfairly treated. The case involved issues related to the grant of rural rates. Councils were able to set a reduced, rural rate for rural land as defined in section 118 of the Local Government Act. " Rural land " was defined as:

> . . . a parcel of rateable land which . . . exceeds 8000 square metres in area, and which is wholly or mainly used for the time being by the occupier for carrying on one or more of the businesses or industries of grazing, dairying, pig-farming, poultry farming, viticulture, orcharding, bee-keeping, horticulture, vegetable growing, the growing of crops of any kind or forestry . . .

A property owner complained about the failure of Lismore City Council to grant her application for a lower rural rate and about council's failure to give reasons for its refusal of her application.

In taking up the complaint, this Office made it clear that it was not seeking to determine whether or not council's decision to refuse the rural rate application was the correct decision, because the applicant had a right of appeal to the court where that question could more appropriately be decided. However, the complaint that council had failed to give reasons for its decision was made the subject of an investigation.

In response to the notice of investigation, council said that it had processed some 3,000 applications in 1988. In describing how it had dealt with each application, council said:

> With staffing and time constraints the Rural Rating Committee [which had 6 members] considered the most practical way of dealing with the applications was at the meetings of the Committee to pass each application to the various members of the Committee who individually formed an opinion based on the details supplied. That opinion by the members was based on the definition of rural land as outlined in Section 118 of the Local Government Act as well as various legal precedents. Each individual member then signed the application indicating his opinion, that is either the positive or negative. Upon a majority being reached the applicant was then advised of the Committee's decision. The non disclosure of the Committee's reason for refusal is quite simply that each member has his own opinion.

Council went on to say:

> To seek to express in writing those opinions, which . . .

> vary from member to member, would involve both time delays and additional resources to service the Committee.
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> . . . the Council just does not have the resources available to undertake such a mammoth task. Perhaps more significantly however, the reason for refusal in every case is simply that the applicant has failed to satisfy the Committee that his/her property qualified for Rural Rating in the terms of Section 118, the provisions of which are included in the application form.

In further seeking to explain why the Committee had not given reasons for its decisions, the Council said:

> Legal precedents are complex in the extreme and in the hands of laymen members, make the task of deciding borderline cases very difficult. For this reason there is a serious inclination to reject them or allow them to be determined by a qualified assessor in the Land and Environment Court. In such instances the reluctance of Committee members to give reasons why they are not convinced, is, I believe, understandable.
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> . . . for the committee to give reasons for refusal in less detail than the assessors in the Land and Environment Court would be unfair to both the applicant and the Council.

In a statement of provisional findings and recommendations prepared by the Office, the council's procedures for determining rural rate applications were assessed, taking a hypothetical situation, in the following terms:

> Using the Lismore City Council's method of processing, four members of the Committee, a majority,

> mark the application for refusal. These four members have different reasons for their decision; two consider it is not "wholly or mainly used" (i.e. the other four members of the Committee consider it is wholly or mainly used) while the other two consider it is not a "business" (i.e. the other four consider it is a business). This example demonstrates how a majority of the Committee can be satisfied that a parcel of land is "wholly and mainly used" and is a "business" and yet the application, using the Lismore Council method, is rejected.

It was clear from council's response to the investigation that the public could have little grounds for confidence in council's decisions about rural rate applications. Not only had council refused to give reasons for its decisions, it seemed that it had none to give. There was no method by which the full council or, more importantly, the local community could be sure that external or irrelevant factors had not affected the decisions of the individual members of the council's Rural Rating Committee.

The Ombudsman said that a mere restatement of the terms of the legislation as a reason for refusal of an application for rural rates was insufficient because it did not allow the aggrieved ratepayer to make any assessment of whether the decision was fair and reasonable. The purpose of giving reasons for administrative decisions is to provide sufficient information to enable the persons affected by them to be confident that their applications or cases have been properly considered and assessed.

Not surprisingly, the Ombudsman found that Lismore City Council's conduct was wrong in terms of the Ombudsman Act. However, because the council had agreed during the investigation to change its procedures for determining rural rate (now "farm land" rate) applications and to

give reasons for such determinations, he made no recommendations in his final report.

It is worth noting that the 1988 amendments to the Local Government Act require councils to give reasons for rejecting applications for "farm land" rates.

Drainage complaints

Two longstanding but important matters were finalised to the Ombudsman's satisfaction during the year.

The Minister for the Environment advised the Ombudsman of steps that he and his colleague, the Minister for Local Government, have taken to facilitate negotiations for the transfer of the drainage responsibilities of the Hunter District Water Board to three local councils in the Newcastle area. This issue was first raised in a report by the Ombudsman about flooding at Merewether, which focused sharp attention on the lack of co-ordination and communication between the councils and the Board in relation to their responsibilities to provide adequate stormwater drainage. It is proposed that the power to levy drainage rates will be transfered to the councils, to enable them to include a drainage rate in their 1990 rate notices and to give them autonomy for drainage within their local government areas.

In another longstanding case, Tumut Shire Council told the Ombudsman that it had constructed a 50 metre stormwater drainage pipe through the land of a Tumut resident. The resident had complained to the Ombudsman that runoff which discharged onto her land from a council stormwater pipe had turned her vacant allotment into a marshland.

The Ombudsman is pleased that the authorities concerned have responded to his recommendations in such positive ways.

New issues, however, continue to emerge in the drainage area. Two Sydney councils, Ku-ring-gai and Willoughby, are to be congratulated for developing policies on interallotment drainage, following investigation by this Office of complaints involving this issue. Ku-ring-gai Municipal Council devised its scheme after a number of residents in Lord Street, Roseville had submitted a petition to council, asking that an underground stormwater drain be constructed to collect surface water from adjoining "upstream" properties. In a report to council on the petition, the Chief Health and Building Surveyor concluded that the problems being experienced by the residents had resulted from "a combination of increased built-up areas, recent high rainfall experienced and, in some cases, inadequate drainage planning".

Overland flow is more likely to be a problem in the older, well-established municipalities which contain subdivisions that were developed to the planning standards of a bygone era. The problem is even more acute in these areas when such developments have occurred on steeply-graded terrain. Councils are able to exercise their powers under section 403 of the Local Government Act to resolve this problem. Section 403 provides:

> (1) The council may control and regulate the draining of any land, whether built upon or not, and may require the construction of sufficient drains for that purpose and may, at the cost of the owner, construct drains to dispose of roof, surface and other waters from the land so as to conduct the water to the most appropriate gutter or water channel under the control of the council
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> (2) Where, in the exercise of its powers under subsection(1), it is necessary for the council to

> construct a drain through land intervening between the land to be drained and the most appropriate gutter or water channel under the control of the council, the council may recover from the owner of the land to be drained any reasonable amount paid by it to the owner of the intervening land for compensation, in addition to the cost of constructing the drains.

Councils are usually reluctant to use these powers because, inevitably, there is disagreement among the affected residents about how the costs involved should be apportioned. Despite this, Ku-ring-gai Council recognised that it was best placed to act as a facilitator in trying to arrange long-term solutions to the problem raised by the Lord Street residents.

The council decided that it would meet the cost of carrying out a design investigation for a drainage scheme to overcome the problem. The ultimate development of the necessary drainage works would depend upon the cost of them, and on the extent to which the residents could agree about the apportionment of that cost.

A resident of Naremburn had a similar problem to that which had beset the Lord Street residents. In his case, however, overland flow had been directed onto his property alone; this, he claimed, was because an immediate neighbour had raised the level of fill on his land by over one metre. The neighbour had also constructed drains along his property line; these caused water that would have flowed over his property from " upstream " properties to be diverted onto the complainant's property. The terrain in the area was very steep, and during heavy rainfall water overtopped the kerb of the roadway several metres upstream from the complainant's property, ran across extensively paved areas on his neighbour's property and ended up on his land.

In response to enquiries from this Office, Willoughby Municipal Council sought legal advice about the issues raised in the complaint. Council's legal advisers suggested that it should prepare and adopt a general policy for the control and regulation of drainage of land and that, in deciding whether to exercise its powers under section 403 of the Local Government Act, council should consider whether:

- specific provision had been made for drainage at the time of subdivision approval or building approval;
- there had been any intervening event or circumstances that made the approved drainage system inadequate;
- the drainage problem had been caused or exacerbated by any action on the part of adjoining landowners, and, if so, whether that action had been authorised or otherwise approved of by council.

The legal advisers concluded their advice:

> While we appreciate that Council does not want to be placed in a situation where it is deluged with requests to invoke its powers under Section 403 of the Act, this cannot be used as a reason for refusing to act, or refusing to consider whether to act in a particular case.

Council later told the Ombudsman that an interallotment drainage policy had been adopted and that it was prepared to exercise its powers under section 403 of the Local Government Act to assist the

complainant, provided he agreed to the construction of the proposed drainage line through his land.

Both councils indicated that they were prepared to apply their policies to resolve future serious drainage problems within their areas.

Notification of adjoining owners: the Ryde experience

The problems caused by the failure of local councils to notify adjoining owners and other " properly interested persons " about building applications which would be likely to affect the amenity of an area were first set out in the 1981-82 Annual Report. The matter has been mentioned in every Annual Report since, apart from that for 1986-87, but the problems persist.

The Ombudsman's interest in this issue arose from complaints which alleged that certain councils had

- failed to notify people that could reasonably and properly be considered to be affected by proposed buildings;
- refused to allow " properly interested persons " to inspect relevant building plans as a basis for deciding whether or not to lodge an objection with council; and
- failed to take into consideration valid objections that were lodged by "properly interested persons".

Some councils cited provisions of the Local Government Act which they believed prevented them from allowing "properly interested persons" to inspect building plans. To overcome this, the Ombudsman recommended that the Local Government Act be amended by removing any possible restrictions on the inspection by "properly interested persons" of building application plans showing the external configuration of a building in relation to the boundaries of a site. He also recommended an amendment to include in section 313 of the Act a requirement that councils consider the likely effect of a proposed building or alteration on adjoining properties.

These recommendations were accepted, and appropriate amendments were incorporated in the Local Government (Miscellaneous Provisions) Amendment Act, 1985. However, two further recommendations, that councils be required to "consider the views and opinions of 'properly interested persons' prior to determining building applications" and "notify adjoining owners and other possibly affected persons of any building application which may affect the amenity of an area", were not supported by the then Minister for Local Government, who 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.

This Office has continued to receive complaints about the failure of councils to notify adjoining owners and other affected persons of building applications, and about the refusal of councils to consider objections to such proposals. Objections usually relate to such issues as loss of views, light and/or privacy; drainage problems; or environmental or geological hazards.

Given that:

- complaints continue to be received;

- a survey of councils conducted by the Ombudsman in 1985 revealed that approximately 60% of councils already have a policy of notifying adjoining owners and considering the objections of " properly interested persons " ;

- those councils which already have such a policy do not as a result appear to suffer an onerous cost burden or experience additional delays in dealing with building applications; and

- wherever possible, all citizens should enjoy the same rights, irrespective of the local government area in which they happen to reside;

The Ombudsman remains firmly of the view that notification of building proposals to possibly affected persons and consideration of their objections to such proposals should be made mandatory. In adhering to this view, the Ombudsman does not seek to undermine councils' powers to make decisions about building applications in their area.

Rather, he wishes to ensure that the principles of natural justice, especially the right to be heard, are given a place in the decision making process. If this were done, the decisions of councils should then be better informed and will have taken account of the interests of all affected parties.

A complaint dealt with by this Office during the year about Ryde Municipal Council represents a case in point. A resident complained that Ryde Municipal Council had failed to take account of the objections of affected landholders to proposed alterations and additions to a building on a neighbouring property. He complained that Council had failed to properly supervise the work, even after it had been advised of departures from the approved plans; had furnished false and misleading information in correspondence; and had later improperly approved deviations from the originally approved plans, after the work had been completed.

The complaint, in part, concerned a neighbour's proposal to construct

windows in a clerestory tower. The council told the complainant that the windows were to be "approximately 3 metres above the stair landing", and would constitute no threat to the privacy of nearby properties. However, the neighbour proceeded to install a floor in the structure, effectively transforming it into an "observation tower", replete with telescope! Even after it had received numerous representations from concerned neighbours and a local Member of Parliament, as well as photographic evidence to the contrary, council continued to insist that no floor existed in the structure.

Council later acknowledged that there had been departures from the approved plans and invited the neighbour to submit for approval amended plans incorporating the departures, after the work had already been completed. Council "approved" the amended plans, even though it had no power under the Local Government Act to do so, and despite the numerous and persistent objections it had received from adjoining owners.

The Ombudsman found that council's conduct was wrong for:

- inviting and retrospectively approving amendments to the original building plans;
- failing to notify adjoining owners and other properly interested persons of the building application, and failing to enter into formal consultations regarding the amendments;
- failing to take proper account of the interests of adjoining owners and other properly interested persons;

- failing to properly supervise the building work, given the numerous and persistent objections that had been received from properly interested persons and the fact that council officers had known that the work was not proceeding in accordance with the approved plans; and

- knowingly providing false and misleading information in correspondence to objectors and to the local Member of Parliament.

The Ombudsman recommended that council adopt a practice of notifying adjoining landowners and other properly interested persons of proposals put before council which were likely to affect them; that it adopt rigorous inspection procedures for works in progress in order to assess compliance with council approvals; and that it issue an instruction to staff that false or misleading information was not to be included in correspondence and that rapid action be taken to correct accidental breaches in that regard. The council has agreed to implement only the last of these recommendations.

The Minister for Local Government said that he did not wish to consult about the report, but he asked that officers of his Department and of the Ombudsman's Office meet and discuss the wider implications of the Ombudsman's findings. Such discussions are to occur in the near future.

Positive progress on this issue is long overdue. The Ombudsman reiterates his view that the rights of all "properly interested persons" to have a say about proposals before councils which are likely

to affect them ought to be uniformly enjoyed across the State, and ought not to depend on the geographical accident of which council's jurisdiction they happen to live within. Otherwise, the Ryde fiasco is sure to be repeated.

The Ombudsman and citizens' rights of appeal in local government matters

Section 13 of the Ombudsman Act sets out a number of grounds on which the Ombudsman is able to exercise his discretion in deciding whether to make any conduct complained of the subject of an investigation or whether an investigation already commenced should be discontinued. However, section 13 also provides:

> (5) Notwithstanding any other provision of this section, the Ombudsman shall not investigate the conduct of a public authority, being a local government authority, if that conduct is subject to a right of appeal or review conferred by or under an Act unless the Ombudsman is of the opinion that special circumstances make it unreasonable to expect that right to be or to have been exercised.

Many complaints received by the Ombudsman about local government matters involve conduct which is subject to a right of appeal or review, most notably before the Land and Environment Court. Such complaints can relate to many different issues, including the way in which local councils deal with complainants over such matters as subdivision, building and development applications; applications to open public roads; compensation on resumption of land; the rateability or valuation of land; and the issue of demolition orders, to name but a few.

The Ombudsman declines to investigate most complaints involving such conduct, since there is invariably available to the complainant an alternative and satisfactory means of redress. However, section 13(5) is not intended to debar the Ombudsman entirely from investigating such matters; where he is satisfied that special circumstances exist that make it unreasonable for a complainant to exercise any right of review that is available, complaints will be taken up. Whilst not exclusive, there are three main areas in which this is likely to occur.

Firstly, local government authorities sometimes abuse both the determination and review processes. During the year, for example, the Ombudsman investigated the rural rating practices of a local council which routinely refused applications for reduced rural rates, without giving reasons; this, in effect, forced individual ratepayers to litigation. In other cases, it waited for ratepayers whose applications had been refused to lodge appeals with the court, before it agreed to review its initial decision. Complaints which allege the existence of systemic problems of this nature will generally be investigated by the Ombudsman, since no individual ratepayer could be expected to resort to litigation on general issues affecting a council's administration of the law.

A second area of local government conduct that is subject to review, but which is likely to be investigated by the Ombudsman, is conduct that involves public interest issues. In such cases it would be unreasonable, having regard to the costs involved and the possible indirect nature of an individual's interest in the matter, to require an individual or group of individuals to exercise a third party right of appeal. An example of such an investigation was the approval by the Sydney City Council of a building at 229-249 Elizabeth St, Sydney which would have overshadowed Hyde Park. This matter was

reported in the 1983-84 Annual Report (pp34-35).

Thirdly, and perhaps the most contentious group of local government complaints likely to be subjected to the scrutiny of the Ombudsman's Office, are those which relate to the way in which local councils have handled development and building applications. The applicants themselves have clear rights of review, and the Ombudsman does not normally investigate complaints about refusals to grant approval.

However, the rights of affected adjoining owners to take appeal action are limited. A third party has no right of review at all in relation to the approval of a building application. And third parties can only challenge the validity of a development consent on a point of law; even then, the appeal must be lodged within three months of the date of the consent. In such cases, the Ombudsman gives consideration to whether an affected third party could reasonably be expected to exercise a right of review, having regard to the substantial costs of court action, and the limited amount of time available in which to seek legal aid and mount a case.

The most recent complaint of this nature to be investigated involved the Grafton City Council's approval of a car yard and workshop in a high-hazard floodway (see " Flood plain policy: the Grafton experience ", elsewhere in this Report). The Ombudsman, in that case, was satisfied that the complainants were not able to fund the costs of an appeal in the matter, and that there were overwhelming considerations of public interest arising from the complaint. In addition, the Ombudsman was advised that the Land and Environment Court could require the complainants to lodge a substantial indemnity in order for the Court to issue an injunction restraining the developer from acting on the consent. It was clear to the Ombudsman that the complainants could not reasonably be expected to challenge the council's

decision at law.

Following the investigation, the Ombudsman issued a statement of provisional findings and recommendations in which he made a provisional finding that council's conduct had been contrary to law. Council's solicitors, in responding to the statement, said:

> Only the Land and Environment Court can find that council acted " contrary to law " in failing to properly consider all relevant heads of consideration.

Later, in a letter to the Ombudsman, the solicitors argued:

> In our view, it is imperative that the complaint against the Grafton City Council be not allowed to gain further momentum. Further investigation of the matter could only have the effect of setting aside the provisions of the Land and Environment Court Act and the Environmental Planning and Assessment Act. In our respectful opinion it was never the intention of your legislation to set up [a] second tier of arbitration in town planning appeals. In our opinion a dreadful precedent is being set by the continuance of your investigation into this matter.

The Ombudsman Act entitles the Ombudsman to find, where the facts support such a finding, that a public authority, including a local government authority, has acted contrary to law. As well, the Ombudsman is entitled to make findings about the reasonableness of lawful conduct. It is true, of course, that any recommendations which the Ombudsman makes have merely persuasive force, and that only a court is able to make a determination that is binding on the parties. For this reason, it is always made clear to complainants that an

Ombudsman investigation of their complaint will not lead to a revocation of a council's consent to a disputed development.

The Ombudsman considers that the conduct of local government authorities should not be exempt from his scrutiny, where wider issues of public interest that go beyond the conduct itself are involved, simply because such conduct is able to be challenged before the courts.

Local government rates: a contentious area

In December 1988 the Local Government Act was amended by the Local Government (Rates and Charges) Amendment Act, which introduced significant changes to how councils levy rates and charges. In particular:

- rate-pegging was abolished and, in its place, a control on increases to councils' total income was introduced;
- councils were enabled to use current valuations when determining rates, rather than those issued prior to 1984;
- funding arrangements for the 100% pensioner rebates scheme were changed;
- rural rates were changed to " farm land " rates; and
- the pensioner rebate scheme was extended to

charges for water supply.

These amendments appear to have prompted an even greater number of complaints to this Office about all sorts of rates.

General rates

General rates are a tax on the land value of all rateable land within a city, municipality or shire. Councils may (but do not have to) set a minimum rate for each separate parcel of land; and they may also set a lower minimum rate for vacant land or flood-liable land. The current maximum charge that can be set for a minimum rate is $220, except where the Minister for Local Government has given permission for a council to levy a higher amount.

The general rate is applied uniformly across the council's area, unless the council has levied a differential general rate. A typical differential rating structure is:

Type of rate	Charge
General (town non-urban)	2.1032 cents
Non-Residential (business & industry)	4.4776 cents
Rural	1.4322 cents
Higher Urban (town)	3.9620 cents
Lower Urban (village)	3.6829 cents

In this example, the differential rural rate is approximately 35% of the town rate and 32% of the business and industry rate. Currently, Ministerial approval is required before a council can set a non-residential differential rate, but this Office understands that Cabinet is reviewing this requirement.

In the main, complaints to this Office about general rates raise issues such as:

- excessive rate levels
- financial mismanagement by council
- problems related to payment by instalments
- interest charges on overdue rates
- pensioner rebates

Setting of the rate and financial management

The fact that a ratepayer believes that a rate (or a rate increase) is excessive does not, in itself, indicate that council's conduct in setting the rate amounts to wrong administrative conduct as defined in the Ombudsman Act. Councils need Ministerial approval for rate increases above the amount prescribed and applying to all councils. Further, councils' finances are subject to review by the Finance Branch and the Inspectorate Branch of the Department of Local Government. The Department has extensive powers and can direct a council to take appropriate action to remedy any mismanagement or to reduce a rate.

For these reasons, the Ombudsman rarely investigates complaints about council's conduct in setting a rate or allegations of financial mismanagement. Complainants are usually advised to write to the Department of Local Government if they are dissatisfied with the rate

approved by the Minister, or if they have any information about financial mismanagement on the part of their local council.

Use of current valuations

Complaints have arisen this year because some ratepayers have had their 1989 rates increased by up to 600%. These dramatic increases have come about primarily because the rate has been levied on the basis of a current valuation of the property (by the Valuer General's Department) rather than on the pre-1984 valuation. Consequently, the rate reflects the current market value of the property, not the pre-1984 value. Some properties and some sections of a local council's area have suffered disproportionate increases (or decreases) in land value, and this is reflected in the rates levied by the council.

For example, Mr A, an aged pensioner, lives in a large house on a large block of land in the main street of what used to be a sleepy coastal town. His property overlooks the beach. In the years between valuations the town has grown and the commercial area has expanded to include his property; consequently, his 1989 rates were 600% more than the 1988 rates. Enquiries showed that the local council had not acted wrongly in terms of the Ombudsman Act and, in fact, had attempted to arrange with Mr A a deferral of part of his rates under section 160DB of the Local Government Act. Section 160DB allows councils to defer, waive or reduce an increase to the rates caused by an increase in valuation, if ratepayers demonstrate that they are suffering hardship. The amount deferred can be recovered by council at a later date, or when the property is sold.

Payment by instalments and interest charged on overdue rates

This Office has received many complaints about these issues. The relevant provisions of the legislation are set out in sections 160A and 160D of the Local Government Act. The key elements of the payment of rates by instalments scheme are that:

- the scheme is voluntary; ratepayers are not obliged to avail themselves of the option;
- if ratepayers opt to pay by instalments, then they undertake to pay the full amount of each instalment by the due date; and
- the legislation provides that, if any of the instalment payments are missed, the overdue rates are to be assessed as if the ratepayer had not opted to pay by the instalment plan. This means that councils can calculate interest on the overdue amount on the basis that the due date was the due date of the first instalment (for most councils, this date is usually sometime in February each year). Further, all unpaid instalments become overdue and incur interest, not just the instalment that has been missed.

As in all rating matters, councils have the power to waive any charges incurred if the ratepayer is suffering hardship.

Pensioner rebates

Before 1989, pensioner rebate schemes operated in conjunction with a two-tier structure of grants to councils. The first of these grants related to the mandatory pensioner rebate scheme under section 160AA of the Local Government Act, whereby the government reimbursed each council for 50% of the cost of the scheme. Where a council's costs in operating the scheme exceeded 6% of its income, the government would subsidise this excess. The other type of grant was made to councils which had voluntarily provided a pensioner rebate in excess of 50% since 1982 (some councils had a 100% subsidy scheme); the government met half the cost of this voluntary scheme.

The new legislation provides for a 50% pensioner rebate, up to a maximum rebate of $250; at the same time, the government abolished the administrative arrangement whereby it subsidised the voluntary pensioner rebate schemes of some councils. The government now only subsidises councils for 50% of the cost of the mandatory rebate scheme.

This year, the Office received many complaints, from pensioner ratepayers in Wollongong City, about the council's decision to abandon the 100% rebate scheme for eligible pensioners. Because the decision was predicated on the change in state government funding of the rebate schemes, there was no evidence that the council had acted wrongly.

The pensioner rebate provisions of the Local Government Act (s.160AA) have remained basically unchanged; they provide that an eligible pensioner is entitled to a rate reduction of 50% (up to the maximum rebate of $250) if:

(a) they are an eligible pensioner on the day the rates

notice is issued; and

(b) they are the owner of the land the subject of the application on the date the rates notice is issued.

During the year, two complaints received by the Office highlighted anomalies in the pensioner rebate legislation:

- Mrs A, who received a widow's pension, complained that her council had refused her application for a pensioner rebate in 1988. The facts were that she had been working for four months, until 15 January 1988, as part of a work experience program (Mrs A had been out the work force for many years, raising her family). Council levied the rate on Mrs A's property on 11 January 1988 and, because Mrs A was not the holder of a current Pensioner Health card on that date, she was refused the rebate. Council had acted in accordance with the law, and would not have received the state government subsidy if it had decided to grant the rebate to Mrs A.

- Mrs B, an aged pensioner, complained that her council had refused to grant a pensioner rebate on a property she had purchased in July 1988; the rates had not been paid by the previous owner. Mrs B had received the rebate on the property she had previously owned but had sold prior to the purchase. She argued that the rebate should be applied to her new property on a pro-rata basis.

> Unfortunately for Mrs B, the Local Government Act does not allow councils to apply the rebate on a pro-rata basis. If Mrs B had known this before settlements of the sale and purchase occurred, she might have been able to negotiate a variation to the sale and purchase prices to take account of it.

The rate section of the Department of Local Government, which was contacted about both complaints, said that they were aware of the anomalies and that this section of the Act was being reviewed. In light of this, and given the facts of each case, this office declined to pursue the complaints.

Very recently, the Minister for Local Government announced an Inquiry into Local Government Rating. The terms of reference for the inquiry are:

> To review the rating and other revenue powers and resources available to local government in New South Wales to finance the services for which councils are responsible and report on the changes, if any, which are considered necessary to enable councils to provide those services more effectively.

The inquiry will be conducted by Mr N Oakes and Sir Nicholas Shehadie and will hold public hearings in the metropolitan area and in country centres later this year.

Rural rates

The 1987-88 Annual Report dealt with the rising tide of disputation between rural councils and their ratepayers over rural rates, and said:

Some complainants have argued that many of the issues raised in their complaints would be adequately addressed if councils provided:

- sufficient information to landowners about reduced rural rates and about the definition of " rural land " in the Local Government Act.
- adequate reasons for their decisions to refuse applications for reduced rural rates.

The complaints also raise the more general issue of whether the law itself is appropriate, given that it generates so much litigation and dissatisfaction between councils and their ratepayers (p.90).

In December 1988 the provisions of the Local Government Act dealing with rural rating were amended and the term " rural rate " was replaced by the term " farm land rate. " Section 118(1) of the Act now provides that:

- " farming " means the business or industry of grazing, dairying, pig-farming, poultry farming, viticulture, orcharding, bee-keeping, horticulture, vegetable growing, the growing of crops of any kind, forestry, or oyster or fish farming within the meaning of the Fisheries and Oyster Farms Act 1935, or any combination of those businesses or industries;
- " farm land " means a parcel of rateable land which is valued as one assessment and the dominant use of which is for farming which -

  (a) has a significant and substantial commercial purpose or character; and

(b) is engaged in for the purpose of profit on a continuous or repetitive basis;

A new section 118AC deals with applications for a declaration that land is "farm land" and provides:

. . .

(5) On receiving an application, the council -

(a) shall, unless it has reasonable grounds for believing that the land to which the application relates is not or may not be farm land, declare the land to be farm land; or

(b) may, if it has reasonable grounds for believing that the land to which the application relates is not or may not be farm land, notify the applicant of such further information (if any) as may be required in order to satisfy the council that the land is farm land and, after having considered any such further information, shall declare whether or not the land is farm land.

(6) The council shall notify the applicant in writing of its decision under subsection (5) and, if it has decided that the parcel of land is not farm land, shall include in its notification the reasons for its decision.

In short, councils are required to identify any additional information that they may need in order to determine an application, before the application can be refused. Further, councils must now give reasons for the refusal of any application. The Ombudsman's view on the need for public authorities to give reasons for their decisions is discussed elsewhere in this Report.

This Office is currently investigating a council's alleged failure to give reasons for its decision on an application dealt with under the new legislation.

Invalid publicity rate

In 1957, at the request of the Murwillumbah Retail Traders' Association, Tweed Shire Council introduced a Publicity Local Rate. The area covered by the rate was extended in 1980 to include land belonging to a fruit processing company. Until 1985, the company paid the rate without formal objection.

In 1985 the Managing Director of the company began to campaign publicly against the rate, claiming that it was invalid. He eventually took council to the Land and Environment Court and sought declarations that the 1985 and 1986 rates were invalid. The court rejected his application, and the Court of Appeal rejected his appeal. Undeterred, he returned to the Land and Environment Court seeking declarations that the 1987 and 1988 rates were invalid; but this time he hired a barrister to represent him, rather than argue the case himself. He succeeded.

Local Rates may be levied by councils under section 121 of the Local Government Act for works or services which " in the opinion of council would be of special benefit to a portion of its area . . . ." A Publicity Local Rate will often be struck in order to promote tourism within a Shire. The Murwillumbah Publicity Local Rate was used by Tweed Shire Council to fund the Murwillumbah Business Corporation, the successor to the Retail Trader's Association.

Through its solicitors, the company complained to the Ombudsman that

council was attempting to circumvent the Court's decision by relying on section 504 of the Local Government Act to fund the Murwillumbah Business Corporation. Section 504, under the heading General Fund may be Applied to any Purpose, states:

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

The company argued that it was unreasonable for council to use this section to fund the Corporation and that its actions were not in accordance with general public policy, which is the foundation of the legislation. The company also complained about the administration of the Publicity Local Rate.

Preliminary enquiries have been made of council and an investigation is now underway.

Water meters don't lie ! Well, sometimes . . maybe . . .

This Office receives many complaints which allege that water meters are somehow faulty and that the readings obtained from them have overstated the amount of water used. Complainants in these matters invariably seek to have their water usage accounts adjusted to reflect what they perceive to be the " true " amount of water used.

Numerous investigations and enquiries by this Office over the years have demonstrated that water meters, generally speaking, are sound in their construction and reliable in their operation and measurement of

the throughflow of water. Most water supply authorities have in place satisfactory procedures to enable water meters to be tested for accuracy in the event of any dispute arising with a consumer.

As many a council has informed this Office when inquiries have been made about complaints concerning excess water accounts, a meter may sometimes need cleaning, because silt can build up in the chamber of the meter. Of course, the water supply authority is usually at pains to point out that such a build-up of silt will cause the meter to under-record the amount of water used, rather than over-record consumption.

It is true to say that a water meter itself is a relatively simple mechanism which, if properly installed, will give an accurate reading of water usage. However, a recent case dealt with by the Office highlighted how easily even the simplest of mechanical devices can be confounded by human error.

A couple complained that Gosford City Council had been sending them

excess water bills which indicated that their water consumption had been rising for the past five years. They complained to council and said that the water meter must have been misreading the actual amount of water used. Council responded by removing the water meter because, it said, the water meter needed to be cleaned. Another meter was installed and this meter recorded a slightly higher level of consumption than the meter that had been removed. Given that dirty water meters usually under-record consumption, this was accepted as normal. Subsequently, council issued an excess water bill based on the readings obtained from the first water meter prior to its removal. Council refused to make any adjustment to the account.

Preliminary enquiries were made about the couple's complaint and council's first response was exceptionally brief. As far as council was concerned, the complainants were users of large quantities of water, and had been for the last five years or so. Council maintained that there was no evidence to show that they had been overcharged. This Office sought more specific information about the evidence on which the council relied to substantiate its claim that the water meter that had been removed had accurately measured the amount of water passing through it. In response council said that past experience had shown that water meters that were removed for cleaning were usually found to be functioning properly and that, at best, such a meter would under-read water consumption. Council was not prepared to concede that the water meter might have been over-recording water usage.

However, the new meter that had been installed had indicated a much greater level of water consumption since its installation, and council, therefore, arranged to have that meter tested in order to prove to this Office that the meter was functioning correctly. To councils surprise, it was found that the new meter was grossly over-recording the level of consumption. When the meter was dismantled it was discovered that

an incorrect metering capsule had been installed in the chamber of the meter.

Council wrote to this Office and said:

> On the basis of the above, no charge will be levied for water consumption for [the complainants'] property for 1987 and 1988 and any monies paid by [them] for water consumption during this period will be refunded.

Public road ? Yes, and no !

The Office received a complaint from a man who alleged that his local council had refused to take action after his neighbour closed a public road that gave access to the complainant's property.

The public road went past the neighbour's house and, because the complainant had an alternate access to his property over a forest road, the neighbour contended that it was unreasonable of the complainant to drive past his house. Consequently, the neighbour removed the motor grid on the road and closed the boundary fence, thereby preventing public access to that part of the public road which ran through his property. The complainant, however, said that the forest road was not an all-weather access and its use involved a much more circuitous route to his stock yards. As well, the complainant claimed, it was impossible for stock transports to gain access to his stock yards by way of the forest road.

The situation got somewhat out of hand when the complainant removed that portion of his neighbour's fence which blocked the road. The neighbour took civil action and charged the complainant

with " malicious damage ". Solicitors for both parties became involved and the court, as an interim measure, came to an agreement whereby the neighbour installed gates across the road and the complainant undertook to close them every time he used them for access.

The care control and management of public roads is vested in local councils and section 252 of the Local Government Act provides:

> Notwithstanding the provisions of the Public Roads Act, 1902, **a public road or part thereof shall not be closed,** nor shall the position of a reserved road within an incomplete purchase from the Crown or within a conditional lease be altered, **unless the consent of the council has been first obtained**. (emphasis added)

The matter was raised with the local council but, initially, council consistently took the view that the dispute was merely one between the complainant and his neighbour. Council said that it was not obliged to take any action because the complainant had a civil remedy at law. Quite recently, however, the council resolved that the complainant's neighbour be required " to remove any obstruction which restricts access to or exists across " the road. This Office understands that further problems have arisen, because the road is not actually located where it is supposed to be and, in fact, has never been surveyed.

The complaint appears to raise the issue of council's proper use of the discretionary powers vested in it by the Local Government Act. An investigation is planned and this will inevitably have to address questions relating to the degree of responsibility placed on councils to ensure that public roads are kept open and whether it was reasonable, in this case, for council to " sit on the fence " and watch two of its ratepayers argue and, eventually, litigate.

Abandoned motor vehicles

The 1983-84 Annual Report discussed difficulties that had been encountered by councils in implementing provisions of the Local Government Act which allowed them to remove abandoned vehicles. In response to a recommendation made by the Ombudsman, the then Minister for Local Government set up a working party to examine the legislation and, if necessary, recommend changes.

In August 1987 the Policy and Research Branch of the Department of Local Government produced a report on the progress that the working party had made. A copy of that report was eventually received by the Ombudsman in August 1988.

The report said that the option preferred to overcome the difficulties that had been identified was to simplify the legislation regarding abandoned vehicles, and this is to be done in conjunction with a general review of the Local Government Act.

PRISONS AREA

Prison Statistics

Visits to prisons

This year, fewer visits were made to prisons; the number of oral complaints dealt with during those visits, however, increased by 36%. In all, 36 visits were made to 22 prisons, and 420 oral complaints were taken. Further details can be found under " Performance Indicators " later in this Report.

The Assistant Ombudsman, Mr G R Andrews, has special responsibility for the oversight and co-ordination of complaints received from prisoners, and he deals with the more difficult and complex complaints in this area.

VISITS TO PRISONS 1 JULY 1988 TO 30 JUNE 1989

Prison	Number of visits made
Bathurst Gaol	1
Berrima Gaol	1
Broken Hill Gaol	2
Central Industrial Prison	2
Cessnock Corrective Centre	2
Cooma Gaol	1
Emu Plains Training Centre	2
Glenn Innes Afforestation Camp	1
Goulburn Gaol	1
Grafton Gaol	2
Kirkconnell Afforestation Camp	1
Long Bay - Special Care Unit	1
Maitland Gaol	2
Mannus Afforestation Camp	1
Metropolitan Reception Prison	2
Metropolitan Remand Centre	2
Metropolitan Training Centre	2
Mulawa Training & Detention Centre	4
Oberon Afforestation Camp	1
Parklea Prison	1
Parramatta Gaol	2
Silverwater Complex	2
	36

New complaints received

Both the Ombudsman Act and the Prisons Regulations contain provisions which enable prisoners to make complaints to the Ombudsman in confidence. Prisoners are able to send letters to the Ombudsman free of postage and without their contents being read.

Written complaints made by prisoners, or by others on their behalf, about all authorities, increased from 275 in 1987-88 to 362 this year, an increase of almost 32%. The table below shows the number of complaints received on a comparative basis over the last three years:

Complaints from or on behalf of prisoners - comparative figures

	1986-87	1987-88	1988-89
Department of Corrective Services	262	257	321
Prison Medical Service (Department of Health)	43	12	39
Parole Board	7	4	-
Mental Health Review Tribunal	-	2	2
	312	275	362

Nature of complaints

Complaints against the Department of Corrective Services accounted for almost 90% of complaints received this year. A breakdown of those complaints appears below.

Complaints against the Prison Medical Service in the main allege failure to provide appropriate medical or dental treatment or, in some cases, prescribed medication. The exceptions this year were complaints about the refusal of an AIDS test, failure to provide crutches, reduction in medication for misbehaviour, failure to provide dental records, failure to modify diet for a diabetic, and alleged wrongful detention in a psychiatric ward.

The conduct of the Parole Board is not within the Ombudsman's jurisdiction. Complaints against the Board usually allege unfair parole conditions, or unfair revocation of parole, on the basis of false or misleading information. The Probation and Parole Act provides an avenue of redress to the Court of Criminal Appeal in such circumstances. Complainants are made aware of those provisions when their complaints are declined. Under the Sentencing Act, 1989 the Parole Board will be replaced by the Offenders Review Board.

Complaints involving the Mental Health Review Tribunal come from forensic patients held within the prison system. The Tribunal's conduct as it relates to the carrying on and determination of its inquiries or other proceedings, similarly, is not within the Ombudsman's jurisdiction.

Complaints against Department of Corrective Service
1 July 1988 to 30 June 1989

Nature of complaint	Number
Complaints against prison officers (including unfair treatment; harassment; assault; racial prejudice)	59
Property (including loss of, delay in transfering)	36
Record keeping (including failure to grant, or wrongful calculation of remissions; wrongful calculation of release date; financial & other)	28
Transfers (forced transfers & delay in transfers)	33
Inadequate physical facilities	25
Visits	22
Mail (delays in; opening of; confiscation of)	22
Classification	14
Fail to ensure physical safety	11
Segregation	10
Failure to obtain medical assistance	10

Probation and Parole	7
Daily routine (including access to telephone calls)	6
Buy-ups	6
Security measures (strip & cell searches; random urine testing)	6
Work and education	5
Legal	5
Unfair discipline	5
Food and diet	4
Day & study leave	3
Escorts	1
	321

Complaints dealt with

During the year, 316 complaints from prisoners were finalised; of these approximately 28% were declined at the outset. The reasons for this varied. Many complaints concerned grievances about Government correctional policies but revealed no clear evidence of maladministration. Some were about matters for which there was clear statutory provision of which the inmate was unaware. Others were considered more suitable to be handled by the Official Visitors, or were open to other avenues of redress. Some complaints were declined because they were trivial.

Another 63% of complaints were declined after preliminary enquiries had been conducted by telephone, personal interview or in writing.

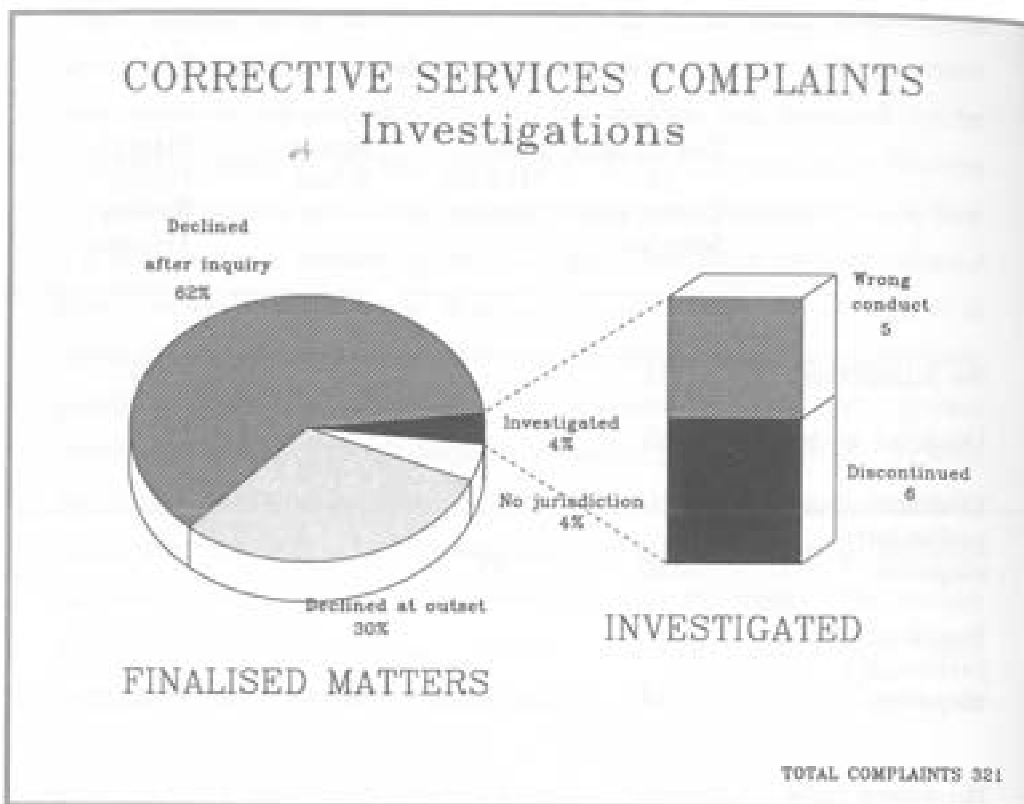
Much alleged wrong conduct does not stand up to examination when further information is provided by the prison authorities. Often, events that seem to be unreasonable on the surface are revealed to be reasonable exercises of discretion when the full circumstances become known. Prisoners sometimes do not pursue their complaints once they are provided with further information about the incidents that initiated them. Other matters are declined because there is no utility in pursuing them, for example complaints which relate to intractable problems that are not open to resolution, given the current overcrowding of the State's largely antiquated prison facilities. As well, the limited resources of this Office dictate that minor issues, especially those that do not have implications for administrative procedures, cannot be taken beyond the preliminary enquiry stage. Preliminary enquiries, however, act as a " filter " and help to determine which complaints merit formal investigation.

Only 3.5% of complaints finalised were investigated. Five reports of wrong conduct were issued this year, and all five involved the Department of Corrective Services. Two related complaints were about wrongful segregation and the failure of the Department to carry out an effective review of the segregation status of the prisoners involved. Further details of these complaints appear elsewhere in this Report. Another matter involved the classification and transportation of a forensic patient. The actions of a Superintendent regarding prisoners' access to wood working equipment and the failure of the Department to develop clear guidelines for the operation of the prison's arts and craft program was the subject of another report. The final matter concerned an improper order requiring a prisoner to leave his cell to be interviewed by police against his wishes.

The following table gives details of determinations made in the year ended 30 June 1989:

Prison complaint determinations

	Department of Corrective Services	Prison Medical Service	Parole Board	Mental Health Review Tribunal	Total
No jurisdiction	13	-	1	1	15
Declined at outset	85	4	-	1	90
Declined after preliminary enquiries	140	15	-	-	155
Resolved after preliminary enquiries	30	5	-	-	35
No prima facie evidence of wrong conduct after preliminary enquiries	8	2	-	-	10
Discontinued after investigation (no utility; resolved; etc)	6	-	-	-	6
Wrong conduct	5	-	-	-	5
Matters subject to preliminary enquiries or under investigation as at 30 June 1989	91	13	-	-	104
TOTALS	378	39	1	2	420



The Ombudsman and the Official Visitors Scheme

A little over a decade ago, the Nagle Royal Commission into New South Wales Prisons observed:

> If our prisons are to be properly run and they are not to be unnecessarily rigorous or unfairly oppressive, a system must be introduced, firstly, to deal with the individual complaints of prisoners and to see that they are examined justly, and, secondly, to make the community aware of what is happening in its prisons.

The Royal Commission considered that the grievance procedures in place in the Department of Corrective Services at the time were " woefully inadequate ", largely because there was no supervision

of prisons independent of the Department. The Royal Commissioner believed that an independent person should be appointed " to hear, and, where possible, resolve prisoners' complaints and grievances ".

The Royal Commission recognised that many prisoners' complaints concerned issues of daily prison life, such as food and amenities. As a commentator quoted by the Royal Commission had noted, being subject to a degree of regimentation and regulation totally foreign to the daily lives of those in outside society, such matters assume great importance in the unnatural social climate of the prison. Many grievances are also ephemeral and need to be dealt with expeditiously if they are to be resolved at all.

The Royal Commission was strongly of the view that the Ombudsman should not have the responsibility of dealing with prisoners' complaints and recommended the appointment of a special Prison Ombudsman. That view, it was said, was not to be taken as criticism of the then Ombudsman or his office; but, rather, as recognition that the resources available to and the procedures followed by the Ombudsman were not conducive to dealing speedily and efficiently with all prisoner complaints and grievances.

This observation, presumably, took account of the fact that it is not the role of the Ombudsman to be an advocate for prisoner grievances; nor is it his primary function to resolve complaints. The Ombudsman Act quite clearly defines the Ombudsman's function; he is an independent and impartial investigator of alleged wrong conduct, and " conduct " is narrowly defined as action or inaction " relating to a matter of administration ".

In the event, the then government decided not to appoint a special Prison Ombudsman, and this Office continued to deal with

prisoners' complaints. In 1979 an Assistant Ombudsman was appointed to deal with matters under the then newly enacted Police Regulation (Allegations of Misconduct) Act, and to be primarily responsible for the handling of prisoners' complaints. A system of regular visits to prisons was established and has been maintained ever since. It was always recognised, however, that this service did not fulfil the need identified by the Royal Commission.

In the early years following the Royal Commission, the Ombudsman was regularly critical of the types of complaints from prisoners that he was having to deal with. Many complaints arose from the lack of access prisoners had, either to information or to appropriate persons in authority within the prison system, or both. Investigation officers found themselves continually being presented with " social welfare " type problems. Although such problems were often quickly resolved by Ombudsman officers, this Office believed that dealing with them ought to fall more properly upon the Department itself. The Ombudsman considered that these essentially " welfare or almoner " type functions were not strictly within the scope or capacity of the Office, a fact that Justice Nagle himself had recognised.

It is accepted internationally that the Ombudsman should largely function as an avenue of last resort. This is reflected in Section 13(4)(b)(v) of the Ombudsman Act, which provides that in considerating whether to conduct or discontinue an investigation, the Ombudsman may have regard to whether " there is or was available to the complainant an alternative and satisfactory means of redress ". It is for this reason that the Ombudsman has consistently encouraged public authorities to develop their own effective internal complaint handling procedures.

In April 1984, the Ombudsman advised the then Minister for Corrective Services that he was considering an investigation into whether

the absence of an effective system within the Department to deal with prisoners' " social welfare " type complaints was in fact wrong in terms of the Ombudsman Act. The Minister replied that he proposed to introduce an Official Visitors Scheme, and the Ombudsman decided not to proceed with an investigation.

The introduction of the Official Visitors Scheme in 1985 was an initiative welcomed by the Ombudsman, and it continues to receive the support of this Office. The Official Visitors have a specific charter to resolve grievances. They have the advantage of being assigned to individual gaols and of being able to deal with complaints quickly at the local level. The system was designed, in part, to deflect complaints away from the Ombudsman. One of the stated aims of the scheme is "to identify those areas, where, prima facie, complaints may be more appropriately dealt with by Official Visitors than by the Ombudsman".

Many complaints received by this Office are declined for the reason that they can be more appropriately dealt with by an Official Visitor. The Official Visitors are advised of such cases and are asked to see the prisoner on their next visit to the prison, although the nature of the complaint is kept confidential. The Official Visitors also refer complaints to this Office because some complaints, particularly those that involve established administrative practices, are incapable of being resolved at a local level, and can be more suitably dealt with by this Office. Since the inception of the full Official Visitors Scheme, complaints from prisoners to this Office have more than halved.

In August 1988 amendments to the Prisons Act gave statutory recognition to Official Visitors, and set out their duties. The scheme, however, was also subject to cut-backs during the year. There were 29 appointed Official Visitors as at July 1988, but only 23 as at 30 June 1989. Even though the Prisons Act places no restrictions on the

number of times an Official Visitor may visit a prison, the Department has restricted payment for visits to one day each month. This Office is aware that some Official Visitors continue to visit the prisons to which they are assigned more often than once a month; but the restriction which has been imposed administratively can only seriously weaken the effectiveness of the scheme. This Office expects an increase in prisoners' complaints as a result.

Escapee policy

In October 1988 the Minister for Corrective Services directed the Department of Corrective Services to introduce a new administrative policy to deal with escapees. This required that any prisoner who had ever escaped from any institution in the State be classified to a medium or maximum security institution, irrespective of whether they were then placed in a lower classification situation. Some of the transfers that resulted were, prima facie, unjust and unreasonable. For example, prisoners who had escaped from juvenile institutions over twenty years before were moved from minimum security institutions back to maximum security prisons. Some of these prisoners had long ago completed their original sentences, which had included extra time for escaping, and had been released to the community. They had later re-offended and had been jailed again, and had been " caught " by the inflexible, retrospective escapee policy.

The forced transfers prompted many oral and written complaints to this Office. The Ombudsman, however, was prevented from investigating the complaints because he lacked jurisdiction to do so.

In accordance with the Prisons Act, the Director-General of the Department is subject to the direction and control of the Minister. The transfer of the prisoners by the Department of Corrective Services had been in compliance with a ministerial directive. Conduct of a Minister of the Crown is excluded from the Ombudsman's jurisdiction. Consequently, in each case, the complainants were told of the Ombudsman's lack of jurisdiction, and they were advised to seek alternative means of redress.

The escapee policy received wide media coverage and two challenges in the Supreme Court were initiated. The Minister then attempted to regularise the policy by gazetting an amendment to the Prisons Regulations. This amendment, on two occasions, was disallowed by the Legislative Council. A further amendment, which limited the retrospective application of the policy to on or after 31 October 1988, was gazetted on 14 April 1989 and is now law.

It is understood that most, if not all, of the prisoners disadvantaged by the forced transfers have since had their minimum security classifications

restored. Future escapees, however, will never be able to serve any part of their sentences in minimum security institutions.

Random urine testing in prisons

In August 1988 the Prisons Act and Regulations were amended to enable prison superintendents to order that a prisoner be deprived of certain amenities or privileges for up to six months, if:

- the result of the prisoner's urine sample was positive (i.e. it showed the presence of a drug); or

- the prisoner refused to provide a urine sample when required to do so by a prison officer of or above the rank of Assistant Superintendent.

Large scale random urine testing was introduced during the year. Initially, many prisoners refused to give samples. Those prisoners were then made the subject of orders issued by the Director of Custodial Services which restricted them to non-contact visits for six months. This

Office received a number of complaints about random urine testing in general, and about the Director's orders in particular.

The orders, in fact, were the subject of litigation shortly after the scheme commenced and the court declared that they were void, because the regulations placed the power to order the deprivation of amenities and privileges specifically in the hands of prison superintendents. The Department moved quickly to restore contact visiting rights; this dampened the growing tension at the time.

When the scheme commenced, urine samples were taken by members of the prison emergency units. The Assistant Ombudsman and an Ombudsman Investigation Officer interviewed the then head of the Malabar Emergency Unit about the complaints that this Office had received. It emerged that the Department had already taken action to refine its procedures for conducting random urine sampling; this included passing the responsibility for obtaining samples from emergency unit personnel to prison staff, because prisoners preferred to deal with prison officers that they knew.

With wider publicity of the procedures used, of the statutory provisions authorising random urine sampling, and of the punishments provided by law for " dirty " samples and for refusing to give samples, the new procedures were quickly accepted as a fact of prison life. Complaints about random urine testing evaporated shortly afterwards.

Segregation

The 1987-88 Annual Report gave details of an investigation into complaints by Mr N and Mr P who had been segregated, for twelve and ten months respectively, on the basis of information, supplied by

the National Crime Authority, about the risk they presented to security. A draft report on the initial investigation was sent to the then Minister for Corrective Services, the late Mr R Aston. Comments that were made by Mr Aston warranted further enquiries being made.

Further investigation was carried out by the Assistant Ombudsman and the Ombudsman issued a final report to the Department and to the complainants in March this year. The report found that the Department of Corrective Services had failed to properly review the prisoners' status at the expiration of each successive segregation order. The report also found that the segregation of each of the prisoners, during breaks of 67 and 23 days respectively in the " chain " of segregation orders, had been contrary to law.

The Ombudsman recommended that Mr N and Mr P each be granted two days remission for every day that they had been unlawfully segregated. He also made a number of other recommendations concerning the Department's policy on segregation, and called for amendment of the segregation provision in the Prisons Act.

The Director-General has notified the Ombudsman that all but one of the recommendations will be implemented. These include recommendations for:

- the development of a special facility for high security risk prisoners, providing, as far is practicable, the same freedom of association and access to recreational, educational and work opportunities that inmates in maximum security institutions enjoy. The former Katingal complex is being redeveloped at a cost of $8 million to provide

a 48-cell Special Security Prison. The new facility will have cells of a size comparable to those in mainstream maximum security gaols; natural light and ventilation; facilities for education, industry and visiting; and exercise yards with natural grass surfaces.

- the amendment of section 22 of the Prisons Act to provide that the Minister or Director-General may approve an extension of a period of segregation only if there are reasonable grounds for considering that the association of a prisoner with other prisoners continues to constitute a threat to the personal safety of that or any other prisoner or of a prison officer or to the security of the prison or the preservation of good order and discipline within the prison.

- the amendment of the Department's policy on segregation to require that requests for extensions of segregation periods be supported by information regarding:

  (i) the nature of the conduct or circumstances that initially warranted the segregation;

  (ii) the general record and conduct of the prisoner during the period of segregation; and

  (iii) the prisoner's views (which may be

given by written submission by the prisoner).

- the review of prisoners segregated on the basis of information from external law enforcement agencies, such review to be undertaken by senior officers of the Custodial Services Division and to include an up-to-date assessment obtained from the external agency of the security risk presented by the prisoner.

The Ombudsman's recommendation that Mr N and Mr P each be granted special remission, for the period that they were held without valid segregation orders, was not implemented. In refusing to implement the recommendation, the Director-General relied on the provisions of the Sentencing Act 1989, which, when it is proclaimed, will remove the Minister's power to grant special remissions.

The Ombudsman considered that his recommendation that special remission be granted to the two prisoners had been justified by the facts of the case. The reasons given by the Director-General for refusing to implement the recommendation were not satisfactory, and failed to address the issues on which it had been based. Nevertheless, given that all of the other recommendations had been accepted and implemented, the Ombudsman decided not to make the matter the subject of a report to Parliament. The implementation of the principal recommendations made by the Ombudsman should provide safeguards against future abuse of the segregation power.

Strip searches of visitors to prisons

It is an offence under the Prisons Act to bring or attempt by any means to introduce into a prison without lawful authority any spirituous or fermented liquor or any drug. Prison officers are able to arrest a person who enters or attempts to enter a prison or prison complex with such articles in their possession.

Prison authorities believe that contact visits are the prime means by which drugs are introduced into prisons. As part of its campaign to reduce the level of drug use in gaols, the Department increased its surveillance and searching of prison visitors during the year.

Visitors are required to leave their personal possessions and other articles in lockers provided for that purpose before they proceed to a visit. The Prison Regulations enable certain officers of the Department to require a visitor to submit to a search of their personal possessions and to be searched from " head to foot by the use of hand held scanning devices ". Prison officers are not, however, able to strip search visitors.

During the year, the Ombudsman again received a number of complaints about strip searching of visitors. These invariably were found to relate to joint operations between the Department's Internal Investigation Unit and police officers. Police have the power to stop, search and detain a person reasonably suspected of carrying illegal or unlawfully obtained substances.

Where prison authorities believe that they have reasonable grounds to suspect that a visitor may be carrying drugs, they call upon a police officer to ask the visitor to undergo a strip search. Approximately ninety people were charged with offences as a result of such searches

during the year. As well, a growing number of visitors have been refused further visiting rights.

A number of incidents in which visitors to prisons have been subjected to searches have been the subject of enquiries by this Office. In each case, no prima facie evidence of wrong conduct has been found on the part of Department of Corrective Services staff, who were able to satisfy this Office that they had reasonable grounds for taking action and that such action was in accordance with the statutory powers available to them.

Forensic prisoners : Part IV

The Annual Reports for the past three years have dealt with issues relating to forensic prisoners. It is only because the administrative problems are still not resolved that, once again, the topic finds a place in this Annual Report. Investigations into certain conduct of the Departments of Health and Corrective Services have concentrated on two major issues.

Most forensic patients are persons who have been detained in prisons or in hospitals because they are not fit to be tried for a criminal offence on account of their mental condition; or who have been found not guilty of a criminal offence by reason of their mental illness but have been ordered to be " detained at the Governor's pleasure ". There are only a small number of forensic patients in New South Wales; but there have been constant administrative difficulties in dealing with them, because two government departments, Corrective Services and Health, an independent tribunal, the Mental Health Review Tribunal, and two Ministers of the Crown, the Ministers for Health and Corrective Services, are all involved in six monthly reviews of the case of each forensic patient.

The Mental Health Review Tribunal is required at least once every six months to conduct these reviews. At the conclusion of each review, the Tribunal may make recommendations to the Minister for Health. The Tribunal may recommend that a patient be released or not released, and the conditions on which a patient should be released.

If the Tribunal is to do its work properly and make reasoned recommendations, it needs to have the best available evidence placed before it. Forensic patients who are in the prison system, however, are subject to prison discipline and to the usual prison security classification system. Classification committees, which periodically review prisoners' progress in gaol, take into account Tribunal recommendations. On the other hand, Corrective Services officers have been reluctant to give evidence and to be cross-examined in Tribunal hearings, and there is always some doubt about whether the Tribunal's recommendations have been based on the best available evidence.

Because of this reluctance, the Tribunal does not have the benefit of the evidence of the people who have most day-to-day contact with the patient, and the patient's legal representative does not have the opportunity of testing that evidence. The prison classification authorities may then be inclined to reject the Tribunal's recommendations, because they are not based on the best evidence available. This is a variant of the Catch-22 situation.

A second major issue being examined in the Ombudsman's investigation is whether it is appropriate to apply to forensic patients the standard classification procedures used by the Department of Corrective Services. There is an argument that, since forensic patients are detained in custody because they are mentally ill (as well as having allegedly committed a criminal offence), it might be more appropriate and administratively efficient for the Mental Health Review Tribunal (with

all appropriate input from the Corrective Services authorities) to make these decisions. This Office has reached no conclusions on this question as yet.

In Mr M's case, as reported last year, the Mental Health Advocacy Service complained about delay in transfering Mr M from prison to a hospital, in accordance with an order of the Governor-in-Council. One of the reasons for the delay was that the hospital nominated by the Tribunal to receive Mr M was not prepared to accept him. The Health Department has introduced new administrative procedures to address this problem. The Ombudsman's Office has been told by the Department that, since the new procedures were introduced, no problems similar to those experienced by Mr M have arisen.

Mr G's case was also mentioned in the 1987-88 Annual Report. Mr G was a forensic patient who had spent about eight years in prison. He was released on licence on the condition that he seek voluntary admission at Morisset Hospital. He complained that he had been treated not as a voluntary patient, but as a prisoner. In any event, the arrangement failed and Mr G was returned to prison. After his case had been reviewed by the Tribunal several times, and after considerable delay, he was finally given a minimum security rating, was transfered to Silverwater and, eventually, became eligible to participate in the work release programme.

Pending a final resolution of the issues currently being investigated, the Ombudsman recommended the adoption of interim administrative measures to close the gap between the Department of Corrective Services and the Mental Health Review Tribunal in the review of forensic prisoners.

Look for Part V next year !

A melancholy Christmas and an unhappy New Year

Separation from family and friends and loss of liberty is especially difficult for many prisoners at Christmas time. Prison authorities are justifiably alert at this time to the possibility of disturbances, even riots, occurring in the gaols while the rest of the community enjoys itself. One such disturbance, which occurred at the Central Industrial Prison (CIP) on Christmas Day 1987, resulted in a complex and protracted investigation by the Ombudsman.

When a young prisoner, who had been drinking home brew, assaulted four prison officers on the main square of the CIP, the Deputy Superintendent, who himself had been attacked, withdrew all of his officers from the square and called for assistance from the Emergency Unit in order to regain control of the gaol. The Special Response Unit, of which the Emergency Unit is part, is a mobile specialist unit, trained to deal with riots, hostage recovery, drug searches and other special problems.

The conduct of the Emergency Unit officers in dealing with the disturbance gave rise to a large number of complaints to the Ombudsman, either directly from prisoners themselves or through the Redfern Legal Centre. The complaints principally alleged that:

- no riot had occurred at the CIP and that, therefore, the Emergency Unit should not have been called;
- prison officers, not prisoners, had damaged gaol facilities;
- prisoners had been assaulted by Emergency Unit Officers;

- prisoners had been unnecessarily gassed; and

- the response of prison officers had been excessive in all the circumstances.

The then Assistant Ombudsman, Ms. P. Adey, and two Investigation Officers conducted preliminary enquiries; they interviewed a number of prisoners and prison officers. After reviewing the results of those enquiries, the Ombudsman decided to hold an inquiry, using his Royal Commission powers, into allegations that Emergency Unit Officers had used excessive force and had thereby caused injuries to prisoners, and had used unsafe procedures which had resulted in prisoners who had not been involved in the disturbance being gassed.

Evidence was taken from twenty-three prisoners and thirty-four prison officers. Documentary and other evidence was gathered from the Department of Corrective Services, including a video-tape of the operation, internal reports and extracts from procedures manuals.

Apart from the gravity of the allegations that had been made by the prisoners, a key factor in the Ombudsman's decision to investigate the complaints was that there appeared to be a significant difference of opinion among senior prison officers about how the Christmas Day operation should have been conducted.

When the Emergency Unit was called by the Deputy Superintendent of the CIP, it equipped itself with riot gear and raced to the gaol. By this time, the officers in charge of the various Wings in the gaol had been ordered by an Assistant Superintendent to lock the entrances to the Wings in order to keep the prisoners already in them isolated from those on the square; the latter were regarded as the major threat.

When the Emergency Unit arrived in the gaol, the Deputy Superintendent used the public address system to order the prisoners to assemble in two caged yards situated off the square, preparatory to their returning to the Wings. This order was followed by warnings that force and gas would be used on prisoners who refused to go to the yards. Approximately two minutes after the warnings were given, the Emergency Unit charged onto the square; they threw gas grenades towards the Wings and towards any groups of prisoners that they saw, in order to drive the prisoners towards the yards. Clouds of tear-gas drifted across the square and penetrated the Wings, especially 3 and 4 Wings, which are situated alongside the two holding yards.

Once the prisoners who had been on the square had been forced into the yards, the Emergency Unit began to clear 3 and 4 Wings. There was clear evidence that force was used by some unidentified Emergency Unit officers in this part of the operation.

Almost all of the prisoners interviewed alleged that they had been struck with batons by Emergency Unit officers or that they had witnessed others being struck. Medical records showed that six prisoners had attended the prison medical clinic that day for treatment for injuries received during the disturbance. A number of prisoners alleged that they had received baton blows but said that they had not attended the clinic, either because their injuries had not warranted medical attention or because they had feared repercussions from the Emergency Unit officers who had escorted prisoners to and from the clinic.

The evidence given by prisoners was to the effect that batons had been used, principally in the clearing of the Wings. As well, a few prisoners alleged that officers who were in an extended line outside the Wings had struck prisoners who were being directed to the yards. However,

the video-tape did not show any batons being used on prisoners who were being directed to the yards. All of the Emergency Unit officers involved in the operation denied that they had used batons on prisoners or that they had seen other officers using them.

Prison Regulation 100C allows prison officers to use force in certain circumstances. For example, they may use force "to ensure compliance with a proper order", or in "the forcible movement of prisoners who decline or refuse to transfer from one location to another", or "to achieve the control of prisoners acting in a defiant manner", or "to prevent or quell a riot or other disturbance". Nevertheless, prison officers are able to use only that amount of force which is reasonable in the circumstances, and they must avoid inflicting injury to prisoners "if at all possible".

The inquiry adduced no evidence to indicate that there had been any physical resistance by prisoners within the Wings. For the most part, especially in 3 Wing, the prisoners had been affected to various degrees by the tear-gas, which had blown in off the square. In 4 Wing, some prisoners had defied orders to vacate the Wing and had yelled abuse at the Emergency Unit; they were subdued by the further use of gas.

In a draft report sent to the Minister for Corrective Services, the Ombudsman concluded that force had been used on prisoners, and that injuries had been inflicted on them by Emergency Unit officers. The report went on to say:

> On the whole, the MEU officers lacked credibility in their denials of the use of force. The fact that the MEU officers have not advanced any evidence about circumstances which would have justified the use of force under Regulation 100C suggests

> that the use of force against those prisoners was unreasonable.

On the other hand, the Ombudsman concluded, the use of gas had been generally justified. There is no doubt that CS gas is extremely potent and has a variety of unpleasant physical effects on those exposed to it. Had it been used within the Wings on unresisting prisoners, as had been alleged, such conduct would have been considered unreasonable, but the Ombudsman was satisfied that it had not. The evidence indicated that most of the prisoners who had been affected by gas had been the victims of gas clouds which had blown into their cells from the square.

Of course, the Ombudsman had to consider the question of whether gas should have been used at all. Senior prison officers gave evidence that, in dealing with defiant prisoners, they had the choice of using physical force, including the use of batons if necessary, or of using gas. They considered that gas was safer, both for prison officers and for the prisoners on whom it was used. If officers engaged in physical combat with defiant prisoners, the risks of a riot were increased because other prisoners might join in, and serious injury to themselves and prisoners might result. The alternative, gas, had the effect of subduing aggressive or violent prisoners, and reduced or even eliminated the need to use physical force.

The Ombudsman accepted that senior officers at the CIP believed at the time that they had lost control of the prison. Four officers, including the Deputy Superintendent, had been severely assaulted by a prisoner. The officers believed that the prisoner was being supported by an unknown number of other prisoners. They also believed that they had to act quickly, in order to prevent the incident from escalating into a riot.

The Ombudsman's draft report also addressed a series of collateral issues, including issues relating to the identification of Emergency Unit officers (who, in riot gear, are virtually impossible to recognise), riot procedures and the failure of the Department to compensate a prisoner whose dentures had been broken by an Emergency Unit officer.

The Ombudsman is waiting to hear whether the Minister wishes to consult with him before he finalises his report.

Education of prison officer recruits

For a number of years, staff of the Ombudsman's Office have addressed prison officer training courses. Until 1987, the participation of this Office was confined to courses for new recruits and for senior prison officers. In 1987, it was extended to refresher courses for new recruits and to executive officer courses.

In the past year, the courses for senior officers have been suspended, but the Office has continued to be associated with the program for trainee prison officers. In the year ending 30 June 1989, this Office participated in twenty-one of these courses. Most of the courses were addressed by the Assistant Ombudsman, Mr G Andrews.

The Ombudsman regards the education of public authorities about his role to be important. The co-operation and support of the staff of the Corrective Services Academy at Brush Farm, which has enabled the continued participation of this Office in training courses for prison officers, is appreciated.

CONSTRUCTIVE ACTION BY PUBLIC AUTHORITIES

Nobody, least of all an Ombudsman, expects that a public authority will never make mistakes. It is reasonable to expect, however, that a public authority, when it does make a mistake, will admit its error and take remedial steps. Where a public authority admits that it has made a mistake, and rectifies it, this Office rarely takes further action. In those cases where a formal investigation has not been commenced, the Office will usually treat the matter as having been resolved. The basic reason for this is that the Ombudsman sees his role as being concerned with improving public administration, and not with meting out " punishment ". When a public authority acts promptly to rectify an admitted problem, the benefits to the public at large are immediately apparent, and there is usually no need for further investigation by this Office.

Some specific examples follow, and statistics on "constructive action" are set out later in this Annual Report under the heading "Performance Indicators".

Australian Gas Light Company

While AGL workmen were installing gas lines in a property, they damaged a neighbour's fence and made inadequate repairs to his driveway. AGL agreed to repair and repaint the damaged fence and to see that the local council fixed the driveway.

Unfortunately, when AGL repainted the fence it neglected to match the colours; the neighbour remained unsatisfied and entered into fairly protracted correspondence with AGL. The problem was resolved after this Office became involved, when AGL paid $30 compensation to the neighbour.

Department of Corrective Services

- Two cases arose during the year which highlighted the need for more information to be provided when prisoners are transfered. Both complainants had been transfered, without notice, to Maitland Gaol, with only the lone word " security " marked on their warrants to explain their removal from their former gaols.

  The Superintendent of Maitland Gaol readily acknowledged to Ombudsman officers that there was a need for more detailed information to be supplied about the reasons for transfers, both to those prisoners transfered and to the Superintendents of the receiving prisons. After this Office raised the issue, the Department's Director of Custodial Services took action to ensure that all prisoners being transfered were accompanied by appropriate and sufficient information. Both complainants are now aware of the reasons for their transfers.

- Based on a " tip off ", prison officials at Bathurst Gaol intercepted a visitor; the visitor was found to be carrying a large amount of money. As well, a quantity of drugs was found nearby.

  The complainant, the prisoner that the visitor had come to see, had his visiting rights restricted, despite the fact that he had not seen the man who was apprehended and did not know until later that he had even been in the prison. The complainant said that he had not been given reasons for being deprived of visiting rights and that an application for review of the decision had not been dealt with.

  As a result of thorough enquiries, the Department adopted new procedures for informing prisoners of withdrawal of visiting privileges and the complainant's visiting rights were restored. The Department also acknowledged that a " clerical error " had led to the review of the original decision being overlooked.

- A prisoner, because of his court commitments, was moved from one prison to another. His personal possessions, including a set of civilian clothes and a pair of leather shoes, went with him. When the time came for him to go to court, the prisoner asked for his clothing, and it was discovered that his shoes were missing. Joggers had to suffice for his court appearance and, later, he submitted a claim about the loss of his shoes and complained to the Ombudsman.

  A check of the prisoner's property card established that the shoes had disappeared sometime between his arrival at the prison and his appearance at court. Extensive searches for the shoes were unsuccessful.

However, another pair of shoes was found in the property room at the prison; these had never been claimed by anyone. The shoes were offered to the prisoner as replacements for his lost shoes, and he accepted them on that basis.

Government Insurance Office

A police van collided with Mr E's car, which was parked in front of his house at the time. As it turned out, the accident was the beginning of a four month round of phone calls and visits to a number of GIO offices by Mr E in an attempt to have his insurance claim satisfied. He was shuffled between various, uncomprehending GIO officers, bearing copies of quotations.

After contacting the Ombudsman Mr E received instant co-operation and a cheque within days from the GIO. We are grateful to Mr E for his " thank you " letter, which concludes:

> If there were more offices that worked as well as yours we wouldn't need offices like yours.

Department of Health

A man complained that there had been a delay of more than eight months in processing his application to retire from employment on medical grounds. His medical examination had been conducted in October 1987, but the necessary notification of his date of retirement on medical grounds was not sent to the superannuation authorities until July 1988.

During this time, the man had been in receipt of sickness benefits, which he subsequently had to repay to the Department of Social Security. The man contended that, if the Department of Health's Medical Examination Centre had not delayed its report to the Superannuation Board, he would have received an additional $10,000 in superannuation pension.

The Health Department told the Office that the delay had resulted from the failure of the man's consulting specialist to provide a report to the Medical Examination Centre. The first request for that report had been made the day after the man's medical examination in October 1987; several follow-up requests had to be made before the report was finally received in May 1988.

The Department said that some doctors, and specialists in particular, were reluctant to provide reports for the statutory fee. Where hardship occurred because of undue delay, however, the Director of the Medical Examination Centre was able to provide an opinion to the Superannuation Board about the medical condition of the retiree, and this often satisfied the Board to the extent that it would agree to make superannuation payments from an appropriate earlier date.

The Director of the Medical Examination Centre offered to provide such an opinion in the complainant's case, to enable the Superannuation Board to review the date from which his superannuation should commence.

Housing Department

The office periodically visits centres outside the Metropolitan area; Wollongong and Newcastle are visited bi-monthly and monthly

respectively. On these occasions some complaints can be dealt with " on the spot ", often by way of a telephone call to the public authority concerned. This is particularly the case when authorities have failed to respond in reasonable time to written enquiries.

A woman who spoke to Ombudsman officers during one of their visits to Newcastle complained about the Housing Department's failure to attend to urgent repairs to her home. The Department had undertaken to carry out work six months previously and the woman feared that there could be some danger to her family if the situation continued.

Immediate enquiries were made with the Department's regional authorities. They carried out an inspection and found that there was no danger present in the current state of the structure. Nonetheless, they agreed that there had been enough delay, and the repairs were given priority.

Department of Industrial Relations and Employment

A man complained about the way in which the Department had handled his complaint about his former employer. The employer had breached the relevant State award, relating to the payment of special allowances.

The Department had taken the matter to the Industrial Court and, whilst the Chief Industrial Magistrate had found in its favour, he had not been able to determine the exact amount owing to the complainant.

The Department had been holding an amount of money, received from the employer as part payment, and had endeavoured to obtain the balance by negotiation because there was ill-feeling between the parties.

After this Office made enquiries, the Department immediately sent a cheque for the amount it was holding to the complainant, and he, in turn, took up the quest for settlement of the balance.

The Department decided that it would in future keep solely to its proper role in relation to the enforcement of industrial legislation, rather than become involved in attempting to negotiate settlements between the parties to a dispute.

Department of Main Roads

A courier driver was unable to pay the Harbour Bridge toll on a journey into the city. She was told by a toll collector that this constituted the offence of "Failure to Pay Toll", and a $50.00 fine would result. When she asked if the toll collector would issue a docket so that she could pay the following day, the toll collector refused and said that it was her "bad luck", as the Supervisor was at lunch. A penalty notice was later issued and, faced with the prospect of being fined, the courier complained to the Ombudsman.

Matters like this are treated in the same way as Traffic Infringement Notices, and enforcement is handled by the Police Department. Enquiries showed, however, that it was within the power of the toll collector to issue a "Booked Toll Docket", and that, in fact, only the Tollmaster had the power to refuse to issue a docket.

The Department responded by organising for relief Toll Supervisors to be available during meal breaks, by counselling the toll collector concerning his incivility and, finally, by cancelling the courier's infringement notice.

Office of State Revenue

A solicitor complained that his clients had incorrectly paid stamp duty of $129.50 on a mortgage document in December 1987. His clients were eligible for exemption from stamp duty under the First Home Purchaser's Deferment Scheme. The Solicitor made an application for a refund almost immediately but did not hear from the Office of State Revenue. He followed up the matter in March and April 1988, and again in June of that year. Part of the problem was that the solicitor failed to quote the relevant Office of State Revenue file number on his letters; nonetheless, a series of letters had been written requesting a refund.

A refund cheque was eventually prepared in September 1988 but, for some unknown reason, the cheque was cancelled and never left the Office of State Revenue. It was at this stage that the solicitor approached this Office about the delay in receiving his clients' refund of stamp duty.

In response to an enquiry by this Office, the Secretary and Chief Commissioner for Stamp Duties said that the solicitor's complaint was justified and that the sequence of events which had occurred represented " poor service" to the clients of the Office of State Revenue. A refund cheque was promptly issued, and new administrative procedures were instituted to overcome similar problems in future.

The Secretary and Chief Commissioner wrote:

> While I regret the sorry history of our dealings with the solicitor in this instance, I am satisfied that the new arrangements will

result in prompt enquiries where correspondence requesting refunds happens to have been misdirected or where this Office's reference number is not immediately apparent.

Roads and Traffic Authority

A woman complained that a telephone enquiry officer of the Roads and Traffic Authority had given her incorrect information about third party insurance cover on an unregistered vehicle.

Inquiries were made of the Authority about the training policies and procedures for telephone enquiry staff. The Authority replied promptly, apologising for the incorrect advice given to the woman and giving an assurance that each member of the enquiry staff had been advised of her complaint, and had been given the correct information to prevent a repetition of the error.

Water Resources Department

Mrs B heard noises coming from her backyard. When she investigated, she found that workers from the Water Resources Department property next door were dismantling the fence separating the two properties. Mrs B told the men that they could trim any vegetation overhanging the fence line, but cautioned them that the fencing material belonged to her because her late husband had erected the fence. Later that day, when Mrs B returned home from town, she was horrified to discover that a reinforced band of labourers had cut a metre wide swathe along her boundary line and had removed an olive tree and a number of shrubs.

A less than cordial exchange took place between Mrs B and the workmen, one of whom suggested that she ought to be pleased to have her yard cleared. Mrs B was anything but pleased; she contacted the local Water Resources Department manager. When no adequate response was forthcoming, she contacted the Ombudsman.

The Department quickly resolved the matter by offering to construct a new weld mesh fence, and to rehabilitate what remained of the olive tree under the supervision of the Department of Agriculture.

Sydney County Council

Mr B received a brief, blunt letter from Sydney County Council requiring him, without explanation, to arrange for the electrical wiring servicing his property to be rerouted and requiring that a new contact point be installed, all at his expense.

It transpired that part of the electrical wiring crossed the boundary of his neighbours property, and the neighbour had complained about this.

Following contact by this Office, Sydney County Council very quickly devised an alternative solution for Mr B, at no cost to him.

Shoalhaven Shire Council

In 1974 Mr P purchased a vacant block of land near St. Georges Basin. Because of the zoning of the land, no dwelling could be constructed on it at that time. In 1981 council prepared a Draft Local Environmental Plan in terms of which it was proposed that a bypass road run through the middle of Mr P's land.

Discussions between the parties began in 1986. Council ultimately agreed that Mr P would not have to pay rates for the time being, and that a dwelling could be built on a triangular portion of the property which would remain after the road went in. This was not satisfactory to Mr P, so he complained to the Ombudsman.

Council responded to initial enquiries by approving the purchase of all of Mr P's property, a decision which satisfied all of the participants.

Wollondilly Shire Council

Mr M owned a large tract of land next to a new shopping centre site. The council constructed a carpark on a section of this land and Mr M allowed access to the carpark entrance across other property which he owned, under the impression that an agreement existed for council to purchase that land.

The property had been valued by the Valuer General in 1985 at $25,000; however, on the council's application, the valuation was reduced to $5,700. The reason given for the reduction was that Mr M was to be credited with 35 carparking spaces in the new carpark, thereby reducing the amount that he would have to pay to council in this regard. Mr M was less than pleased with this, because he had already had a large number of carparking spaces credited to him after allowing other sections of his land to be used for the shopping centre.

After several years of unsatisfactory negotiation between the parties, the Ombudsman finally became involved. After preliminary enquiries were made, council acknowledged that it had acted unwisely in its dealing with Mr M and re-opened negotiations with him.

Police Department

- The complainant had surrendered a rifle to police during the firearms amnesty in 1988. When the present gun laws were reinstated, he asked that his rifle be returned. The local police told him, quite correctly, that he would have to obtain a shooters license before the weapon could be returned to him. He did this; but then the police found that his rifle had already been destroyed.

  The complainant accepted the destruction of his rifle, but when he asked for a refund of the license fee he was told that no refund could be made. Enquiries by the Ombudsman, however, established that a refund could be made and the $25 license fee was subsequently refunded in full.

- A motorist was towing a trailer when, without warning, it began to sway violently. His car was eventually forced off the road but, fortunately, no one was injured.

  A passing traveller stopped to help; he noticed that all of the wheel nuts on one side of the trailer were loose. These were tightened and, although the car and trailer were badly damaged, the motorist managed to reach the next town, where he reported the accident to the police. The motorist was surprised when a police officer gave him an infringement notice for negligent driving. Although he paid the fine, he wrote to the Ombudsman about the matter.

  Enquiries were made and the Police Department found that there had been no justification for the issue of the infringement notice. The infringement notice was marked "no action" and

the motorist was given a refund of the fine he had paid.

As well, the local Inspector counselled the police officer who had issued the notice; he reported, "I also emphasised the fact that, where it is intended to issue someone with a traffic infringement notice, it is necessary to ensure that the offence has in fact been committed."

- A man complained to the Ombudsman that police had charged him with "goods in custody" without any evidence that the property, a car stereo, had been stolen. Information supplied by the man was referred to the Police Department. As a result, ownership of the stereo was clearly established and the charges against the man were withdrawn.

- A woman complained that a watch which police had returned to her after a court case was not her watch. Another type of watch had been substituted for her own, and police were unable to identify the cause of the mix-up.

  Although enquiries were unable to locate the woman's watch, the Police Department made an ex-gratia payment to her for the cost of a replacement watch.

POLICE AREA

Police complaint statistics

This year, 2231 complaints against police were received, an increase of 4% over last year. The following table gives details of the number of complaints received:

	1987/88	1988/89
* Complaints under the Police Regulation (Allegations of Misconduct) Act	1995	2091
* Complaints against Police dealt with under the Ombudsman Act.	51	87
* Complaints dealt with under both Acts.	3	-
* Complaints outside jurisdiction.	89	53
	2138	2231

The numbers of complaints received in the last five months of the year ended 30 June 1989 were consistently high, giving an indication of a possible upward trend for the coming year.

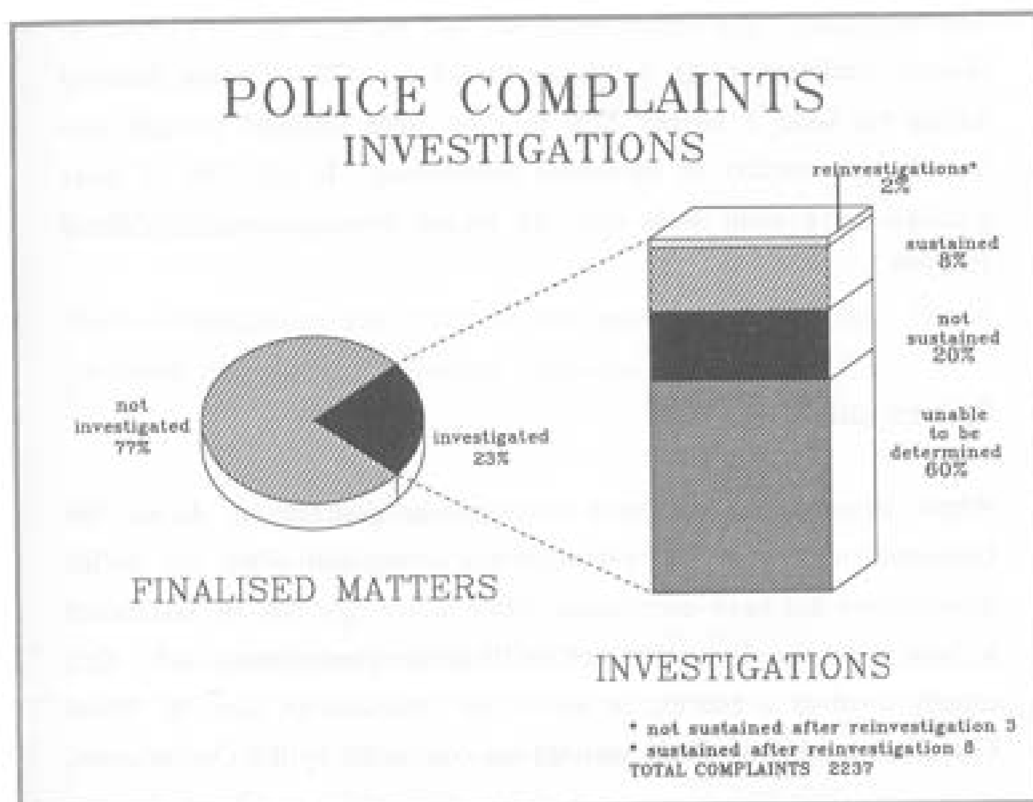
Complaints not investigated

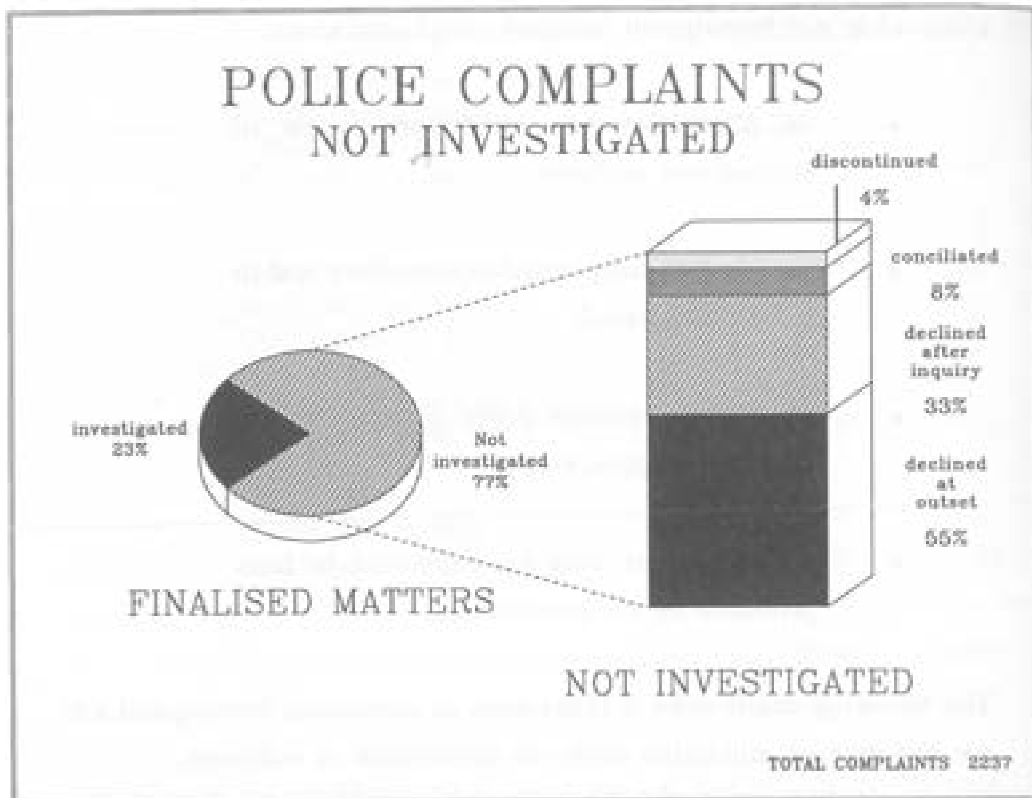
The Ombudsman is conscious of the persistent misperception on the part of many police that investigations of complaints of a trivial nature are initiated by his Office. For this reason, in part, the Office has continued to stringently screen new complaints. More complaints are now being dealt with by requiring preliminary enquiries under section 52 of the Police Regulation (Allegations of Misconduct) Act to be made, while the ratio of complaints conciliated has remained fairly constant. This reduced the number of complaints investigated this year to 23% of all complaints dealt with, as compared to 27.8% in 1987-88.

Complaints not investigated included complaints where:

- an alternative and satisfactory means of redress was available;
- the conduct complained of was minor and in some cases trivial;
- conciliation between police and citizens was considered appropriate;
- the allegations were not supported by facts produced by the complainant.

The following charts show a breakdown of complaints investigated and not investigated; sub-tables show the distribution of outcomes.





Matters declined at the outset accounted for 42% of cases finalised during the year; a further 25% of cases were finalised through pre-investigation enquiry or successful conciliation. In all, 77% of cases finalised were dealt with short of formal investigation (72.3% in 1987/88).

Reinvestigations

Where he considers that it is necessary or desirable to do so, the Ombudsman is able to reinvestigate a complaint after the police investigation has been completed. Most reinvestigations are conducted by way of an inquiry under section 19 of the Ombudsman Act. This usually involves a hearing in which the Ombudsman uses his Royal Commission powers. Such hearings are conducted by the Ombudsman,

the Deputy Ombudsman or an Assistant Ombudsman. It is the usual practice for a seconded police officer and an Executive Assistant to participate in reinvestigations.

Fewer reinvestigations were conducted in 1988-89, because there were vacancies in statutory and seconded police officer positions in the early part of the year. Appointments were made to all vacancies during the year and, after allowing some time for necessary training, the Ombudsman recommenced a programme of reinvestigations.

This year, eleven reinvestigations were completed; this was significantly less than in previous years. One important reason for this was an improvement in the quality of police investigations. Better quality police investigations enable the Ombudsman to make positive determinations more often. The higher level of " sustained " findings coming from the Police Department this year clearly impacted on the number of reinvestigations that the Ombudsman might otherwise have had to conduct.

Investigations

Fewer investigations were finalised this year than in 1987-88. This is attributed to a number of factors, principally:

- improved performance in screening complaints by pre-investigation enquiry;
- more complaints declined at the outset;
- a large influx of complaints in the latter part of the

year (results of investigations begun in these cases will occur during 1989-90); and

- reduced number of reinvestigations conducted by the Ombudsman during the year.

It is interesting to note that, whilst the number of matters investigated were fewer this year, the number of sustained findings almost doubled. Analysis shows that, in the majority of these cases, the Commissioner found the issues sustained and the Ombudsman agreed with that view. Only in relatively few cases did the Ombudsman find evidence to sustain allegations, contrary to the Commissioner's assessment.

In the recently published annual report of the Police Internal Affairs Branch, statistics show that the number of police charged with criminal and departmental offences increased by 109% (combined figures). These results support the view that the Police Internal Affairs Branch and Internal Security Unit, which are under the direction of the Assistant Commissioner (Professional Responsibility), are now more active and effective forces within the Department. The Ombudsman acknowledges the Assistant Commissioner's achievements.

Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill 1988.

The 1987-88 Annual Report (pp 135-145) referred in detail to the Police Regulation (Allegations of Misconduct) Amendment Bill 1988, introduced by the Minister for Police on 25 May 1988. The Bill was referred to a Select Committee of the Legislative Council which published an interim report on 2 August 1988.

The Final Report of the Committee was published on 19 April 1989. The Committee concluded, amongst other things, that the Ombudsman does not investigate trivial or vexatious complaints and that, in practice, there is substantial agreement between the Ombudsman and the Commissioner of Police as to which complaints are trivial and do not warrant investigation. The Committee also concluded that the perception that the Ombudsman investigated trivial complaints and that he was unfair to police appeared to be present throughout all ranks and levels of police administration, including the Police Board.

The Committee commented:

> It is widely accepted that this perception about the Ombudsman and the Police complaints system is endemic to, and is damaging to, the morale of New South Wales Police.
>
> The perception, however, has no basis in reality. It is not based upon a realistic understanding of the Police complaints system. Rather it is based upon rumour, innuendo, mis-information and misunderstanding of the system.

(at p17)

The Committee identified a number of aspects relating to its principal term of reference, which was whether the provisions of the Bill were in the public interest:

1. <u>Middle Ground Complaints</u>

   The Committee has formed the view that the area of substantial dispute regarding the Bill into which the Committee is inquiring involves so-called " middle ground " complaints which relate to neither trivial matters nor the matters that amount to criminal offences. These " middle ground "

complaints relate to such matters as unwarranted failure to investigate, victimisation and harassment, and abuse of Police powers of arrest or of search and seizure. The Committee believes that these matters are not trivial and in the main will not amount to criminal offences and will not necessarily fall within the ambit of " serious misconduct ".

2. Concept of " Serious Misconduct "

The Committee believes that the concept of " serious misconduct " being conduct for which the Commissioner would dismiss a member of the Police Force is an unsatisfactory aspect of the Bill. Dismissal from the Police Force is a penalty within the entire discretion of the Commissioner. It is not possible at the commencement of an investigation to determine whether such a penalty is appropriate to a particular offence if subsequently found to be proved.

3. " Prescribed Summary Offence "

The Committee believes that it is unsatisfactory that the Bill leaves it to subsequent regulations to specify what is a " prescribed summary offence ". The Attorney-General's Department and Parliamentary Counsel are equally capable of drafting a regulation setting out what are prescribed summary offences, or of including a schedule in the Bill stating what these offences are. Parliament is entitled to know what it is being asked to approve, particularly in relation to a measure which is so controversial.

4. Police Commissioner's Discretion

It is unsatisfactory that the Police Commissioner has unreviewable discretion as to what is " serious misconduct ". There is no valid reason why a discretion in regard to such an important matter should be unreviewable by the Courts.

The Ombudsman, Mr Landa, at the very beginning of this Committee's enquiry, warned that the Commissioner has, in the past, delegated the statutory responsibilities vested in him under the

existing legislation, and that it will be necessary for him to do so in relation to the proposed Bill.

The former Ombudsman, Mr Masterman, was of the opinion that the Commissioner for Police, at any time, would not know more than ten percent of whatever goes on in the Police Force. Mr Avery did say that his duties would not allow him to examine every matter or every complaint, or even very serious complaints.

5. Improved Police Practices and Procedures

The Committee finds that a number of practices and procedures have been improved in the Police Force as a result either directly or indirectly of the activities of the Ombudsman. Under section 52 of the PRAM Act the Ombudsman may require the Police Commissioner to provide him with an explanation of a policy, procedure or practice relevant to conduct complained of.

In his submission to the Committee, Mr Landa listed 26 cases between 1985 and 1987 where the Department undertook reviews of procedures which could be traced to input provided by the Ombudsman. The obvious implication is that some of these improvements would not have been effected if the Ombudsman did not have the power to review all complaints of misconduct made against Police.

(at pp 23-24)

The Committee concluded:

The Committee seriously questions the wisdom of creating legislation to address a perception that has no basis in reality. The Committee believes that, as a matter of principle, public policy should address real issues in a meaningful way.

The legislation is attempting to address a " perception ",

a shadowy ill-defined concept, rather than a constant real " failure " of the system and the Committee does not believe that this is proper.

The Committee finds that the current Police complaints system is a success, and that, as it actually operates, does not damage Police morale.

(at p.28)

and recommended:

In view of the overwhelming evidence presented to the Committee against the Police Regulation (Allegations of Misconduct) Amendment Bill 1988, the Committee finds the Bill to be contrary to the public interest and accordingly recommends to the Legislative Council that the Bill not be proceeded with.

(at p.28)

The Committee was also required to consider whether the current police complaints system was working effectively. It concluded:

1. Section 19 hearings

It is apparent from the evidence given to the Select Committee that quite deep resentments are held within the Police Force regarding the hearings held under section 19 of the Ombudsman Act.

The Committee has formed the view that such proceedings are often necessary, because reinvestigations of Police complaints more often than not require an assessment to be made of the credit of witnesses in the determination of questions of fact, and in the public interest but that some

concern on the part of Police would be allayed if Police were given a statutory right to legal representation at such hearings.

Accordingly the Committee recommends that the PRAM Act should be amended to confer such a right on Police who appear at section 19 hearings where they are in jeopardy of having an adverse finding made against them.

2. Delays and cost

It was argued that the requirements of the Police under the PRAM Act unduly and wrongfully take up an inordinate amount of Police time which should be used in more productive ways.

As to these delays in the present system, they can arise either during the initial investigation by Internal Affairs or in any subsequent reinvestigation by the Ombudsman. It appears after examination that it is more likely than not that it is the Police investigation which is usually very lengthy and that if the Bill became law the amount of work that Internal Affairs performed would not be considerably less.

The Committee has formed the view that out of date Police practices such as two Police Officers conducting every interview during the course of an investigation contribute to such delays. The Ombudsman's Office, in contrast, undertakes investigations with an individual investigation officer.

There does not appear to be any valid reason why with the advent of modern technology such as tape and video recording, that investigations could not be carried out by a single officer.

The Committee recommends that both Internal Affairs and the Ombudsman should be requested to bear in mind the need for efficiency and to adapt their practices so that unnecessary delays are eliminated.

The Ombudsman is conscious of the problem of delays and it was largely as a result of reports of

the Ombudsman that the PRAM Act was amended in July 1987 to impose a 180 day time limit on Police investigations.

3. Police Secondees

The Committee believes on the evidence that Police Officers seconded to serve in the Ombudsman's office perform a useful role. The Committee also believes that whether for reasons of peer pressure or otherwise, Police are reluctant to accept secondment to the Ombudsman's office. Seconded Police have played such a valuable role in conducting re-investigations for the Ombudsman and the Committee accordingly recommends that the Minister for Police and Emergency Services and the whole Police administration should actively encourage such secondment.

4. Conciliation

The Committee believes that there is sufficient evidence to conclude that the existing conciliation procedures under the PRAM Act are not used with sufficient frequency. The Minister and the Police administration should ensure that it is brought to the attention of all Police that it is desirable that complaints should be conciliated in the first instance wherever it is possible to do so. (The power exists under section 14(1) of the PRAM Act). The Committee recommends that the Commissioner of Police should also consider the training of patrol commanders in conciliation procedures.

(at pp25-26)

The Ombudsman supports these recommendations.

The Committee also referred to the importance of educating police about the role of the Ombudsman in the police complaints system. The Committee said:

> Another educational exercise which should be encouraged is the public awareness campaigns conducted by the Ombudsman throughout the State. These visits should be combined, as a matter of course, with talks to Police Officers about the functions of the Ombudsman in regard to complaints of Police misconduct.
>
> In view of what the Commissioner has said to the Committee (as to the concern, threat or awe inspired by the Ombudsman) it should be questioned if the Ombudsman's Office is doing enough to allay the apprehensions the Police have about his Office.

The Ombudsman has always believed that both he and the Commissioner of Police have important tasks to perform in eradicating misconceptions about the role of his Office, and these views were recognised by the Committee. The Ombudsman is presently developing a detailed proposal for visits by his officers to major centres and police districts in the next twelve months to address police officers on the role of the Ombudsman. In light of the Committee's remarks, he would expect to receive strong support for this initiative from the Commissioner of Police.

The Police Board and the Ombudsman : Two different worlds ?

Those who have read and compared recent Annual Reports of the Ombudsman and the Police Board will have noticed a steadily diverging attitude on the part of each body about the continued necessity for the present police complaints system and about the role that the Ombudsman should have within that system.

The Board set the scene in its 1986-87 Report, when it said:

> The " police discipline package " of 1983 was appropriate to the circumstances of the time. The Police Regulation (Allegations of Misconduct) Act (1978), introduced on the basis that senior police could not then be trusted to discipline other police, gave extensive powers to the Ombudsman and to a statutory Internal Affairs Branch to investigate complaints against police. A large, expensive and intrusive industry has grown up around the processes so created, and the Board has observed worrying signs of overkill. Fear of the protracted and frequently hostile investigation process looms large in the minds of many police, leading to a " don't get involved " syndrome, potentially poisonous to community policing. Worse, the statutory and external character of the investigation of complaints has tended to weaken in police supervisors the feeling of responsibility for proper conduct of their subordinates. A complaint against a Constable or Sergeant is not permitted to be investigated by his or her Inspector; that job presently has to be given to an officer of a different division or to staff of the Internal Affairs Branch in headquarters; their investigation is not permitted to be reported to the supervisor of the complainee! The Ombudsman reviews the investigation and may elect to reinvestigate. Much of this formality might have been prevented by a little judicious guidance and counselling by the supervisor in the first place, had that been allowed. The Board is of the view that the present system of complaints against police has served its original purpose and, given the changes achieved within the Police Force, now stands in urgent need of fundamental review. The thrust of revised legislation should leave the mainstream of responsibility for ethical and correct behaviour of individual police squarely on their line supervisors and commanders, reinforced by training, work performance appraisal, and the discipline of a uniformed service.

(at pp12-13)

The Board followed up these remarks in its 1987-88 Annual Report:

> We are of the view that the present system of complaints against police has served it original purpose and, given the changes achieved within the Police Force, now stands in urgent need of fundamental review.

The Board welcomed the invitation by the Select Committee of the Legislative Council on the Police Regulation (Allegations of Misconduct) Amendment Bill, 1988 to provide a submission to the Committee. In our submission we raised several matters for consideration. First, that the Police Force of today and the Police Force of 1978 are two different bodies. Second, that the present system of complaints against police has served its original purpose and now stands in urgent need of fundamental review. It has become apparent that the spirit and intent of the Police Regulation (Allegations of Misconduct) Act, 1978 has been lost. Events have subsequently shown that the manner in which the Act has been interpreted and applied has become an impediment to the effectiveness of the Police Force. This interpretation and application has :-

- placed police officers in fear of performing their duties to the highest level of their ability due to the ever present threat of becoming the subject of complaint;
- placed the accountability for police behaviour in an area of uncertainty by denying supervisors an investigative and disciplinary role; and
- in all probability, proved highly unsatisfactory to the genuine complainant who is denied the speedy resolution of his/her complaint in the manner he/she desires.

We believe that disciplinary matters should be dealt with as speedily and informally as possible. The authority for dealing with such matters should be returned to the Commissioner of Police.

Until changes of this nature are made the police disciplinary process will continue to be unnecessarily lengthy and complex.

> It is our view that the principal Act has become an obstruction to change and now hinders progress towards a more efficient Police Service.

In a written submission to the Select Committee, the Board repeated these remarks and said:

> Our primary function is to promote the improvement of the Police Force and to ensure the maintenance of an efficient and effective Police Service as legislated in Section 7(1) of the Police Board Act, 1983. We are in no doubt that performance of our duty under the Police Board Act requires reform of our present system. Its presence and operation hinders improvement of the Police Force and impedes the maintenance of an efficient and effective Police Service.

In developing these themes the Board in its submission made four assertions:

- the Police Force of 1988 and the Police Force of 1978 were two different bodies;
- the Police Force of 1988 was capable of and must have self-regulation to be efficient;
- the way in which the Police Regulation (Allegations of Misconduct) Act had been interpreted and enforced did not give effect to Parliament's intent; and

- the present police complaints system no longer served the public interest.

On the other hand, in its submission to the Select Committee, the International Commission of Jurists, Australian Section, said:

> The ICJ Australian Section considers that no reasonable and impartial person, who has studied the Ombudsman's Annual and other Special Reports on this subject since 1984, could believe that the existing system has now completed its useful life and may be safely dismantled. It is, frankly, contrary to human experience and absurd to suggest that such a metamorphosis could have occurred throughout the police force within this short period. Yet this is what the Police Board and the Commissioner seek to suggest.

In an Editorial headed " Confidence and Trust in the Police ", The Sydney Morning Herald (8 October 1988) was equally trenchant:

> The NSW Police Board seems to have a peculiar blind spot on how best to deal with police corruption. Two months ago the chairman of the board, Sir Maurice Byers, displayed this before the NSW parliamentary inquiry into proposed legislation to reduce the Ombudsman's powers to investigate complaints against police. He said the board believed it was time to trust the police force to discipline itself. Apart from the most serious cases requiring court action, the force was " now capable of dealing with such of its members as may fall victim to corruption without external aid ".
>
> Sir Maurice seemed here to be saying it was not so much a question of reducing the Ombudsman's role as eliminating it entirely. Now his designated successor, Sir Gordon Jackson, has renewed this call. Sir Gordon this week suggested that it might have been reasonable in 1983

for legislation to give " extensive powers to the Ombudsman and to a statutory Internal Affairs Branch to investigate complaints, even anonymous complaints, against police ", but such external checks had been taken too far and had had unintended results. " The statutory and external character of the investigation of complaints tends to weaken, in police supervisors, the feeling of responsibility for proper behaviour of their subordinates ", he said.

Sir Gordon said that as community trust in its police leaders was rebuilt - he did not make clear whether he believed this was something still in progress or already achieved - " external agencies " such as the Ombudsman were best confined to " monitoring the health and effectiveness of personnel systems and processes instead of actually conducting individual cases ". The two civilian members of the Police Board established in 1984 therefore appear to be saying that the police force, barely four years on, is in good enough shape for the most serious external checks - apart, of course, from the courts - to be removed. It is hard to see how this can be taken seriously.

Although there has been a remarkable improvement in the quality of senior personnel, can it really be said that the force is free of all serious problems such as the Ombudsman was established to deal with? More to the point, should this debate about the Ombudsman's powers ever proceed on the question whether the police at a particular time have reached a state of cleanliness where they are entitled to say " trust us, and us alone " ? Surely not. The debate is not about trust but about what is the most practical means of dealing with certain constants, the most important of which are police misconduct, ranging from the trivial to the viciously corrupt, and public complaints about the same.

Naturally, some police resent any suggestion that the force cannot be kept clean by its unaided efforts. But it must not only be clean in their eyes. Inevitably, in difficult cases, the public will always have more confidence in the pronouncement of, say, an independent Ombudsman than of the police in their own cause. That does not diminish the police or connote a lack of trust in them. As many police themselves recognise, the existence of such an outside agency strengthens them, by strengthening public confidence in them. If, as both Sir Maurice and Sir Gordon have suggested, some police feel that the

> Ombudsman system has weakened morale, that does not mean the system is at fault. It only means that the moral regeneration of the force still has some way to go.

The Select Committee, in its Final Report on 19 April 1989, did not support the submission made by the Police Board.

The Ombudsman believes that the final say on these issues might usefully be left to Mr G E Fitzgerald Q C. In his Report on the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct to the Queensland government published on 3 July 1989, Mr Fitzgerald said:

> No powerful institution, especially one with the potential to injure innocent citizens, should have untrammelled responsibility and authority to determine its own policies and methods. Nor should it decide the principles concerning the confidentiality of its material or perform its own regulation.
>
> Elsewhere, police boards have been created to govern the Police Force.
>
> Whilst it may be possible to have a police board which works because of the eminence and commitment of its members, the risks are great.
>
> The Police Force should not be unregulated or regulated only by an " internal " group of civilians who are more-or-less inexperienced in the criminal justice system, unfamiliar with police attitudes and practices, involved with police administration only on a part-time basis and participants in other time-consuming activities. Such a police board would inevitably become merely a captive of the police lobby and the victim of a need to support police performance in order to justify its own performance. It would be incapable of effective regulation. The addition of police representatives would only exacerbate the problem.

> As the institution with the responsibility and authority for the enforcement of criminal law, the Police Force should be subjected to external overview and critical assessment. External overview should be supported by effective internal delegation, spread of authority and responsibility, comprehensive and detailed internal reporting and regular inspections.

(pp 307-8)

Relationship between the Ombudsman's Office and the Internal Affairs Branch of the Police Department

Since the appointment in September 1988 of Mr A R Lauer as Assistant Commissioner (Professional Responsibility), the relationship between this Office and the Internal Affairs Branch has improved considerably. The Assistant Commissioner meets with the Deputy Ombudsman and the Assistant Ombudsman (Police) each month to discuss ongoing problems; these discussions have been frank and open. The meetings enable the resolution of problems of concern to both this Office and the Police Department through mutual agreement, without the need to resort to lengthy and time-wasting correspondence.

Naturally, not all problems can be resolved in this way. Where disagreements remain, these are referred for discussion between the Ombudsman and the Commissioner of Police, who also meet from time to time.

The statistics for 1988-89 show a considerable reduction in the number of matters reinvestigated by the Office. In the year ended 30 June 1988 thirty-four matters were re-investigated; in the year ended 30 June 1989, only eleven matters were re-investigated. This is, in part, due to the fact that since the appointment of Mr Lauer, the quality of Internal

Affairs Branch investigations has shown considerable improvement. These are now more thorough and the police conducting them appear to be taking a more realistic approach when framing findings and recommendations. For example, in the year ended 30 June 1988 there were forty-two " sustained " findings by officers of the Internal Affairs Branch; in the year ended 30 June 1989 there were eighty-three " sustained " findings by Internal Affairs Branch officers. This represents an increase of almost 98% in " sustained " findings at first instance.

It seems inevitable that, despite the improved relationship between the Internal Affairs Branch and the Ombudsman's Office, differences of opinion and of approach will continue to arise. In those circumstances, the Ombudsman will continue to put his views vigorously where he considers that it is appropriate or desirable for him to do so.

Regionalisation

On 1 September 1988 the Police Internal Affairs Branch of the Police Department was regionalised. In August 1988, the Commissioner of Police advised the Ombudsman of the proposal to regionalise the Branch and outlined the new system. He said:

> The Police Internal Affairs Branch will still continue to act as a central point of receipt of all new complaints within the meaning of the Act. However, from that point responsibility will rest with Region Commanders, who will correspond with you direct on matters within their area of administration. The exception to this will be where, following investigation, it appears that preferment of Departmental or criminal charges may be appropriate. In such cases, responsibility for a final decision will still rest with the Assistant Commissioner (Professional Responsibility) and that Officer would then be corresponding with you.

Once a matter has been referred to a particular Region for attention, I would invite you to correspond with the Commander there as the occasion arises. For practical purposes, you may still wish to utilise the daily " by hand " mail system operating between the Police Internal Affairs Branch and your Office for this correspondence. In this event, mail addressed to individual Region Commanders will be promptly relayed through in-house systems.

Of course, I well realise that final responsibility for matters coming within the ambit of the Police Regulation (Allegations of Misconduct) Act rests with the Commissioner of Police. I accept and expect that in areas such as important policy decisions you would still wish to correspond direct with me. There is no intention to interfere with this and I look forward to a continuation of the present amicable working relationship in this regard.

I am confident that the exercise of my delegated authority by Region Commanders, rather that the Assistant Commissioner (Professional Responsibility) will prove beneficial to all parties concerned. However, you can be sure that the new procedures will be closely monitored to ensure that the highest standards continue to apply to this phase of Police duty.

Delegations

It was clearly the intention of the Commissioner of Police to delegate his powers to the four Region commanders, each of whom hold the rank of Assistant Commissioner. However, under section 49 of the Police Regulation (Allegations of Misconduct) Act, as it then stood, the powers, authorities, duties and functions of the Commissioner could only be exercised by the Commissioner or a Deputy Commissioner, and the Commissioner had no power to make these delegations.

This caused difficulty. In one instance, a Region Commander directed that criminal charges be laid against a police officer. The preferment

of the charges should have been under the hand of the Commissioner and, on account of this legal defect, the charges failed at court.

Since early 1989, the Commissioner has had the power to delegate most of his functions. The Statute Law (Miscellaneous Provisions) Act 1989 amended section 49 of the Police Regulation (Allegations of Misconduct) Act to enable the Commissioner to delegate most of his powers, authorities, duties and functions to an Assistant Commissioner.

The legislation, however, specifically excluded from the powers that the Commissioner was able to delegate, his power under section 26 of the Act to require the Ombudsman to refrain from publishing particular material obtained during an investigation. The situation remains, therefore, that, in every instance, the power conferred under section 26 can only lawfully be invoked by the Commissioner. This problem is currently the subject of discussion with officers of the Police Department.

Misleading comments in Internal Affairs Branch Annual Report

The Ombudsman has noted with concern certain propositions which have been advanced in the Annual Report of the Police Internal Affairs Branch for 1988. In the report the Assistant Commissioner (Professional Responsibility), Mr A Lauer, discussed the impact of Justice Lee's decision in the case of **Ombudsman v The Commissioner of Police** (1987)[4]. Justice Lee held that complaints made by police against other police are complaints within the terms of the Police Regulation (Allegations of Misconduct) Act and that the law required that the Ombudsman be notified of them.

[4] See 1987-88 Annual Report; pp 131-35

The Assistant Commissioner in discussing the decision said:

> What does cause concern though is the probably (sic) unintentional widening of the role of the Ombudsman flowing from this decision
>
> . . . the situation now is that the Commissioner is in the position of having to approach the Ombudsman and virtually seek his consent before he can enforce discipline within the Police Force . . .

Both of these propositions are refuted. They simply do not reflect the true situation; they are incorrect.

So far as the first proposition is concerned, Justice Lee was concerned only about the proper interpretation of the law relating to complaints against police and, in this context, about the meaning of the word " person " in section 5(1) of the Police Regulation (Allegations of Misconduct) Act, 1978. Justice Lee said:

> . . . there is nothing in the Act which even vaguely suggests that the Act is limited to complaints by private citizens and that it is not applicable to complaints from members of the Police Force acting as such.

(p11)

He added:

> The whole of the Act appears to be framed upon the footing that <u>any</u> allegations of misconduct made against the police from whatever source are intended to be dealt with by procedures established by the Act which link the Commissioner's responsibilities and powers of investigation with the Ombudsman's overseeing role.

(p12)

Justice Lee concluded that the Commissioner of Police had " erred in taking the view " that complaints by police about the conduct of other police were not complaints within the meaning of the Act.

It is clear from the comments made by His Honour that the Commissioner's interpretation of the Act had always been wrong. It is incorrect to state, as the Assistant Commissioner has, that His Honour's decision has resulted in " widening . . . the role of the Ombudsman ". The decision did nothing of the sort; it simply resolved a dispute and clarified the meaning and intention of the Act in a way which accorded with the view that the Ombudsman had always held and which required the Commissioner to comply with a law that he had persistently breached.

The second proposition is also incorrect. As His Honour said in his judgment:

> Nor can it be said that the provisions of the Act in any way interfere with the Commissioner's right and responsibility to keep and have a disciplined force at his disposal to carry out the exacting task of keeping law and order in our community.
>
> (p24)

The Commissioner has argued that the operation of the Police Regulation (Allegations of the Misconduct) Act should not intrude into areas which relate essentially to management practices, and that these areas should remain matters for his administration. Under the terms of the Police Regulation (Allegations of Misconduct) Act, however, the Commissioner must notify the Ombudsman of all complaints which fall within it. The Ombudsman is required by Section 12 of the Act to keep a register of all such complaints. As was stated

in the Ombudsman's 1987-88 Annual Report, the Ombudsman agrees with the Commissioner that there will be cases which, whilst constituting complaints under the Act, can appropriately be left to the Commissioner to deal with.

In cases where the Ombudsman does not require the Commissioner to investigate a complaint because it involves a matter of management or administration, the Commissioner can take any disciplinary action that he considers appropriate. He does not need the Ombudsman's permission before disciplining a member of the Police Force, and to suggest that he does merely fosters the misperceptions that many police have about the Ombudsman's role. It is the Ombudsman's policy, and his practice, that all complaints must be vigorously reviewed on their merits. Where it is appropriate for him to do so, the Ombudsman will decline to require investigation of complaints, using the discretion conferred on him by section 18 of the Police Regulation (Allegations of Misconduct) Act.

Ainsworth v The Ombudsman

The necessity for the Ombudsman to be independent from government has long been recognised. A corollary to the Ombudsman's independence and freedom to investigate the conduct of public authorities, is his immunity from legal proceedings in respect of the exercise of his functions.

Section 35A was included in the Ombudsman Act by amendments introduced in 1983. The section provides:

> 35A. (1) The Ombudsman shall not, nor shall an officer of the Ombudsman, be liable, whether on the ground of want of jurisdiction or on

any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this Act unless the act, matter or thing was done, or omitted to be done, in bad faith.

(2) Civil or criminal proceedings in respect of any act or omission referred to in subsection (1) shall not be brought against the Ombudsman or an officer of the Ombudsman without the leave of the Supreme Court.

(3) The Supreme Court shall not grant leave under subsection (2) unless it is satisfied that there is substantial ground for the contention that the person to be proceeded against has acted, or omitted to act, in bad faith.

During 1982 and 1983, solicitors for Mr L H Ainsworth and the Ainsworth group of companies made a series of complaints under the Police Regulation (Allegations of Misconduct) Act about the conduct of members of the New South Wales Police Force. The complaints were investigated by the Internal Affairs Branch, and subsequently, the former Ombudsman decided to reinvestigate the complaints.

Ultimately, several of the complaints were reinvestigated and were the subject of a report made by the former Ombudsman. The balance of the complaints, however, remained unresolved and the then Deputy Ombudsman, to whom the unresolved matters had been assigned, eventually decided to take no further action. His decision was challenged by the plaintiff in the Supreme Court.

In the course of his judgement in favour of the Ombudsman given on 2 March 1989, Enderby J reviewed recent litigation concerning the position of the Ombudsman - see Boyd v The Ombudsman

(1981) 2 NSWLR 308 and The Ombudsman v Moroney (1983) 1 NSWLR 217, both decided before the insertion of section 35A in the Ombudsman Act. His Honour said:

> The Office is a unique institution.
>
> It does not deal directly or in any legal way with legal rights.
>
> It investigates complaints and reports to Parliament. An Ombudsman is a creature of Parliament.
>
> It has always been considered that the efficacy of his office and his function comes largely from the light he is able to throw on areas where there is alleged to be administrative injustice and where other remedies of the Courts and the good offices of members of the parliament have proved inadequate. Goodwill is essential. When intervention by an Ombudsman is successful, remedial steps are taken not because orders are made that they be taken but because the weight of its findings and the prestige of the office demands that they be taken.

His Honour also reviewed the history of the legislation and other authorities and concluded:

> In my opinion S.35A prevents any form of civil proceedings being taken against the Ombudsman except those referred to in the section where leave is required and those referred to in S.35B. Subsection (3) of Section 35A requires also that there be substantial grounds for the contention that there be bad faith before leave is granted.

Police nominal complaints

Between early February 1989 and 30 June 1989, this Office was notified of seventy-five complaints, which had been generated from within the Police Department, about the conduct of individual police officers.

These complaints are different to the usual complaints received by the Office under the Police Regulation (Allegations of Misconduct) Act (the Act); there is no complainant apart from the police administration itself. For this reason, complaints of this nature are described as " police nominal complaints ".

Such a complaint, for example, might arise where an Inspector of Police carries out an audit of accountable exhibits at a police station. If he finds an exhibit missing, he is required to submit a report to his superiors. The report constitutes a complaint in writing under the Act and should be forwarded to this Office for consideration. Many complaints which arise in this and similar ways concern purely administrative matters; and they are usually dealt with pursuant to section 18(1) of the Act, which provides that, in determining whether a complaint should be investigated, the Ombudsman may have regard to such matters as he thinks fit, including whether, in his opinion, in relation to the conduct complained of there is or was available to the complainant an alternative and satisfactory means of redress [section 18(1)(d)].

When the Commissioner sends a police nominal complaint to this Office, he often asks the Ombudsman to deal with it under section 18(1)(d) and not require an investigation under Part IV of the Act. If the Ombudsman agrees, the complaint is declined and is handled entirely by the Commissioner or his delegate.

Of the seventy-five police nominal complaints sent to this Office to 30 June 1989, the Commissioner made section 18(1)(d) applications in fifty-four of them. The Ombudsman agreed with the Commissioner's requests in thirty-two cases; he required that the remainder be investigated. Examples of matters in which the Ombudsman agreed with the Commissioner's request were:

- officer failed to attend court.

- investigation officer left fingerprints at scene of crime.

- officer failed to obtain Commissioner's permission to engage in outside employment.

- incivility to a senior officer.

Circumstances might arise, nevertheless, where in similar cases the Ombudsman would require an investigation. For example, if the consequence of an officer's failure to attend court was that the case had to be dismissed for lack of prosecution, an investigation might be required. Similarly, an investigation might be warranted if there was any suspicion that the investigating police officer whose fingerprints were found at the crime scene was, in fact, the offender. In determining whether a complaint should be investigated, the overriding consideration is the public interest.

It is interesting, but nonetheless disturbing, to note that applications have been made to treat the following types of conduct as "managerial" or "administrative" :

- theft of exhibits by police officers.

- theft by an officer of a book of medical certificates from his local doctor; the officer later submitted a certificate with a forged signature to explain an absence from work.

- involvement of a detective sergeant in drug trafficking and bribery.

- submission by an officer of a fraudulent hurt on duty claim.

- assault by an officer of an independent witness to a motor vehicle accident in which the officer was involved.

It was abundantly clear to the Ombudsman that all of those matters were serious ones which reflected adversely on the image of the Police Department, and that, as such, their investigation was in the public interest. All of them fell well outside the range of matters which could be considered to be merely "managerial" or "administrative".

Complaints about off-duty police

The Office has received advice from Senior Counsel that, in certain circumstances, a complaint about the conduct of an off-duty police officer can fall within the ambit of the Police Regulation (Allegations of Misconduct) Act.

The advice considered two issues:

- the actions or behaviour of a police officer while off-duty; and

- the actions or behaviour of a police officer where

such actions or behaviour had nothing whatsoever to do with police service.

In relation to the first issue, Senior Counsel said that, in deciding what constitutes a complaint within the meaning of section 5 of the Act, it was necessary to examine the duties and obligations imposed on a member of the Police Force. The provisions of the Police Regulation Act, the Police Rules and the Police Instructions demonstrated that there were many aspects of the actions or behaviour of a police officer while off-duty which were subject to explicit controls. These imposed an obligation on a police officer to not engage in conduct at any time which could bring discredit on the Police Force. If a member of the Police Force is alleged to have engaged in conduct of a type about which he had obligations arising from his being a policeman, then the allegation is a complaint within the meaning of the Act.

Senior Counsel said:

> In my view, there is no reason for restricting the definition of " conduct " in s.4 of the Police Regulation (Allegations of Misconduct) Act by reference to whether the action or inaction, or alleged action or inaction of the member of the Police Force occurs whilst he is on duty . . .

and he cited the following examples in support of his opinion:

- Any allegation of dishonesty on the part of a policeman can be the subject of a complaint under the Act.

- Any allegation that a police officer has not taken adequate or appropriate action to protect life or property, prevent crime, detect and bring to justice offenders, or preserve order, concerning circumstances which arose while the policeman was off-duty, can form the subject of a complaint under the Act.

- Any allegation that a police officer has engaged in conduct which itself amounts to a breach of the Criminal Law can be the subject of a complaint under the Act.

In relation to the second issue considered, Senior Counsel said that the Act did not apply to actions or behaviour of a police officer where such actions or behaviour had nothing whatsoever to do with police service. He added that many activities of a police officer when off-duty, however, are connected with police service, and he gave the following examples:

- If a policeman's neighbour complained that the policeman let his house and garden deteriorate so that it became an eyesore, that would have nothing whatsoever to do with police service. But if the neighbour complained that the policeman had, contrary to s.306 of the Local Government Act, made alterations to his house without council approval, such a complaint would fall under the Act.

- If a policeman's wife complained that the policeman

> had left her, that complaint would not fall under the Act; if she complained that he had assaulted her, it would fall under the Act.

This Office considers all complaints received about the conduct of off-duty police officers having regard to the principles set out in Senior Counsel's advice.

Investigation into events leading to the death of Mr D J Gundy

Mr Gundy was shot during an operation by the Special Weapons and Operations Squad on 27 April 1989. He later died of his injuries. Immediately after the incident and in response to media attention, the Minister for Police said that the police investigation of the shooting would be "monitored" by the Ombudsman's Office. At the time, however, no complaint had been made by any person and, because of this, the Ombudsman had no jurisdiction in the matter at all.

Within days of the incident, several complaints about the shooting and the conduct of the police involved were received. The first of the complaints was taken up; on 2 May 1989 the Commissioner of Police was notified that an investigation under the Police Regulation (Allegations of Misconduct) Act should be carried out. The Ombudsman asked the Commissioner to provide copies of documents and statements that had been obtained to that time, and for copies of other material to be provided as it was obtained. Other complaints that had been received were declined on the basis that the matter was already under investigation.

On 5 May 1989 discussions were held between the Ombudsman and the

Assistant Commissioner (Professional Responsibility) concerning the investigation which the Ombudsman had directed the police to carry out. The assistant Commissioner expressed concern that the operation of the Police Regulation (Allegations of Misconduct) Act might require the police to conduct an investigation independent of and parallel to the investigation which was already being conducted by the Regional Investigation Shooting Team. Whilst the Ombudsman expressed his reservations about public comments that had been attributed by the media to the Superintendent commanding this Team, he concurred with the investigation being carried out by the Superintendent on the basis of a personal assurance given by the Assistant Commissioner that the investigation would be reviewed by the Internal Affairs Branch.

The Assistant Commissioner provided a number of documents on 9 May 1989. The Ombudsman asked for additional documents on 19 May 1989. In the meantime, the Coroner had opened his inquest on 5 May 1989, and on 7 June 1989 the Ombudsman wrote to the Coroner and asked that he be provided with a daily transcript of the inquest.

In a letter received by the Ombudsman on 13 June 1989, the Assistant Commissioner told the Ombudsman that the complainant had been interviewed. He went on to say that, in his view, neither the original letter of complaint, nor the records of interview obtained from the complainant, constituted complaints under the Police Regulation (Allegations of Misconduct) Act. The Assistant Commissioner added that he had discussed the matter with the Coroner and that it was the Coroner's view that, not only did the complaint not qualify for attention under the Act, but the Ombudsman's jurisdiction was excluded by virtue of clause 8(a) of Schedule 1 of the Ombudsman Act.

Clause 8(a) excludes from the Ombudsman's jurisdiction the conduct of a public authority relating to the carrying on of any proceedings before any court, including a coronial inquiry and committal proceedings, or before any body before whom witnesses may be compelled to appear and give evidence.

The Assistant Commissioner sought the Ombudsman's consent to discontinue the investigation under the Police Regulation (Allegations of Misconduct) Act. He said, however, that he had no difficulty with the Ombudsman oversighting police inquiries into Mr Gundy's death, and that he was happy to return to the arrangement to supply the Ombudsman with documentation, as agreed upon with the Minister for Police.

The Ombudsman wrote to the Coroner and asked whether his views as to the Ombudsman's jurisdiction in the matter were as had been related by the Assistant Commissioner. The Ombudsman said that, whilst he agreed that clause 8(a) of Schedule 1 of the Ombudsman Act precluded him from inquiring into the conduct of the inquest, no complaint of that nature had been received. The Coroner, meanwhile, had already written to the Ombudsman, saying that he doubted that the Ombudsman

had jurisdiction in the matter, that he did not believe that the complainant's letter constituted a complaint, and expressing his view that the Ombudsman was not entitled to have the documents that had already been provided to him by the Police Department. The Coroner said that he was not prepared to arrange for the Ombudsman to receive copies of the transcript of the inquest until the inquest had been concluded. The Coroner confirmed these views in a further letter dated 22 June 1989 and in that letter said that the provision of transcripts to the Ombudsman would imply that the Ombudsman was exercising some supervisory role in relation to the inquest itself.

On 27 June 1989 the Ombudsman wrote to the Assistant Commissioner refusing to consent to discontinuance of the investigation; he again asked that he be provided with copies of all documents, statements, records of interview and information obtained by the investigation to that time. He wrote, as well, to the Coroner and said categorically that he was not concerned with the inquest, nor with the conduct of the police who were carrying out investigations to assist the inquest, but only with the conduct of those police officers who had been involved in the events leading up to and including the shooting of Mr Gundy. The Ombudsman pointed out that his jurisdiction under the Police Regulation (Allegations of Misconduct) Act existed independently of the Coroner's obligations under the Coroner's Act. He added that he had no intention of interfering with the inquest and did not intend taking any action until the inquest was concluded and its findings were known. The Ombudsman asked the Coroner to reconsider his refusal to provide a daily transcript; but on 3 July 1989 the Coroner responded, and said that he was not prepared to provide the transcripts. In the face of the Coroner's refusals to provide transcripts, the Ombudsman asked the Attorney-General to arrange for their provision but that request was initially unsuccessful.

In the meantime, further correspondence had been received from the Assistant Commissioner in which he again expressed his reservations about the nature and scope of the complaint that was being investigated. The Ombudsman replied that he was firmly of the view that the complaint referred not only to the shooting of Mr Gundy, but to the actions of police officers leading up to the entry to Mr Gundy's home as well. A copy of the brief that was provided to the Coroner was finally received from the Police Department on 19 July 1989.

The Ombudsman has had to obtain information about fresh evidence emerging during the inquest as best he can from the media. This is a most unsatisfactory situation. The evidence given to the inquest, particularly fresh information and information not included in the police brief given to the Coroner, will be relevant to any determination the Ombudsman might in future make about the conduct of the police involved in this matter.

At the time of writing, the Attorney Generals Department had provided the Ombudsman with a transcript of evidence following the conclusion of the inquest.

Seconded police officers

The Office of the Ombudsman has nine established seconded police officer positions. Previous Annual Reports have outlined the difficulties that the Office has experienced in filling these positions. Additionally, the introduction of positional promotion within the Police Force resulted in a number of seconded police officers, who were concerned that their being outside of the police rank structure would be detrimental to their promotional prospects, deciding to transfer back to the Police

Department. By January 1989, only three seconded police officers remained, and one of them had applied for a transfer.

The Ombudsman believes that the secondment of serving police officers to his Office is vital to the effective performance of his functions. Seconded police officers bring with them a mixture of experience and expertise, and a knowledge of police practices, procedures and operations which represent an invaluable resource to this Office.

One possible solution that was proposed in order to make recruitment to the Office of the Ombudsman more attractive to police - the designation of a rank to each seconded police officer position - raised as many problems as it solved. For instance, whilst it might be unreasonable to expect the Police Department to promote a police officer to a position within the Ombudsman's Office, without affording the Department a significant role within the selection process, the Ombudsman considers that it is essential that he maintain the right to select his own staff, including seconded police officers. Only in this way can the Ombudsman guarantee his independence. Because of this dilemma, the Ombudsman considered other ways of making secondment more attractive to police officers. The solution eventually proposed by the Ombudsman was to pay all seconded police officers an allowance equal to 10% of their salary.

The Commissioner of Police responded positively to the proposal but, because of its industrial relations implications, lengthy discussions with the Public Employment Industrial Relations Authority were required before approval could be obtained. The initial advertisement in the December 1988 Police Personnel Notices attracted twelve applications from officers with a variety of ranks and backgrounds. Six applicants were finally selected and commended duty in February 1989.

" Serious misconduct " reports

Section 33 of the Police Regulation (Allegations of Misconduct) Act, provides that where the Ombudsman is of the opinion that a member of the Police Force is or may be guilty of " such misconduct that may warrant dismissal, removal or punishment ", he shall report his opinion to the Minister for Police and to the Commissioner of Police, giving his reasons.

Two such reports were made this year. The first arose out of an anonymous complaint that had been received by a police sergeant in charge of a country police station. The complaint alleged that under-age persons had been obtaining drivers licences from the police station Motor Registry.

Whilst preliminary enquiries made by the Police Department failed to confirm the allegation, they revealed that drivers licences had been issued from the police station Motor Registry to a considerable number of persons who residing outside the area serviced by the police station, and that the police who had issued those licences had acted contrary to Police and Department of Motor Transport instructions. The instructions stipulated that licences had to be obtained from the Registry closest to the place of residence or the place of employment of the applicant, unless good cause could be shown.

Further investigation by the police identified eleven police officers who, whilst not guilty of the misconduct alleged in the anonymous complaint, had been guilty of other misconduct, including fraudulent completion of documents, failure to administer requisite tests and the issue of licences as favours.

The Ombudsman considered that this misconduct was sufficiently serious

to warrant a report about it under section 33. The Police Department took disciplinary action against the police officers involved and three of them were dismissed. One of these officers successfully appealed against his dismissal and was reinstated; however, he was transfered from the area. Two other police officers were transfered, and the remainder were all paraded and counselled about the proper discharge of their duties.

The second matter arose following a Police Tribunal hearing of departmental charges against two constables. At the conclusion of the proceedings, the Tribunal made serious criticisms about the conduct of the constables in relation to issues that fell outside of the misconduct charges preferred against them. In particular, the Tribunal said:

> The man . . . was required to go to . . . police station. I used the word " required " because that was the expression used in these proceedings by Officer . . .. It is quite clear in the circumstances that he was arrested. He was handcuffed and placed in the back of the vehicle and later in the afternoon he was released. It would appear on the evidence before this tribunal, no charge of any nature, including a possible breach of the **Motor Traffic Regulation**, was preferred against him.

(pp4-5)

> The man . . ., in my view, was clearly wrongfully arrested. He was assaulted by these two officers. He was wrongfully imprisoned . . .

(p7)

> The man . . . had been wrongfully arrested. There is clearly no power to arrest him under the common law by a constable, either in his capacity as a citizen or as a

> police officer. There was no power under s. 352 of the Crimes Act without a warrant to arrest him because there was no reasonable cause to suspect [the man] of having committed any drug offence. He was a passenger on a motor cycle and a small amount of Indian Hemp was found upon the rider. Identification was provided and he answered quite properly and freely all questions under the provisions of the Motor Traffic Act.
>
> The power to arrest for suspicion is not part of the law of New South Wales.

(p8)

Although the Tribunal had clearly said that the arrest and detention of the man had been unlawful, the Ombudsman could only make a report under section 33, because that particular issue had not been the subject of a complaint to his Office.

Because the constables had already been brought before the Tribunal on charges that had arisen from the original complaint, the Ombudsman did not recommend that further charges be brought against them. Instead, he recommended that both constables be paraded before their District Commanders and be counselled regarding their powers of arrest and detention; and that a record of this be made in the officers' service registers.

On 19 June 1989 a draft copy of the Ombudsman's report under Section 33 of the Police Regulation (Allegations of Misconduct) Act was forwarded to the Commissioner of Police, seeking his comments. On 5 July 1989 the Assistant Commissioner (Professional Responsibility) informed the Ombudsman that both recommendations would be adopted.

Need for independent legal advice

In his Annual Reports for each of the past four years, the Ombudsman has set out his view that independent legal advice should be obtained by the Commissioner of Police when he is considering whether to bring criminal or disciplinary charges against police officers the subject of complaint under the Police Regulation (Allegations of Misconduct) Act. It has been a matter of concern that, far too often, the Commissioner has not obtained independent legal advice, even where the Ombudsman has recommended that he do so, but has instead sought advice from the Legal Services Branch of the Police Department.

The Ombudsman remains of the view that it is important for decisions of this kind to be based on advice obtained independently of the Police Department; this is especially so in relation to those complaints which the police investigation has found not sustained, but which on reinvestigation by the Ombudsman are held to be sustained.

This is because:

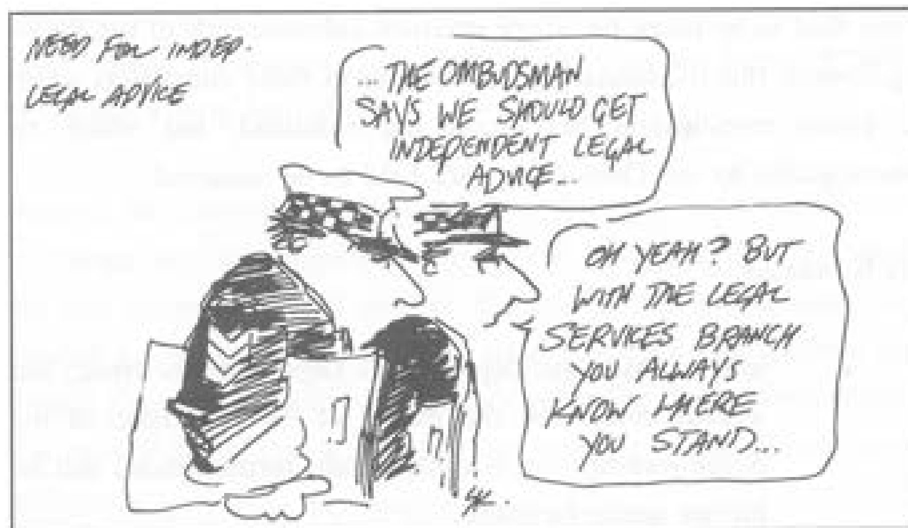
- in most cases, the Department's Legal Services Branch has already considered the matter at the conclusion of the police investigation, and has usually recommended that no further action be taken;

- no matter how careful officers of the Legal Services Branch are, a suspicion of bias is unavoidable when police officers must decide whether a fellow officer ought to be charged; and

- legal opinions given by members of the Legal Services Branch are subject to comment and

> criticism by senior police officers. It is inevitable that this will affect the " independence " of any opinion that is given.

Whilst, in some instances, the Police Department has sought independent legal advice, this has usually been only about the question of whether criminal charges should be brought. The Ombudsman, however, is strongly of the view that independent legal advice is needed on the question of bringing both criminal and disciplinary charges against police officers. Such advice should not only be impartial, but should be seen to be impartial.



In November 1988, the Ombudsman made a special report to Parliament on this issue, because he was gravely concerned about the continued refusal of the Commissioner of Police to adopt his recommendations in this regard. In his special report, the Ombudsman pointed to thirteen occasions in the previous two years on which the Office had recommended that independent legal advice be obtained in

order to determine whether sufficient evidence existed to lay departmental charges. The report said that, in three matters, the Commissioner had sought no advice at all; and the remaining ten matters had been merely referred to the Police Legal Services Branch for advice.

Two examples illustrating the inadequacy of the advice that had been provided by the Legal Services Branch were given in the special report to Parliament:

(i) The first case concerned, a complaint that Senior Constable C. Tillott had solicited customers for a Penrith based funeral service. The police investigation found the complaint not sustained. The Ombudsman reinvestigated the matter and interviewed all relevant witnesses, including many who had not been questioned during the police investigation. The Ombudsman found the complaint sustained and, in part, based his finding on the evidence of former Probationary Constable Ms H Marshall. Ms Marshall had seen Senior Constable Tillott hand a business card to a relative of a recently deceased person and had heard him say " they will look after you "[5]. The Ombudsman recommended that independent legal advice be sought on the question of laying departmental charges. Instead, the Police Department forwarded all of the papers, and the transcripts of the evidence obtained during the Ombudsman's hearing, to the Legal Services Branch. The opinion given by that Branch was extremely critical of former Probationary Constable Marshall and said that "competent cross-examination of [Marshall] would

[5] For a fuller account, see 1987-88 Annual Report (Case Notes; pp48-50).

place her evidence in the category of unreliable or vexatious". The advice went on to say that to seek independent legal advice would be "a waste of money".

In this case, the Legal Services Branch had already considered the question of bringing charges against Senior Constable Tillott at the conclusion of the initial police investigation. On this first occasion, its advice was against bringing charges on the basis that a successful attack on former Probationary Constable Marshall's credibility could be mounted. On the second occasion, following the Ombudsman's recommendation, the Branch criticised this Office for accepting Ms Marshall's evidence, and once again recommended against departmental charges being laid.

The advice given by the Legal Services Branch ignored two important points. The Ombudsman's special report said:

> Sergeant Mason of the Legal Services Branch criticised this Office for accepting Ms Marshall's evidence because, in his opinion, her evidence lacked credibility. He concluded, therefore, that the complaint could not be sustained and recommended against Departmental charges because, in his view, Ms Marshall's evidence was critical. Sergeant Mason reached his conclusion concerning Ms Marshall's credibility even though neither he nor anyone from his Department had spoken to Ms Marshall. This is contrasted with the fact that Ms Marshall gave oral evidence at the inquiry where her demeanour was observed and where she was cross-examined. In addition, whilst Ms Marshall's evidence was critical, there was other evidence which corroborated

> the complaint and which influenced my decision. Sergeant Mason did not properly consider this other evidence, but merely focussed on Ms Marshall's evidence.
>
> These circumstances alone provide a strong argument for obtaining independent legal advice. Furthermore, the fact that the Officer-in-Charge of the Branch had previously considered the matter, and advised against Departmental charges, makes it imperative that independent advice be obtained to ensure that justice is not only done but is seen to be done.

(ii) In the second case, a man complained that he had been improperly detained for six hours as an intoxicated person. The police investigation found the complaint not sustained, but the Ombudsman's reinvestigation reversed that finding. The man had not been able to adequately describe or identify the police officer who had detained him. During a hearing under Section 19 of the Ombudsman Act, evidence was taken from all relevant witnesses; again, this included many witnesses who had not been interviewed during the Police Department's investigation. The Ombudsman found that Constable First Class B B Robinson of Manly police station had wrongfully detained the man as an intoxicated person.

A crucial consideration in the Ombudsman's conclusion related to the identification of Constable Robinson. The man could not adequately describe or identify the police officer who detained him. However, based on the evidence of an independent civilian witness, the man's friend (who had been previously detained), the relevant

Intoxicated Person Act form and the elimination of all other possible police officers, the Ombudsman concluded that it was Constable First Class Robinson who had detained him.[6]

The Ombudsman recommended that independent legal advice be sought on whether to bring departmental charges, but the Commissioner of Police merely referred the matter to the Legal Services Branch. An officer of that Branch recommended against charges, because the man had been unable to positively identify Constable Robinson as the police officer who had detained him. The Commander of the Branch, however, disagreed; he recommended that the three civilian witnesses who gave evidence before the Ombudsman be interviewed. This was done and the police investigator found that the man, indeed, had been unlawfully detained by Constable Robinson, as had been alleged. The additional material gathered in the investigation was, yet again, sent to the Legal Services Branch for comment and advice. That Branch confirmed its earlier opinion, and the advice provided (the third advising given by the Branch) was defensive, argumentative and selective. There was, at worst, a deliberate or, at best, an inadvertent disregard of the additional evidence that had been obtained. The Ombudsman said:

> This matter has now been considered three times by officers within the Legal Services Branch. The matter should have been

[6] See 1986-87 Annual Report (Case Notes; pp98-100).

> referred for independent legal advice as recommended by the Ombudsman. It is inappropriate for an internal police body to advise three times regarding the one matter. In the interests of justice it is time that this matter received fresh and independent consideration.

The Ombudsman's special report was tabled in Parliament in late November 1988. When the report was tabled (and, thereby, became public), the Minister for Police made a statement in which, amongst other things, he said that the Ombudsman's recommendation was merely that, and that the Commissioner was under no obligation to do anything. At the end of his statement, however, he said:

> " Mr Avery and I share the view that there is a need to develop a consistent approach to the process of reviewing questions of disciplinary proceedings arising from Ombudsman investigations and to regularise the hitherto ad hoc arrangements. Following discussions with Mr Avery, in consultation with the Attorney-General, we have come to an arrangement, whereby expeditious independent legal advice will be available on these matters. "

Although no more has been heard on the matter from the Minister, in one case reinvestigated by the Ombudsman since then, advice on the question of charges against police officers was provided by the State Crown Solicitor's Officer after the Commissioner of Police had approached the Attorney-General.

Since November 1988, the Ombudsman has made two further reports to Parliament because of his continued concern about this issue. The first report dealt with the failure of a Legal Services Branch officer to properly consider all of the evidence. The second report dealt with a

case in which the Legal Services Branch had carried out a judicial function; instead of assessing the evidence and determining whether the elements of the charge had been made out, it had preferred the evidence of one witness over another, allegedly on the basis of an assessment of their respective credibilities. This supposed assessment was made on the papers, without the Branch having had the benefit of hearing oral evidence, and despite the contrary views held by both the police investigator and the Ombudsman, both of whom had actually had an opportunity to assess the credibility of the witnesses.

The Ombudsman believes that the appropriate body to provide independent legal advice in these cases is the Solicitor for Public Prosecutions, and that any resulting proceedings (whether criminal or disciplinary) should be conducted by lawyers independent of the Police Department.

Justice - delayed, but just as sweet

In March 1984 two men complained to the Ombudsman about assault, unlawful detention and threatened harassment by police at Molong. Two senior constables and a sergeant of police were involved.

A police investigation was carried out and in July 1984 the then Assistant Commissioner (Internal Affairs) informed the Ombudsman that no further Departmental action would be taken, because he was satisfied that the allegations had not been sustained. After reviewing the police report and other evidence, the Ombudsman decided to reinvestigate the complaint and, for that purpose, to conduct an inquiry under section 19 of the Ombudsman Act.

The Ombudsman's reinvestigation found that one of the senior

constables had assaulted both of the complainants, that the other senior constable had assaulted one of them, and that both senior constables had unlawfully detained both men. He found the complaints about the sergeant of police to be not sustained.

In this particular case, the Police Department adopted the Ombudsman's recommendation that independent legal advice be obtained on the question on whether criminal or departmental charges should be brought against either of the senior constables. On 27 March 1987, the Director of Public Prosecutions recommended that both senior constables be charged with "assault, beat and otherwise ill-treat".

The charges were heard at Orange Local Court on 3 November 1987. After hearing the prosecution evidence, the Magistrate said that he was not satisfied that the evidence was capable of satisfying a jury beyond reasonable doubt, and he discharged both defendants and dismissed the charges against them. On 31 December 1987, the then Assistant Commissioner (Review) told the Ombudsman that no further action would be taken by the Police Department.

On 18 November 1988, civil proceedings brought by one of the complainants for assault and false imprisonment against both police officers were heard at Orange District Court before His Honour, Judge Dunford. Judge Dunford accepted the evidence of the complainant and determined that one of the senior constables had committed an assault and battery upon the complainant and that he had been unlawfully imprisoned by both senior constables.

The standard of proof required in civil proceedings is lower than that required in criminal proceedings. Notwithstanding this, Judge Dunford's determination was not based on the lower standard of proof. His judgement made it clear that there was no doubt in his mind as to the

facts. During the course of his summing up, he made the following observations:

> The versions of events given by the plaintiff on the one hand and the defendants on the other are totally different and cannot be reconciled on the basis of mistake or even exaggeration. One or the other side is not telling the truth. (p1)
>
> The plaintiff gave his evidence in a quiet but impressive manner and I found his demeanour most impressive. (Ibid)
>
> The defendants, on the other hand, I found their demeanour and presentation not impressive . . . even accepting their version of the words used when the car was stopped and its occupants searched and they were told to hop in the police car, I find it incredible for them to say that in those circumstances the plaintiff and [his friend] were free to come and go as they wished. (p2)
>
> I accept the evidence of the plaintiff . . . that after [his] car was stopped [Senior Constable A] came to the driver's side door grabbed him by the hair at the back of his head and dragged him out of the vehicle. He then threw him over the bonnet of the police car and carried out what has been described as a pat search, saying to him, " Don't move or look or I will kill you " or words to that effect. (p4)
>
> I am satisfied that [the plaintiff] was given no explanation or statement as to what was going on or why he had been stopped and that [Senior Constable A] then told [the plaintiff] that they had been very naughty boys and when saying those words he hit him about 4 or 5 times behind the left ear with a closed first. (Ibid)
>
> Meanwhile, [Senior Constable B] gave similar roughhouse treatment to [the plaintiff's friend].
>
> [The plaintiff] was not asked to get into the car but was pushed into the police car and no explanation was given as to why he was put in the car. (Ibid)
>
> I am satisfied, accordingly that [Senior Constable A]

> committed an assault and battery upon [the plaintiff] in grabbing him by the hair, in dragging him out of the car, in body searching him and in punching him 4 or 5 times behind the left ear. (p5)
>
> I am further satisfied that [the plaintiff] was then imprisoned . . . and taken to the police station against his will . . . True it is they were never told they were under arrest but to compel a person to go in a given direction against his will is an imprisonment . . . I hold [Senior Constable B] liable along with the first defendant for the false imprisonment. (p6)
>
> [The plaintiff] was humiliated in front of one of his friends in a small town and suffered mental hurt and deprivation of that liberty which we all regard as so precious. (p8)
>
> These were the actions by police officers in uniform totally disregarding the rights of fellow citizens. They placed themselves above the law and abused their uniform and their power of arrest, their authority and their standing in the community as police officers. If those sworn to uphold the law behave in such a manner, and are allowed to behave in such a manner, we are living in a police state. They act not as upholders of the law and protectors of the rights of citizens but as a couple of thugs. (p9)

Judge Dunford awarded damages of $24182 for the assault and $22440 for the false imprisonment. He further ordered that the police officers pay the complainant's legal costs.

The Ombudsman believed that, if the police officers were not to be charged with departmental offences, then at the very least they should be transferred away from the district in which the complainant lived.

The Ombudsman raised the matter at a meeting with the Assistant Commissioner (Professional Responsibility) on 15 June 1989, and on 19 June 1989 the Assistant Commissioner said that the two police officers would each be charged departmentally with three counts of

misconduct.

Ironically, the Ombudsman has been informed that, as in all similar matters, the damages awarded by the court to the complainant are to be paid by the State (that is, by the taxpayers), and not by the police officers adjudged by the court to be guilty.

Operation " Blow Wave "

On 2 May 1989 the Ombudsman made a special report to Parliament in which he called for an immediate review of the training and procedures of the Special Weapons and Operations Squad (SWOS). In his report, the Ombudsman was extremely critical of advice that had been given to the Commissioner of Police by the Police Legal Services Branch; he said that it would have been desirable for the Commissioner to have sought independent legal advice about the matter, which involved the possible commission of a crime by one member of the Police Force against another. The Ombudsman made the report because of the public interest and extensive media coverage the matter had received in 1986-87 and because he believed that the public was entitled to know the full facts of the matter.

The incident which gave rise to the original complaint occurred in May 1985, during a three day " mock " terrorist operation involving the Federal and New South Wales Governments. The exercise, code-named " Blow Wave ", involved role play by members of SWOS, as well as members of the Australian Security Intelligence Organisation and military personnel. The complainant, Constable Jane Blackshaw, and two male members of SWOS were given the role of terrorists. Determining their location and apprehending them was the task of police.

Constable Blackshaw had been briefed about the role that she was to play, and she had been provided with an instruction booklet which contained " safety " instructions. She claimed that she had not been made aware of any procedure which she could use to alert personnel that she no longer wished to role play.

During the operation, Constable Blackshaw was captured and handcuffed by members of SWOS under the command of Sergeant J. Brazel.

Sergeant Brazel had interrogated Constable Blackshaw in order to learn the identity of another of the " terrorists ". During his interrogation of Constable Blackshaw, Sergeant Brazel had:

- directed one of his officers to " hit her with the mace " (that is, to spray her with CS gas);

- sprayed her, or had caused her to be sprayed, with CS gas, at close range, on the chest, near her left eye and under an armpit;

- wrapped masking tape around her head and hair and had then slowly removed it, causing pain and discomfort;

- threatened that he would " squirt " her " on the fanny ", if she did not start talking;
- threatened that he would pull her " knickers " down and stuff them in her mouth.

Mace contains CS gas which irritates the skin and mucous membranes. It causes burning and irritation to the eyes and skin and induces headaches and vomiting.

Two detectives eventually arrived and took Constable Blackshaw into custody. Some time later Constable Blackshaw was escorted to the toilet and allowed to wash herself; but this did not help because washing revives the stinging sensation. Her attempts to remove traces of mace from her body were unsuccessful because proper procedures for decontamination had not been used, and she continued to experience pain and remained distressed for some time. Another policewoman who assisted Constable Blackshaw to remove the sticking plaster from her head, afterwards touched her own face and noticed that the areas she touched immediately became painful.

Sergeant Brazel had been a permanent member of SWOS since 1979. He had extensive training in anti-terrorist operations, was a weapons instructor and a qualified chemical agents operator. He had been trained by the Nuclear Biological and Chemical Warfare Wing at the School of Military Engineering at Holsworthy in New South Wales. First aid and decontamination procedures introduced in 1981 for the Chemical Weapons Operators Course had been compiled by Sergeant Brazel. He was thus well aware of the severity of the effects of CS gas and of its danger when used at close-range, particularly when sprayed near the eyes. Instructions relating to the use of CS gas, in part prepared by Sergeant Brazel in 1980, identified the following situations as appropriate for the use of chemical agents:

(i) Large crowds.
(ii) Smaller groups.
(iii) Sniper/barricaded criminals.
(iv) Self-defence.

More recent instructions issued to SWOS personnel in 1988 state:

> CS gas is normally used when the temper of the mob, or the desperation of the criminal requires that effective counter measures be administered in order to achieve complete incapacitation.

Constable Blackshaw had not resisted arrest; she had not been violent; and she had been handcuffed at all times during her interrogation by Sergeant Brazel.

Following the incident, Constable Blackshaw complained of frequent nightmares. She remained emotionally distressed and sought advice from the Police Equal Employment Opportunity Unit. She consulted the Police Medical Officer, who was concerned that she might have suffered permanent eye damage and about the fact that she had been sprayed at close range with much of her body exposed. He believed that she could have died by choking on her mucous; or from vagal shock, had the gas been applied to her vagina as Sergeant Brazel had threatened. Although Constable Blackshaw did not suffer permanent physical damage, she was eventually discharged from the Police Force as being psychologically unfit as a consequence of the incident.

On 27 May 1985 Constable Blackshaw officially complained about Sergeant Brazel's conduct. A copy of the complaint was not forwarded to this Office, however, because, at the time, it was the Police Commissioner's directive that a complaint made by a member of the Police Force against another member did not come within the terms of

the Police Regulation (Allegations of Misconduct) Act.[7] The complaint was investigated by an Inspector of Police who determined that the allegations were not sustained, because the incidents had occurred during " a mock terrorist " operation and the parties involved had been aware of the sort of treatment they might receive. During his interview with Sergeant Brazel, the Inspector said that he would not administer the usual " caution " to Sergeant Brazel because he was conducting an investigation " on a departmental basis only ". The Inspector went on to say:

> . . . I am told by reliable people that the situation that existed on the 4th May 1985 between yourself and Constable Blackshaw was a play/act situation, but I am required to ascertain if there was any possible over-reaction on departmental level . . .

It was clear that the Inspector had not addressed his mind to the question of whether a criminal offence had been committed.

The papers dealing with the investigation were forwarded to the Legal Services Branch of the Police Department. An Inspector there considered that further enquiries should be made, because certain witnesses had not been interviewed. He commented:

> Even though I accept that this was an exercise and such exercise was aimed at realism, it must be remembered that there is no specific legislation within this

[7] See 1987-88 Annual Report; " Ombudsman-v-Commissioner of Police " ; pp131-35.

> State which allows violence to be occasioned to an arrested person, be he a " terrorist " or an ordinary criminal.

Further police enquiries revealed that the Forward Commander of the " mock " terrorist operation had no knowledge of mace having been used by police during the operation. The Assistant Commissioner (Emergency Services), similarly, was not aware that any person had been in possession of chemical agents. He said:

> . . . I could not condone such behaviour. The spraying of mace during the course of an exercise or for that matter in a real incident for the purpose of extracting information is unacceptable.

The Legal Services Branch recommended that Sergeant Brazel be charged with misconduct, because he had behaved in an " indecorous " manner. On 31 July 1986, the Police Tribunal found that the charge had been established. Sergeant Brazel appealed, and the appeal was upheld on the basis that realism had been required in the anti-terrorist exercise and his behaviour had not been indecorous in all of the circumstances. Thereafter, the complaint was considered to be not sustained by the Police Department.

In December 1987 the Supreme Court in The Ombudsman v Commissioner of Police held that any complaint about the conduct of a police officer, including complaints made by police officers, came within the terms of the Police Regulation (Allegations of

Misconduct) Act.[8] The Office of the Ombudsman was first notified of Constable Blackshaw's complaint on 29 January 1988; the Commissioner sought the Ombudsman's agreement to deal with the complaint under section 18(1)(d) of the Police Regulation (Allegations of Misconduct) Act; that is, to decline investigation of the complaint because there was available to the complainant an alternative and satisfactory means of redress. The Ombudsman refused the Commissioner's request because the facts in the matter raised serious issues of public interest. Moreover, in the Ombudsman's opinion, the action taken by the Police Department as a result of Constable Blackshaw's complaint had been defective.

The defence on which Sergeant Brazel had relied during the Police Tribunal hearing had been that " role play " required realism to ensure that the participants would be trained in real-life, anti-terrorist tactics. The only inference which could be drawn from this defence was that Sergeant Brazel regarded the use of mace as an appropriate means of interrogation of an offender in custody in a "real-life" situation. The evidence obtained by the police investigation of Constable Blackshaw's complaint would have justified a charge of assault being laid against Sergeant Brazel. Constable Blackshaw had not consented to the physical violence perpetrated upon her, and she would have been entitled to assume that she would have received " treatment which was proper for persons detained in custody ", according to the briefing that she had received.

The Ombudsman has long been of the view that the Commissioner of Police should obtain independent legal advice when he is considering whether to charge a member of the Police Force; this is particularly important when the facts, prima facie, disclose the commission of a

[8] Ibid

crime, as they did in this case. Regrettably, the advice provided to the Commissioner by the Department's Legal Services Branch failed to address the issue of the commission of a criminal offence.

The Minister for Police said in Parliament that procedures had been introduced to ensure that such matters, in future, would be referred for independent legal advice.

The Ombudsman had also recommended that the procedures and instructions of the Special Weapons Operations Squad be reviewed to ensure that every member was made aware of the guidelines for arrest, detention and interrogation. On 17 April 1989 the Ombudsman met with the Minister for Police who agreed to adopt his recommendations, one of which was to remove Sergeant Brazel from SWOS permanently.

On 2 May 1989 Sergeant Brazel was transfered to duty as the Operations Officer, Witness Protection Unit, State Investigative Group. However, according to press reports, he is available, " on call ", for normal SWOS operations. A review of the procedures of SWOS was undertaken, but this Office has not yet been provided with the results. This issue will be pursued.

Inflicting an act of torture for the purposes of obtaining information is now a criminal offence by virtue of The Crimes (Torture) Act, 1988. This Federal legislation covers military and civil law enforcement personnel. It is enabling legislation of the "Convention against torture and other cruel, inhuman or degrading treatment or punishment" which was adopted by the General Assembly of the United Nations on 10 December 1984. Australia became a signatory to the Convention in December 1985. The Convention sets out an appropriate standard of conduct for the treatment of offenders, be they terrorists or not.
The Ombudsman's report to Parliament, and subsequent media

attention to it and to Sergeant Brazel, have generated much comment. That some " raw nerves " have been touched seems evident. The August 1989 issue of " Police News ", the journal of the Police Association, for example, carried two letters to the Editor which were supportive of Sergeant Brazel and critical (in one case, perhaps even defamatory) of the Ombudsman. It is surprising that some of those given the duty of upholding the law can so blithely condone and excuse serious breaches of it when the offender is "one of their own".

Alleged suppression of previous convictions

The 1987-88 Annual Report (pp162-68) gave details of a lengthy investigation into allegations that a person charged with driving with the prescribed concentration of alcohol in his blood had paid $1500 to police, through a " middleman ", to suppress the record of his prior convictions when he appeared in court. The Ombudsman found that, when the person appeared in Glebe Court on 28 July 1983, the police prosecutor, Acting Sergeant Wood, had knowingly tendered false traffic and criminal records to the court. In his report, the Ombudsman found this conduct to be unlawful and made a number of recommendations. On 19 July 1989, the Ombudsman was finally able to tell the Commissioner of Police that he was satisfied that the Department had complied with his recommendations.

The Ombudsman had recommended that the Commissioner obtain independent legal advice about the possibility of preferring criminal charges against Mr Wood or any other person, and about whether, arising from the investigation, there were grounds upon which objection could be raised to the renewal of Mr Wood's Private Inquiry Agent's license. The Director of Public Prosecutions later advised that there was insufficient evidence to charge Mr Wood, or any other person, with

a criminal offence. The Crown Solicitor advised that there were no grounds upon which to lodge an objection to the renewal of Mr Wood's Private Inquiry Agent's licence or to the renewal of any licence held by a company of which Mr Wood was a director.

The Ombudsman's investigation discovered that an inaccurate transcript of court proceedings had been prepared during the Internal Affairs Branch investigation. As a result of recommendations in the Ombudsman's report, the Police Department issued a circular regarding the certification of transcripts of court proceedings prepared during investigations under the Police Regulation (Allegations of Misconduct) Act. The circular requires investigating officers to certify the transcript after personally checking it for correctness.

The Ombudsman also recommended that the Commissioner of Police issue a Police Instruction directing that a member of the Police Prosecuting Branch be required to :

- have present in court any police officer who wished to make favourable comment on behalf of a defendant and call that officer to give evidence, if required by the court;

- disqualify himself or herself from a prosecution where the defendant is known to the member and the member intends to make favourable comment or give character evidence on behalf of the defendant.

A direction incorporating this recommendation was circulated to

prosecutors by the Legal Services Branch.

One of the Ombudsman's major concerns, when he framed his recommendations, was to prevent a recurrence of this type of complaint. This had not been the first time that a complaint about the suppression of a previous conviction had been investigated. The most important of the Ombudsman's recommendations related to the need to improve the security of traffic and criminal records. During the investigation of this complaint, the Police Department had computerised its criminal records. Inquiries made during the investigation suggested that the new computer system was actually less secure than the manual system that it had replaced.

After several months and much prompting by the Ombudsman, the Police Department eventually provided information about the security of traffic and criminal records. Unfortunately, that information did not enable a proper assessment to be made of the adequacy of the security systems. After an inspection by the Deputy Ombudsman of the security systems in place to safeguard traffic and criminal records, the Ombudsman was satisfied that the Department had complied with his recommendation.

The investigation was finally completed, over five years after the complaint had first been received by the Ombudsman.

What a catch !

At about 3.30 am one morning in January 1985, two fisheries inspectors observed Sergeant A, in full police uniform, illegally netting fish in enclosed waters. As the inspectors approached the boat containing Sergeant A and a civilian companion, they saw the Sergeant throw the

net overboard. Sergeant A told the inspectors that he was just catching a few fish for " a feed at the end of night shift ". The inspectors obtained particulars of both men, confiscated some fish and the illegal, 110 metre-long net and left the area. They prepared breach reports to enable Sergeant A and the civilian to be prosecuted for possessing the net and for illegally using it. The breach reports were forwarded to the Police Prosecuting Branch in Sydney.

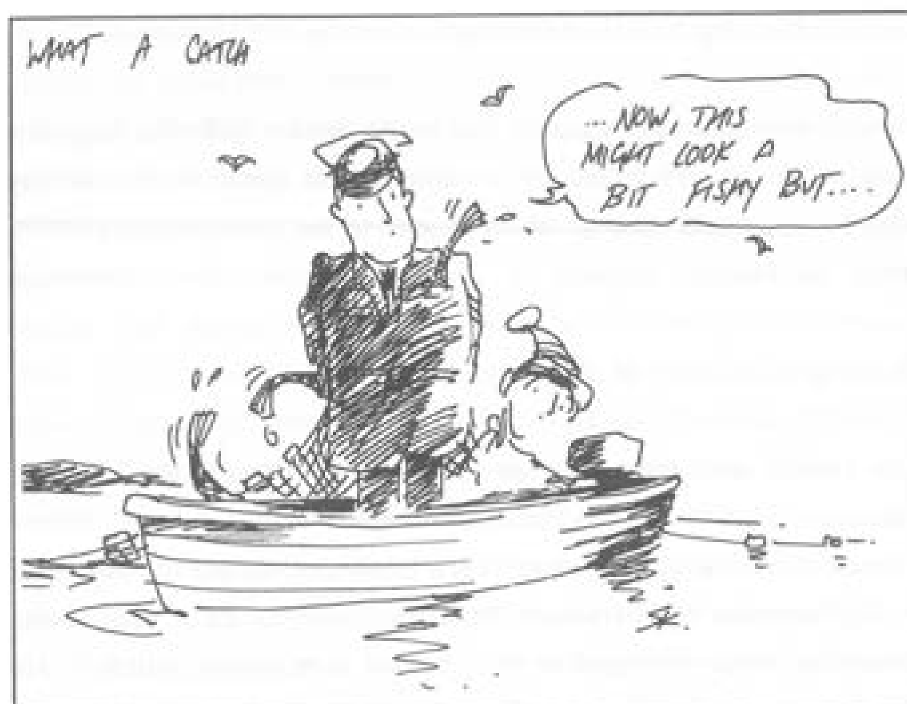
The next day Sergeant A got in touch with Senior Fisheries Inspector B and sought his assistance. Senior Inspector B told him that nothing could be done and that he could expect to be fined about $100.00. Shortly afterwards, Sergeant A and his civilian friend forwarded statutory declarations to the Fisheries Office in which they denied possessing or knowing of the illegal net.

Many months later another Senior Fisheries Inspector, Senior Inspector C, attended a charity golf day at which Sergeant A was present. Senior Inspector C and Sergeant A knew each other and, during the course of the day, Sergeant A told Senior Inspector C that he had " pulled the prosecution papers in regard to when he had been caught netting ". He also said that he would " get " Senior Inspector B because he had failed to assist him in the matter. Senior Inspector C reported the conversation to his Chief Inspector.

The Chief Inspector enquired about the status of the breach reports. He discovered that the information had not been laid before a court by the Police Department and, because the six month period of statutory limitation had expired, no action could be taken against Sergeant A or the civilian.

The Chief Inspector enquired with the Police Prosecuting Branch and was told that the breach reports had been sent to the prosecutor

attached to the police station where Sergeant A worked. The prosecutor, however, had no record of receiving the breach reports. (During the Ombudsman's reinvestigation it was found that all incoming mail was sorted by the Station Sergeant. All police, including Sergeant A, would have had access to the prosecutor's mail).



In March 1986 the Director-General of Agriculture complained about the matter to the Commissioner of Police and was told that the matter would be investigated by the Internal Affairs Branch. Having heard nothing from the Police Department by October 1986, the Director-General made enquiries with the Police Commissioner, only to be told that the papers could not be located. He was assured, however, that his complaint would immediately be investigated.

In March 1987 the Police Department, for the first time, informed the Ombudsman that the complaint had been made. Although a year had

elapsed since the complaint had been made to the Police Department, the 180 day period allowed for completion of the police investigation only commenced from March 1987. In September 1987 the Police Department requested a 60 day extension in which to complete the investigation. This request was denied because the progress of the police investigation had been unacceptably slow. At that time, only two statements from witnesses and some documents had been obtained. In December 1987 the Police Department completed its investigation and found all issues of the complaint to be not sustained.

The Director-General of Agriculture was disturbed that the first hand evidence of his four fisheries inspectors had not been accepted by the Police Department and he asked the Ombudsman to reinvestigate the complaint.

A hearing under section 19 of the Ombudsman Act was held. At the hearing Sergeant A gave evidence that, while he was performing night shift, a civilian friend had attended the police station and had told him that some people were acting suspiciously near moored boats in the local harbour. Sergeant A said that, rather than contact the police vehicle which was patrolling the local area, he had decided to leave the station and go in pursuit of the offenders by boat with his civilian friend. He agreed that he had been spoken to by two fisheries inspectors while in the boat, but he claimed that there had been no net, no fish and no conversation about illegal fishing. He said that he did not know how the fisheries inspectors had obtained names and addresses for himself and his friend. Sergeant A maintained throughout the hearing that he had been in the boat for official police purposes. He agreed that he had not considered the possible danger his friend might have been placed in if the " offenders " had been located.

Sergeant A denied that he had sought assistance from Senior Fisheries

Inspector B and denied informing Senior Fisheries Inspector C that he had " pulled the breaches " or that he would " get " Senior Fisheries Inspector B. Sergeant A said that Senior Fisheries Inspector C had been intoxicated at the charity golf day.

The Ombudsman found that:

- Sergeant A had intended and had attempted to influence the outcome of proceedings against him by telephoning Senior Fisheries Inspector B.

- Sergeant A had made threats concerning Senior Fisheries Inspector B to Senior Fisheries Inspector C, and that he had invented the allegation concerning Senior Fisheries Inspector C's sobriety in order to discredit him.

- Sergeant A had been fishing illegally while in uniform and on rostered duty, and that he and his civilian companion had concocted their evidence after they had been discovered illegally fishing with the mesh net.

- despite Sergeant A's motive and opportunity to interfere with the breach reports, there was insufficient evidence to find that aspect of the complaint sustained.

In his report, the Ombudsman recommended that Sergeant A be charged with misconduct in relation to those aspects of the complaint that had been found sustained. On the advice of the Police Legal Services Branch, the Police Department preferred three departmental

charges of misconduct against Sergeant A. Those charges were:

- that on 22 January 1985 Sergeant A used a net in contravention of the provisions of Section 19(1)(a) of the Fisheries and Oyster Farms Act;

- that on 22 January 1985 Sergeant A had fish in his possession which might reasonably be suspected of having been taken in contravention of the Fisheries and Oyster Farms Act and/or the Regulations under that Act; and

- that on 22 January 1985 at Gosford, without lawful excuse, Sergeant A absented himself from rostered duty.

In December 1988, the Police Department advised the Ombudsman that Sergeant A had admitted the three departmental charges; he had been fined $2,000 and had been transfered from his former station to the Sydney Police Centre.

The departmental charges laid against Sergeant A, of course, related only to the fact that he had been illegally fishing while on duty. The Ombudsman was disturbed that the Police Department had failed to act on his recommendations relating to the Sergeant's attempt to influence the outcome of proceedings against him and to the threats that he had made. The Ombudsman made a special report to Parliament about this.

In his Report to Parliament, the Ombudsman criticised the Police

Department's investigation of the complaint and voiced his dissatisfaction with the advice given by the Legal Services Branch; such advice, in his view, had been inadequate, and highlighted the need for the Police Department to obtain independent legal advice. The Ombudsman said:

> Legal advice about the question of laying charges against police officers should not only be impartial but should be seen to be impartial. In his 1985-86 Annual Report the former Ombudsman argued that decisions of this sort should be taken independently of the Police Department, especially in cases where the Ombudsman's re-investigation has found a complaint sustained where that complaint had been previously considered not sustained by the original Police Department investigation, as in this case.
>
> The appropriate body to provide such legal advice on the question of both criminal and disciplinary proceedings is the Solicitor for Public Prosecutions, and not the Police Department's Legal Services Branch.

In relation to the delay in the police investigation, the Ombudsman said:

> . . . [the] conduct of the police investigation was unacceptably slow. The papers were even lost twice before an investigation was commenced. Eventually, three statements were obtained from fisheries inspectors in January 1987. No further action was taken for four months, when in May, two further fisheries inspectors were interviewed. The investigation was held up once more and on 17 September 1987 Internal Affairs requested an extension of 60 days to enable completion of the investigation. The then Acting Ombudsman, Dr Jinks, refused to grant an extension and the police investigating officer managed to obtain the remaining 8 statements by 30 September 1987. I consider that the long delays in finalising the investigation of this complaint are unacceptable. Clearly, the police officer investigating the matter gave it no priority even though the investigation did

> not commence until more than a year after the Department of Agriculture's original complaint to the Police Prosecuting Branch. There can be no excuse for the two lengthy periods during which no action was taken regarding this matter.

Despite assurances given by the Minister for Police, both in Parliament and to the Ombudsman, the Ombudsman has still not received written advice regarding:

- the criteria for selecting which complaints should be forwarded for independent legal advice;
- who is to supply such independent legal advice; and
- if independent legal advice will be obtained for both criminal and departmental charges.

The Ombudsman will continue to seek clarification of these issues.

Strip-searches by police

Sometimes the Ombudsman has to consider difficult legal issues for which there is no guidance from the courts in the form of case law. One such issue is the power of police to strip-search persons in public places. Police have powers under a number of Acts, such as the Drug (Misuse and Trafficking) Act, the Poisons Act and the Crimes Act, to " stop, search and detain " persons whom they suspect on reasonable grounds of possessing illegal drugs or stolen goods.

The extent of the " search " power is not defined in the legislation; nor is it laid down in Police Instructions or guidelines. This lack of clear instruction on the exercise of the power to search suspects causes difficulties, both for persons who are subjected to a strip-search in public places, and for the police who carry them out. Two cases which the Ombudsman dealt with during the year illustrated the problem.

In one matter, a mother complained that her son and another boy had been stopped and strip-searched in a shopping centre because police thought that the boys were under the influence of drugs. Police took the boys to the base of some stairs in the shopping centre and ordered them to strip. A civilian witness saw the boys naked. The shopping centre was in a Blue Mountains town and the incident occurred in mid-winter. The police officers did not dispute that they had conducted a strip-search on the boys.

The Ombudsman found that the conduct of the two officers had been unreasonable in the circumstances. He also found that the Police Department had failed to provide written instructions to guide officers in conducting searches. He recommended that the Commissioner issue appropriate instructions to police, that he seek legal advice on the extent of the power to search, and that the two officers involved in the matter be counselled about conducting future strip-searches in private.

In the second matter, a journalist was stopped and strip-searched by police who suspected that he may have received a parcel of illegal drugs in the Kings Cross area. The Deputy Ombudsman conducted an inquiry into the matter.

The police investigation of the journalist's complaint found no evidence of any involvement by him in illegal drug trafficking, and the Commissioner of Police gave him a written apology as well as a

personal, oral apology.

The Deputy Ombudsman's inquiry disclosed that the incident had arisen in conjunction with a surveillance operation, designed to provide evidence against a large-scale drug dealer, which had been conducted in the Kings Cross area. The dealer had been followed and, according to the evidence of the police, had appeared to pass something to the journalist. The police had suspected that the dealer intended to make a " drop " at about that time in the area where they had seen the journalist; they thought that the dealer had made the " drop " on the journalist. The journalist had been followed as he drove to his parents' home for dinner.

The detectives who had mounted the surveillance operation arranged for uniformed police to stop and search the journalist and his vehicle. The journalist told the Deputy Ombudsman that he had been given the choice of being searched in a dimly-lit laneway or at North Sydney police station, but he said that he had not understood that the police intended to conduct a strip-search. In the event, he had decided to be searched in the laneway. He said that only when he was in the lane with the police had he learned that he was to be strip-searched.

There was no dispute in the evidence given at the Deputy Ombudsman's inquiry that the journalist had been strip-searched and that no illegal drugs had been found by police after they had searched his vehicle and his person. The police, however, disputed the journalist's claim that he had not been told that he would be strip-searched. This dispute will be dealt with when the Deputy Ombudsman makes his report.

Domestic violence

Since 1983 the Crimes (Domestic Violence) Act has given police the power to intervene in domestic violence situations, to charge the offender, and to seek apprehended violence orders. Before such an order can be made, the police must establish, but only on the balance of probabilities, that the complainant reasonably fears physical violence or other harassment from the defendant.

Research suggests that domestic violence occurs in one in every three homes in Australia, and that one in every three homicides is related to marital conflict. There is also a significant body of research which suggests that " the police remain the greatest single obstacle to the effective operation of the legislation because of their continuing reluctance to intervene in domestic violence matters and their failure to use the new provisions on behalf of victims. " (Stubbs, J & Wallace, A, " Protecting Victims of Domestic Violence " ; in Findlay & Hogg, Understanding Crime and Criminal Justice (1988) p. 52).

A complaint to the Ombudsman which illustrated the problem arose from the murder of Ms S by her de facto husband, Mr W, in 1986. The complaint, which was made by the women's refuge where Ms S had lived for some weeks before her death, contained two allegations. According to the complaint, in July 1986 police had been called to assist Ms S to leave the house she had shared with Mr W since his release on parole from prison a year earlier. Although Ms S had obviously been violently assaulted, she had insisted that police action would lead to further violence and retribution against her by Mr W, and police had decided not to charge him and not to seek an apprehended domestic violence order (restraining order) on her behalf. The police had taken Ms S to the women's refuge. The refuge

also alleged that, when Ms S had telephoned the police some weeks later to ask that they accompany her to the house to collect her furniture and personal effects, she had been refused assistance and had been advised to obtain a court order with regard to her belongings.

In the event, Ms S disregarded advice that she had received, probably from unidentified police officers, and certainly from others; accompanied by Mr W's parole officer, she had returned to the house where, while alone with Mr W, she was murdered.

The police policy on domestic violence encourages police to charge offenders, whether or not the victim is willing, rather than remove the victim from the family home. The policy explicitly makes the points that inaction encourages domestic violence and that police action is the best way of breaking the cycle of domestic violence. Yet the police who had removed Ms S to the refuge had not acted on the evidence of criminal assault by Mr W, or on the evidence of apprehended violence on the part of Ms S. The officers involved were paraded and counselled by their senior officers, but no notation was made on their service records.

The Ombudsman agreed with the police investigators that the police who had not charged Mr W had failed to take appropriate action; action which, in any event, was required by police instructions. He found this aspect of the complaint sustained.

In relation to the complaint that police had failed to assist Ms S in a situation where she had apprehended domestic violence, the Ombudsman was unable to determine where the truth of the matter lay. Because the chief witness would have been the murder victim herself, and because there was a conflict in the evidence which could not be resolved without her testimony, he decided that a reinvestigation would

achieve nothing. This aspect of the complaint, therefore, was deemed to be not sustained.

Whilst in this case the Ombudsman was critical of the conduct of the police involved, he recognises that the role of police in domestic violence issues is complex. Experience, judgement and discretion must be exercised in every instance. Inevitably, judgement and discretion will not always be exercised correctly and an honest mistake in the exercise of discretion may well result in a complaint being made. In such cases, it does not follow that a report of wrong conduct would automatically result; the facts in each case will differ. However, at least something might be learned in the process of examining a complaint and the issues it raises in order to add to and improve the guidelines issued to police.

Detention of Aboriginals

In the context of the Royal Commission into Aboriginal Deaths in Custody, it is alarming to note that serious complaints continue to be received regarding inadequate procedures adopted by police in the arrest and detention of Aboriginal people, particularly juveniles. During the year allegations were made to this Office about the failure of police to notify officers of the Department of Family and Community Services, parents or the Aboriginal Legal Service when they detained Aboriginal juveniles.

In one case, three Aboriginal juveniles were arrested by police in a rural town after they had allegedly broken and entered an empty homestead and substantially vandalised it. In a scuffle during their arrest, one of the juveniles had been wounded slightly.

A solicitor with the Aboriginal Legal Service complained that, after their arrest, which had occurred late at night, the juveniles had not been brought before a court at the earliest opportunity, but had been questioned without the benefit of legal advice until late in the afternoon of the following day. Moreover, solicitors of the Aboriginal Legal Service had not been informed of the juveniles' detention until late in the afternoon, and the solicitor, when finally informed of the case, had been obliged to take instructions from the juveniles under the stress of constant interruption and with police remaining within earshot.

When this complaint was initially referred by the Ombudsman to the Police Department for preliminary enquiries, these were undertaken by a police officer whose duties had involved him, although only in a peripheral way, in some of the incidents under investigation. He produced a report which failed to address key aspects of the complaint, and concluded in tendentious fashion by describing the allegations as " baseless ", " malicious " and " frivolous ".

The Ombudsman required formal investigation, both of the original complaint and of the manner in which the preliminary enquiries into the matter had been conducted.

A report was ultimately produced commenting adversely upon the delay by police in bringing the juveniles to court, their failure to advise the Aboriginal Legal Service and the lack of facilities available at the particular police station for solicitors to interview clients. Criticisms were also made of the lack of thoroughness and impartiality on the part of the officer who had made preliminary enquiries in the matter.

The Ombudsman, in reporting to the Commissioner of Police and the

Minister for Police, recommended various procedural changes to the manner in which preliminary enquiries should be conducted. He also recommended that the Police Department adopt a policy of notifying the Aboriginal Legal Service directly when an Aboriginal juvenile is taken into custody.

In responding to the report, the Commissioner advised that disciplinary action had been taken against the officers involved and, in particular, that the police officer who undertook the preliminary enquiries was to be counselled. Consultation was said to be underway between police and solicitors in the region as to ways of improving facilities for meetings between solicitors and clients in custody.

The broader recommendations regarding routine notification of the Aboriginal Legal Service are still under consideration.

A photogenic constable

Early one Monday morning, an off-duty constable and his two friends, neither of whom were police officers, were travelling in a car driven by the constable. They had been celebrating the twenty-first birthday of one of the constable's friends.

When the merry travellers reached an intersection equipped with a red light camera, the constable stopped the car to admire this example of a, then, recent technical innovation in traffic law enforcement, and to point it out to his passengers.

The camera busily recorded a series of still photographs of the constable's two friends, smiling and graciously posed and, at one stage,

climbing an adjacent flash unit pole. All of this was recorded for posterity because the constable drove his vehicle backward and forwards, activating the camera, no less than eight times in five minutes.

Some days later, when police cleared the camera, they identified the constable's vehicle and an investigation was commenced by the Police Internal Affairs Branch.

The constable admitted driving his car back and forth over the sensor which activated the camera but his explanation for his actions was difficult to believe. He told the police investigator that he was trying to coax his friends back into the car!

The police investigator found the complaint sustained, and the Ombudsman agreed with that determination. Because the constable had been paraded before his superiors and counselled, and because the cost of processing the film had been recovered, the Ombudsman made no recommendations in the matter.

The constable's abiding interest in red light cameras and other traffic control technology was later confirmed when he went to work at the Traffic Signals Operation Unit.

Delay in paying for car repairs

The 1987-88 Annual Report referred to Mr H's complaint about delay by the Police Department in paying for repairs to his car which, while in the custody of police, had been involved in an accident and had been damaged. The Department agreed that Mr H had a genuine complaint but he still had to wait some nine months before receiving an

ex-gratia payment. In the meantime, the cost of repairs needed to the vehicle had risen and Mr H had to pay an extra $40. It was not clear to this Office why he had to wait for so long, and preliminary enquiries were made under the Ombudsman Act.

The Department explained that approximately six months of the delay had been caused when the papers submitted to the then Minister for Police in January 1988, recommending that an ex-gratia payment be made, had been held in the Minister's office, unapproved (presumably because of the then pending State election). After the change in government, the papers had been returned to the Department for fresh submissions but these had not been re-submitted until June. The Department said that the matter " must be regarded as an isolated occurrence ". It was expected, said the Department, that regionalisation would in future ensure a quicker " turn-around ".

In recognition of the increased cost of repairs brought about by the Department's delay, and the petrol consumed while the vehicle was in police possession, a further payment of $60 was made to Mr H.

OPERATIONAL ASPECTS OF THE OFFICE OF THE OMBUDSMAN

Human resources

Numbers and categories of officers and employees

At the beginning of the financial year, the approved staff number was 67. During the year an additional position of Assistant Ombudsman was made permanent on the understanding that one established seconded police officer position remain vacant; and a number of positions were upgraded. Extra positions were created in order to co-ordinate the provision of information by the Ombudsman to the public; as a result of the introduction of a police complaints computer system; and to comply with the requirements imposed on the Office by the Freedom of Information Act. As at 30 June 1989 the approved staff number was 74.
During the year the Public Employment Industrial Relations Authority approved of the following changes in the establishment:

Position Created	**Position Deleted**
Assistant Ombudsman	Special Officer of the Ombudsman (Seconded Police Officer)
Interviewing and Investigation Officer, Grade 4/5 (Aboriginal Complaints)	Interviewing and Investigation Officer, Grade 2/3 (Aboriginal Complaints)

Senior Investigation Officer (Police), Grade 9/10	Senior Investigation Officer (Police), Grade 9
Staff and Personnel Officer, Grade 5/6	Staff and Personnel Officer, Grade 4
Administrative Assistant, Grade 2/3	Stenographer, Grade 1
Administrative Clerk, General Scale	Stenographer, General Scale
Data Control Officer, Grade 5/6	
Public Relations Officer, Grade II	
Investigation Officer, Freedom of Information Unit, Grade 7/8 (2 positions)	
Interviewing and Investigation Officer, Freedom of Information Unit, Grade 4/5	
Typist, General Scale (2 positions)	

Categories of officers and employees are shown in the following table:

	At 30/6/89	At 30/6/88	At 30/6/87	At 30/6/86
<u>Statutory Appointees</u>				
Ombudsman	1	1	1	1
Deputy Ombudsman	1	1	1	1
Assistant Ombudsman	2	2	2	2
<u>Officers</u>				
Principal Investigation Officer	1	1	1	1
Executive Officer	1	1	1	1
Senior Investigation Officer	4	4	3	2
Investigation Officer	17	15	14	16
Special Officer of the Ombudsman (Seconded Police Officer)	9	9	9	10
Executive Assistant (Police)	3	3	3	2
Public Relations Officer	1	-	-	-
Data Control Officer	1	-	-	-
Accounts Officer	1	1	1	1
Personnel Officer	1	1	1	1
Administrative Assistant	1	-	-	-
Interviewing Officer	6	5	3	3

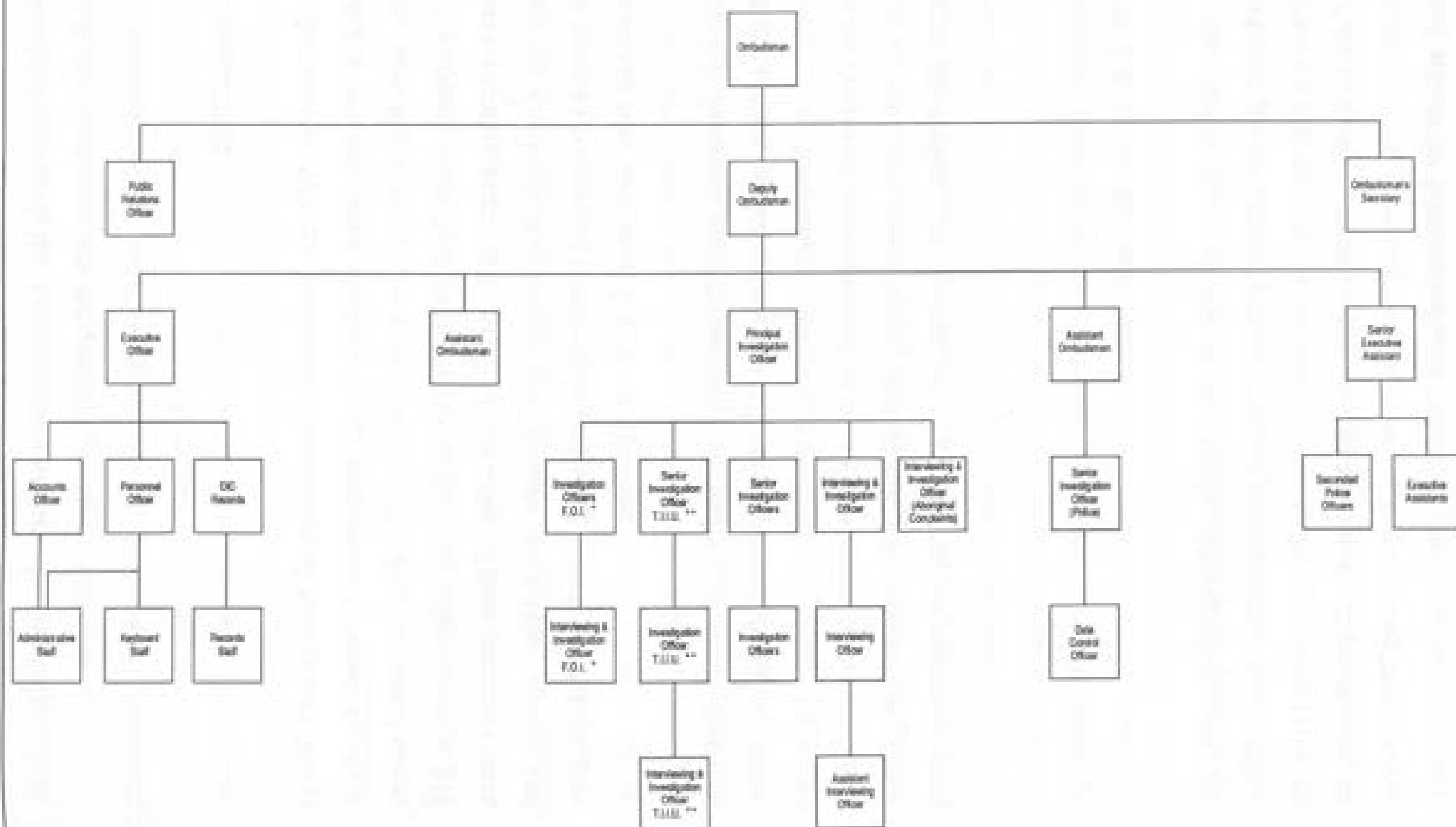
	At 30/6/89	At 30/6/88	At 30/6/87	At 30/6/86
Officers (cont.)				
Administrative Clerk	2	1	1	-
Officer in Charge, Records	1	1	1	1
Clerical Assistant, Records	4	4	4	4
Information Officer	1	1	1	1
Keyboard Staff and Stenographers	16	16	15	16
	74	67	62	63

Second Assistant Ombudsman position made permanent

As mentioned in previous Annual Reports, in April 1986 Cabinet approved the employment of a second Assistant Ombudsman on a temporary basis.

In August 1988 the Ombudsman wrote to the Premier seeking his approval for the establishment of the second Assistant Ombudsman position on a permanent basis. The Ombudsman made this request due to the sheer volume of complex and sensitive matters in the Office and the need to have the work of the investigative staff of this Office supervised by statutory officers.

Office of the Ombudsman
Organisation Chart



* Freedom of Information

** Telecommunication Interception Inspection Unit

The Premier approved the Ombudsman's request in December, 1988. Mr G R Andrews occupies the position at the present time.

Wage movements

On 1 September 1988 the Industrial Commission of New South Wales awarded a two-tier wage increase to all employees covered by State awards, including those in the public sector. The first increased wages by 3% effective from 16 September 1988; this was followed by a $10 per week increase effective from 17 March 1989. These increases were granted on the basis that unions would make no further claims and would agree to co-operate positively in reviewing awards in order to give effect to the new Structural Efficiency Principle.

During the financial year considerable difficulty was experienced in recruiting serving police officers to fill vacant seconded police officer positions. In November 1988 the Public Employment Industrial Relations Authority gave approval to the Office paying seconded police officers an allowance equivalent to 10% of salary for performing special duties at this Office. As a result of this approval, six vacancies were filled.

Personnel policies and procedures

With the introduction of the Public Sector Management Act the Ombudsman gained greater control over the management of his Office. The Public Employment Industrial Relations Authority, which replaced the Public Service Board, has delegated more responsibility to department heads, including the power to set commencing rates of pay for staff appointed from outside the public service.

Whilst the Ombudsman now has more control of his establishment, he is still required to seek the approval of the Public Employment Industrial Relations Authority to grade and classify positions. The Ombudsman must also ensure that he does not exceed the maximum staff number imposed by the Treasurer.

Recruitment

During 1988-89, twenty-eight positions, other than seconded police officer positions, were advertised. Twenty-five positions were filled; a number of positions in the investigation area were filled by multiple recruitment from one advertisement. Three positions remained vacant at the close of the financial year. This was due to the suspension of recruitment announced by the Premier in May 1989. This suspension has since been lifted and the positions are now filled, two of them through internal promotion. Of the twenty-five people recruited during the year, fifteen were females and ten were males.

In October 1988 one of the seconded police officers returned to uniform duty; this left six vacancies in that area. As a result of the Industrial Authority's approval to pay police officers seconded to the Ombudsman's Office an allowance equal to 10% of salary, all six positions were filled in February 1989. Six males were recruited to fill these vacancies; no applications were received from female police officers.

Apart from the difficulties associated with recruitment of serving police oficers, this Office has experienced little difficulty in filling vacancies. Only three positions had to be advertised twice, and one of these was re-graded and re-advertised to attract a more competitive field.

The recruitment policy of this Office is to advertise all vacant positions

as widely as possible in order to attract the most competitive range of applicants. Statutory, investigative and senior administrative positions are advertised in both the Public Service Notices and in the press. Junior administrative positions are advertised in the Public Service Notices only. Advertisements for vacancies in the investigative area are also distributed to various organisations, such as Law Faculties, community based agencies and the Commonwealth Employment Service.

Regular meetings with staff

The Office continues to have regular staff meetings. A formal staff meeting is held monthly and provides staff with information on relevant issues, including current investigations, changes to policies or procedures and dealings with government departments, local councils and the police. Staff are also provided with information on administrative matters, including budget allocations and expenditure, and issues which arise from meetings of the various office committees. These meetings are also a forum in which staff can express their views. Attendance at them by the Statutory Officers, the Executive Officer and all Investigative and Interviewing staff is mandatory. Administrative and keyboard staff, although not required to attend, are encouraged to do so.

The Executive Officer holds regular meetings with keyboard and administrative staff to ensure that they are informed about the activities of the Office. Time is made available at these meetings to discuss matters of concern, and in this respect staff are actively encouraged to express their views.

Occupational Health and Safety

The Occupational Health and Safety (OH&S) Committee met

regularly throughout the year. In addition to reviewing a number of existing policies and procedures within the Office, the Committee submitted draft policies on the following OH&S issues:-

1. Smoking in the workplace: The Committee recommended a restricted smoking policy for the Office. Prior to this recommendation being made and accepted, the Committee sought the views of staff and obtained relevant technical advice. As the Committee felt that the rights of both smokers and non-smokers should be protected, it recommended that a specific area of the Office be designated where smoking is allowed.

2. Emergency procedures: The Committee developed procedures for the evacuation of the Office in the event of an emergency. These procedures were referred to the Board of Fire Commissioners for assessment. Fire wardens have since been chosen and a Fire Drill has been conducted.

3. Occupational Health and Safety Policy: The Ombudsman issued an Occupational Health and Safety Policy which detailed the responsibility of management, supervisors and employees in ensuring a safe and healthy place to work.

4. Provision of First Aid: A review was undertaken of the provision of First Aid, including the supply of analgesics. First Aid kits were purchased and posters displaying first aid procedures were posted

throughout the Office. The number of trained First Aid Officers was increased from two to four.

5. Rehabilitation policy: A rehabilitation policy was developed, as required by Workers Compensation legislation. This policy sets out the responsibility of the Office if a work injury occurs, including the identification of medical providers. The Personnel Officer has been nominated as the Rehabilitation Co-ordinator.

The Ombudsman approved a suggestion that a representative of the Occupational Health and Safety Committee attend meetings convened to discuss the relocation of the Office.

Equal Employment Opportunity

Following the appointment of Dr Clare Burton as the new Director of Equal Opportunity in Public Employment, the EEO Annual Report for the Office, for the period ending 30 June 1988, was assessed in March 1989. In her evaluation the Director said that she was " pleased with the progress in relation to advancing the career and promotional prospects for women ". Dr Burton, however, highlighted the fact that no targets had been set in this area, and suggested that they be included in future reports.

Dr Burton was further encouraged by the Ombudsman's decision to identify five positions as ones requiring cross-cultural skills; and by the establishment of a position to deal with complaints from the Aboriginal community. In the area of employment of people with a physical

disability, Dr Burton thought that it was appropriate for the Office to evaluate strategies to ensure that this target group receive broader representation in its workforce.

As an EEO initiative, English in the Workplace classes have been organised for the number of employees of the Office. These classes aim to give the participants a greater understanding of the English language and, in particular, the English language in a working environment. Attendance at the classes is voluntary, but is encouraged by the Ombudsman. At present, seven members of staff are attending them.

The EEO Management Plan will need to be reviewed in light of the new Structural Efficiency Principle. That principle seeks to establish such things as skill-related career paths and broadbanding the range of tasks which a staff member is required to perform; it will eliminate cases where award provisions discriminate against sections of the workforce. It is essential that EEO initiatives and target groups are properly considered when decisions are made to implement the principle.

The EEO Committee met regularly and discussed a number of issues, including the implementation of the EEO Management Plan. One issue addressed by the Committee concerned gathering and recording statistical information for inclusion in the EEO Annual Report. It was apparent that a system which accurately reflected staff involvement in EEO activities/strategies was needed. For example, it was felt that the statistics on training and staff development activities did not accurately portray activities undertaken by staff. To overcome this, each request to attend a seminar or training course must be accompanied by a proforma on which is set out relevant EEO information.

The Committee has developed a Selection Techniques Workshop for staff and plans to run this Workshop on an ongoing basis.

The Committee reviewed the distribution of EEO information to staff and, as a result, developed procedures to ensure that information is given to staff promptly.

The Ombudsman approved the establishment of a permanent grievance procedure. The procedure has been introduced to identify, prevent or redress problems in the workplace. If staff feel that they are unable to approach their supervisor with a grievance, they can discuss the matter with a staff-elected Grievance Receiver.

<u>Ethnic Affairs Policy Statement</u> (EAPS)

As its major initiative for 1988-89, the EAPS Steering Committee undertook the complete revision of a multilingual pamphlet. This pamphlet, which was translated into twelve community languages, has been distributed to community groups and government departments.

In an effort to increase the awareness of ethnic communities and government departments about the role of the Ombudsman, staff of the Office undertook public awareness campaigns.

A strategy of EAPS was to identify a number of investigation officer positions which would benefit from requiring, as one of their position specifications, the ability to communicate effectively with people from diverse cultural backgrounds. The Ombudsman recognised the importance of this strategy and approved provision for inclusion of the specification in all advertisements for investigative positions.

Arrangements have been made for a representative of the Ethnic Affairs Commission to address staff on the EAPS program and the use of interpreters.

Industrial relations

Although there were no industrial disputes involving the Office during the year, there was considerable discussion with the union following the introduction in Parliament of the Ombudsman (Amendment) Bill. The principal purpose of the Bill was to establish the Office of the Ombudsman as a corporation, independent of the public service. This amendment would have altered the employment status of current staff and would have reduced mobility to promotional positions within the public service. In addition, the amendment removed from staff in the Office access to the Government and Related Employees Appeal Tribunal in respect of promotional and disciplinary matters.

From December 1988, the Ombudsman held regular meetings with individual staff members, the workplace group and with Public Service Association representatives. The purpose of these meetings was to discuss the proposed incorporation of the Office and its effect on current staff, their conditions and entitlements. These meetings highlighted areas of concern to both the Ombudsman and his staff, which were also discussed in a meeting between all parties and representatives of the Cabinet Office. As a consequence, a number of changes to the legislation were either made or proposed.

On 29 August 1989 the Premier informed the Ombudsman that the Bill would not proceed.

One positive result flowed from meetings with the workplace group to discuss the proposed incorporation; the Ombudsman agreed to invite union representatives to weekly management meetings. Staff, through their representatives, now have a mechanism to have input to and influence the decisions of management.

Structural Efficiency Principle

The August 1988 National Wage decision awarded pay rises on the condition that unions agree to co-operate in a review of awards.

In May 1989 the Public Employment Industrial Relations Authority and the Labour Council of New South Wales signed an agreement which set out the parameters of matters for negotiation between public sector departments and unions, and the ways and means by which structural efficiency will be accomplished.

Under the principle, a number of measures have to be considered, including establishing skill related career paths; eliminating impediments to multiskilling; broadbanding the range of tasks which a staff member is required to perform; creating appropriate relativities between different categories of staff; and addressing any cases in which award provisions discriminate against sections of the workforce.

The Office of the Ombudsman has commenced the process of implementing the Structural Efficiency Principle. Several meetings with the Public Employment Industrial Relations Authority have been held in order to identify areas where change to the current structure would increase efficiency and create career paths.

Staff training

Training and information sessions for investigative staff are held monthly. During the year, topics covered in these sessions have included:

- environmental planning legislation
- questioning techniques
- telecommunications interception inspection legislation and practice
- on site demonstration of police radar detection practices and procedures
- conflict of interest in local government - current legislative provisions and practices
- current law and issues on local government responsibility for drainage
- current law and issues on local government rating
- police powers of arrest
- handling media interviews
- Building Services Corporation - practices, procedures and problems
- use of dictaphones

Where possible, outside experts conduct or participate in monthly training sessions. For example, the Secretary of the Local Government and Shires Associations, Mr W Henningham, and the Chief Local Government Inspector, Mr C Wheeler, both attended the session dealing with conflict of interest in local government. The session on the Building Services Corporation was addressed by the Corporation's General Manager, Mr K Jubelin.

In addition to these sessions, investigative staff have attended relevant courses and seminars conducted by outside agencies. In most instances, the Ombudsman has approved of the Office meeting the cost of attendance. A number of keyboard staff attended word processing courses conducted by Unisys, which covered an introduction to the system as well as learning to use the word processing package. In addition, two of the more experienced operators attended a more detailed course on system administration.

English in the Workplace courses have been arranged for seven of the keyboard staff. The Office recognised that, in order to enhance their current skills and to assist them with career development, these officers needed a structured English language course. The Adult Migrant Education Service has been most helpful with the organisation and delivery of this course.

Other training opportunities have been available to keyboard staff through job rotation to clerical areas of the Office.

During the year, two outside agencies organised and presented training or information sessions. Health specialists from the Occupational Health and Safety Unit at Sydney Hospital conducted a course for keyboard staff on health and safety matters and, in particular, on the prevention of repetitive strain injury. A training company, Social

Change Media, organised a training session on how to deal with the media. This was attended by investigative and senior staff who are required to deal with the media in the course of their duties.

Overseas visit by the Ombudsman

In September 1988 the Ombudsman attended the 4th Annual Conference of the International Association for Civilian Oversight of Law Enforcement (IACOLE) in Montreal, Canada.

The members of IACOLE are essentially responsible for the investigation of complaints against police. The purpose of the organisation is to share information and exchange ideas about the investigation and review of public complaints concerning law enforcement agencies.

Participants at the conference included provincial, state and municipal political leaders, community agency representatives, chiefs of police, police union representatives, Ombudsmen, Police Commissioners, civilian and police investigators, members of criminal review boards and criminal justice educators and experts.

While overseas, the Ombudsman took the opportunity to visit the Civilian Complaint Review Board in New York; Civilian Oversight and Administrative Law bodies in Washington, D.C.; the Civilian Complaint Authority in Toronto, Canada; and the Office of Police Complaints Authority in London.

Overseas visitors to the Office

Mr Sidney Linden, Commissioner of the Office of Information and Privacy Commissioner in Ontario, Canada, visited the Office and

addressed all investigative staff in October 1988. Mr Linden discussed aspects of the Freedom of Information and Protection of Privacy Act of Ontario.

Mr Linden's function is to review decisions made by government agencies where access to information has been denied to a member of the public; he has the power to order disclosure of information. Mr Linden was formerly Executive Director of the Canadian Auto Workers' Legal Service Plan, where he laid the foundation for the establishment of Ontario's first major pre-paid legal service scheme. He then served as the first Public Complaints Commissioner and Chairman of the Police Complaints Board. In this role he established and administered a new system for handling complaints against the Metropolitan Toronto Police Force - a Force of some 5,000 officers.

Consultants

During the year, the Ombudsman utilised the services of five consultants to provide assistance as follows:

Freedom of Information

The services of Ms H Mueller were engaged to ensure that procedures were in place, prior to the commencement of the legislation, for discharging the responsibilities of the Office under the Freedom of Information Act. In addition to developing procedures, Ms Mueller has been involved with the establishment of the Ombudsman's Freedom of Information Unit, with staff recruitment for the Unit and in training the staff selected.

Current Organisation Structure

The Ombudsman engaged a firm of Management Consultants to review the effectiveness of the current organisation structure. The results of that review have been submitted for the Ombudsman's consideration.

Staff Training and Development

Two organisations were engaged, on a consultancy basis, to conduct staff training and development sessions. One firm presented a course for Investigation Officers and senior staff on dealing with the media. The second provided keyboard staff with up-to-date information on occupational health and safety issues relevant to their work.

Office Relocation

A consultant was engaged to co-ordinate the relocation of the Office to the Coopers and Lybrand Building. In addition to acting on behalf of the Office in its dealings with organisations such as the Public Works Department and the Office Accommodation Bureau, the Consultant is required to organise the physical relocation, including the refurnishing of the Office at its new location.

Accounts payable policy

The 1987-88 Annual Report outlined details of an "Accounts Payable Policy" adopted by the Office to ensure prompt payment of accounts. The aim of the policy is to ensure that all claims for payment are

processed within the time allowed by government contract, or within the supplier's terms. Suppliers are given a copy of the policy when orders for goods and services are placed with them.

A major aspect of the policy is the provision for a penalty interest payment where there is an unjustified delay in the payment of an account. Interest can be charged for each day an account is overdue, and details of such payments are required to be included in the Annual Report.

No penalty interest payments have been imposed on this Office.

Financial summary

Funds allocated by Parliament for the operation of the Office of the Ombudsman during the year ended 30th June 1989 totalled $3,707,000. Expenditure for the year totalled $3,336,447. The significant expenditure items were as follows:

Item	Expenditure $	Percentage of Total Expenditure
Salaries and other employee payments	2,218,896	66.50
Rent	402,283	12.06
Fees	137,318	4.12
Stores	297,434	8.91
Postage and Telephone	46,847	1.40
Printing	33,078	0.99
Travel	44,852	1.34
Motor Vehicles	50,433	1.51

Total expenditure for the financial year was $370,553 less than budget allocation, for the following reasons:

1. From July 1987 to February 1989 the Office was seriously understaffed because of its inability to recruit seconded police officers. In addition, from August 1987 to January 1989, the Office was without at least one statutory officer and, for one period, it was without two statutory officers. This resulted in underexpenditure in salary related items and in those items that are distinctly related to staffing levels, such as Travel and Motor Vehicles.

2. Reduced numbers of reinvestigations of complaints against police resulted in less than expected expenditure in Travel and Fees. As well, a major piece of litigation (Ainsworth v Ombudsman) was decided in favour of this Office; this resulted in significant savings in Fees. The costs associated with this litigation were noted as a contingent liability in the 1987-88 Annual Report.

3. Rent for the Telecommunications Interception Inspection Unit (TIIU) was unexpectedly met by the Office Accommodation Bureau for the full financial year, and expected rent increases for Level 14, 175 Pitt Street did not eventuate.

4. The fitout cost for the building housing the TIIU, again, was fully met by the Office Accommodation Bureau, resulting in under-expenditure in building maintenance.

Recent amendments to global budgeting have enabled Departments with sufficient savings to transfer up to 2% of their 1988-89 budget to the following financial year. This Office made such a request and approval was given to transfer $71,000 to the 1989-90 financial year.

Value of recreation and long service leave

The monetary value of recreation leave and long service leave owed in respect of persons employed in the Office of the Ombudsman for the 1987-88 and 1988-89 financial years is shown below:

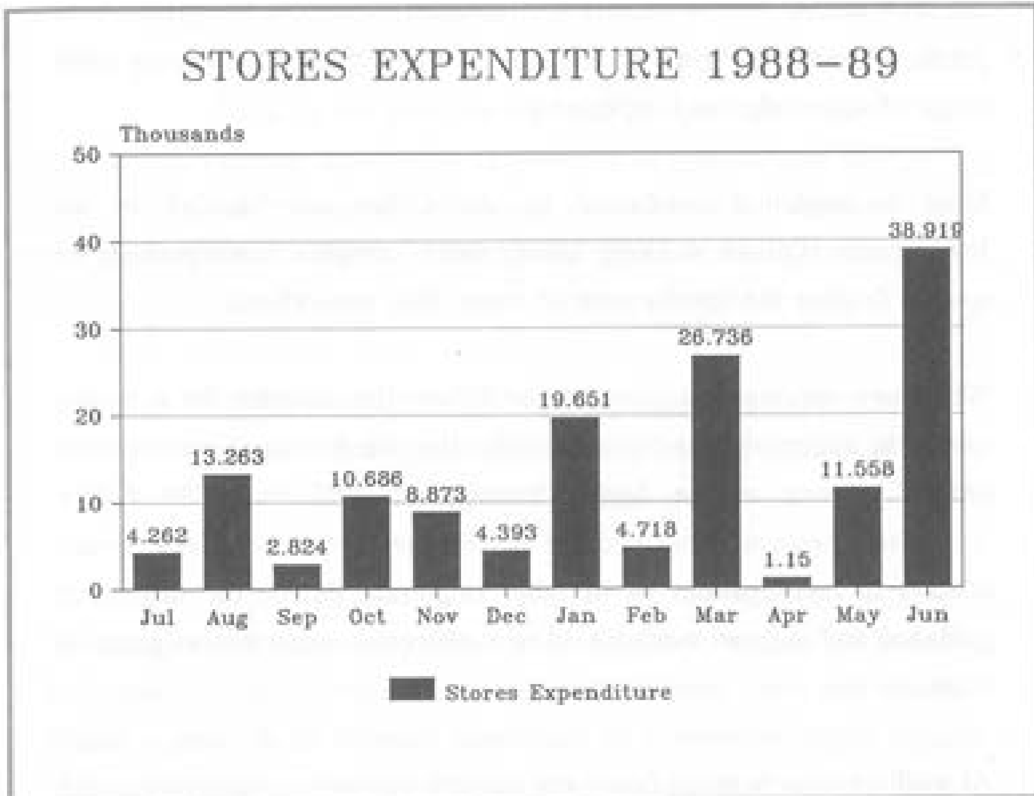
	Year ended 30 June 1988 $	Year ended 30 June 1989 $
Recreation leave	110,842	161,381
Long service leave	212,992	251,627

Major Assets on hand as at 30th June 1989

Type		Quantity on hand 1987-88	1988-89
Motor Vehicles		10	6
Photocopiers		4	5
Work Stations	- Adler	1	1
	- Sanyo	13	13
	- IBM	-	7
	- Unisys	6	11

Stores and equipment expenditure

The following graph indicates expenditure trends in the Stores item.



Stores expenditure in June reflects the urgent purchase of new furniture and other equipment needed for the new Office accommodation. In this respect, a request to Treasury to transfer $150,000 to a Special Deposits Account for the purchase of new furniture in the 1989-90 financial year was approved, subject to the funds being expended by 30 September 1989, and to their exclusive use for the purchase of new furniture.

Group system on trial

One of the strengths of the Office of the Ombudsman lies in the independence and autonomy given to Investigation Officers in carrying out their duties. These officers are recruited from both the private and public sectors and bring with them to the Office an extremely wide range of knowledge and experience.

Most investigations conducted by the Office are handled by an Investigation Officer working alone; some complex investigations, of course, require the involvement of more than one officer.

When new officers first come to the Office, they operate for a period under the supervision and guidance of either the Principal Investigation Officer or one of the Senior Investigation Officers. The Office recognises, however, that because of the involvement of those senior officers in investigations or in other important duties, the degree of guidance and support available to new officers is often not as great as it should be.

As well, obvious benefits flow from officers exchanging information and lending their particular expertise to solving problems. For this and other reasons, the Office has experimented with a system of informal groups of Investigation Officers. Experience to date suggests that the advantages of the group system outweigh its inevitable disadvantages. Some of the benefits which have become apparent include:

- groups provide a regular source of advice and support for newer officers;

- experienced officers gain similar benefits by using their colleagues as ' sounding boards '. The group system facilitates and enhances a process which, prior to their advent, had occurred somewhat haphazardly;

- new complaints are initially assessed on an informal basis by the group as a whole; this potentially gives greater consistency to decisions on whether and how to investigate, and brings out relevant information for the use of the officer to whom the complaint is allocated;

- officers who strike difficulties with workload, or with a particular case, have a supportive group from whom to seek assistance and guidance.

In setting up the group system, care was taken to ensure that the independence of individual Investigation Officers was not eroded. Whilst a group in its informal assessment of a complaint might suggest that a particular course be followed, it has no decision making powers; the decision about how a complaint should be dealt with, and, in particular, whether it should be taken up or declined, rests always with the Investigation Officer to whom the complaint is allocated.

Consistency of treatment of similar complaints or situations is inevitably reduced by the autonomy and independence given to officers. There is always the possibility that the Office, in seeking to do justice to individual complaints, could be criticised for making inconsistent decisions; even though the risk is not great and, in any event, is one that the Office is prepared to take, the group system helps to reduce it.

The groups also help to combat the tendency for officers to feel ' drowned ' by their caseload, especially when investigations have to be reallocated to them from officers who leave. The groups provide assistance and advice and this helps to reduce the time taken to complete investigations and the risk that, where investigators have excessive caseloads, their judgement may be impaired.

Although the informal structure of the groups has had definite benefits in terms of their operation, there appears to be a need to balance this with a degree of " team-leadership " in order to provide support and to facilitate consistency, dispute-resolution and the rational allocation of workload and resources, both within each group and between them. A study is being undertaken to see how the positive attributes of the group system can be strengthened.

Performance Indicators

The 1985-86 Annual Report (pp271-6) set out details of the sorts of performance indicator statistics that would be included in future Annual Reports.

The statistical tables which follow provide the following indicators of performance:

Information supplied to the public

Enquiries dealt with

Interview conducted, according to location

Complaints handled, according to categories and stages

Action taken by public authorities, according to categories

Number of days of formal hearings, by category

Number of formal reports, according to categories

Responses to recommendations

Reports to Parliament

This year, an additional table has been included. This table gives details of complaints against police which were found sustained, but in respect of which it was not necessary for this Office to make any recommendations because it agreed with the action taken by the Police Department.

TELEPHONE ENQUIRIES AND INTERVIEWS

	Interviewing Officers	Receptionist	Total
Telephone enquiries	6252	956	7208
Interviews with prospective complainants	535	-	535

VISITS

	Oral Complaints Received	No. of Visits	No of hours spent by Investigation Officers: Travel	Interviewing and follow-up	Totals
Prisons	420	36	175	301	476
Juvenile Institutions	146	12	53.5	81	134.5
Community Awareness Programmes	494	33	238	394	632
Totals	1060	81	466.5	776	1242.5

Action	Prisons	Juvenile Institutions	Community Awareness Programmes	Totals
Complaint discussed with relevant local public authorities (including Prison Superintendent, Institution Manager, etc.) and advice given to complainant	116	74	16	206
Other general enquiries made and advice given to complainant	72	25	57	154
Advised to make written complaint	41	5	112	158
Written complaint taken	36	8	28	72
Referred to other service	30	8	55	93
Declined	48	5	52	105
No jurisdiction	41	18	144	203
Enquiry re existing complaint; advice given/arranged	41	3	30	74
Totals	425*	146	494	1065

* In some instances more than one action has been taken on an oral complaint.

CONSTRUCTIVE/REMEDIAL ACTION TAKEN BY PUBLIC AUTHORITIES

1 July 1988 - 30 June 1989

	Departments and Authorities	Councils	Prisons	Police
Nature of action taken				
Apology made	9			
Account paid or adjusted or refund made	7	3		
Information provided/promised	13	6		
Procedures changed	7	2	2	
Case reviewed (or review promised)	5	6	2	
Liability admitted/action to remedy taken	7	1		2
Damage repaired	3			
Delay resolved	25	9	1	
Inspection or personal visit to complainant made	1			
Case reconsidered and action favourable to complainant taken	31	13	2	2
Claim met or application approved	6		1	
Repairs/Work/Action/Notices to resolve problem	9	14	1	
Payment made	9			2
Ex gratia payment made	3	1		
Negotiations commenced	2	3		
Service or benefit reinstated, officer counselled, reprimanded or disciplined	3			10
Direction to staff issued	6			1
Investigation commenced by authority		1		
Facilities provided	1			
Financial assistance given/promised	2			
Matter re-opened and action taken in accordance with approved procedures	1	5		
Other	20	6	4	
No. of cases involved *	103	35	9	16

* It is not unusual for more than one constructive/remedial action to be taken in one particular case.

HEARINGS UNDER SECTION 19 OF THE OMBUDSMAN ACT - NUMBER OF DAYS

				LOCATION				
	No of hearings	No of days	No of witnesses	Office of Ombudsman	Other Sydney	Newcastle/ Wollongong	Country town/city	Inter-State
Departments and authorities	2	5.5	12	2.5	-	2	1	-
Local government councils	3	18.5	50	14.5	-	1	3	-
Prisons	-	-	-	-	-	-	-	-
Police	13	32	115	13.5	2	1.5	11.5	3.5
Totals	18	56	177	30.5	2	4.5	15.5	3.5

NUMBERS OF FORMAL REPORTS

OMBUDSMAN ACT

	Wrong Conduct	No Wrong Conduct
Departments and authorities	24	1
Local government councils	14	
Prisons	5	
Totals	43	1

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT

	Sustained		Not Sustained	
	Reinvestigated	Not reinvestigated	Reinvestigated	Not reinvestigated
Police	8	83	3	4

These are reports made final. Reports sent to Ministers for advice on consulation are set out in the topic "Reports to Ministers and to Parliament".

REPORTS TO PARLIAMENT

Non Compliance with Recommendations

Departments and authorities	1
Local Government councils	1
Prisons	-
Police	3

Other (Not Relating to Recommendations)

Ombudsman Act	2
Police Regulation (Allegations of Misconduct) Act	1
Total	8

COMPLIANCE WITH RECOMMENDATIONS

1 July 1988 - 30 June 1989

	Departments and Authorities (excluding prisons)		Prisons		Local Government Councils		Police		Totals	
Number of cases involved	22		5		18		40		85	
Nature of recommendations	Accepted	Not Accepted	Accepted	Not Accepted	Accepted	Not Accepted	Accepted	Not Accepted	Accepted	Not Accepted
Change in action:	3	1			4	3	1		8	4
Change in legislation:	1								1	
Change in policy:	1				2	1	1		4	1
Change in procedure:	11	4	5		5	2	9	1	30	7
Disciplinary action:	4						19	2	23	2
Ex gratia or other payment:	2	1	1		2	2	3	1	8	4
Review/investigation:	4				6		7	3	17	3
Issue direction or instruction to staff:	8		3		2		10	1	23	1
Provide information to public:	1	2			4	2	1		6	4
Other:	7		3		6	1	2	2	18	3
TOTALS	42	8	12		31	11	53	10	138	29

Police

Sustained Complaints -

No Recommendations Made; Action by Police Accepted

Nature of Action Taken - Accepted by Ombudsman	Number of Cases Involved: 56
Change in procedure	1
Disciplinary action	44
Ex gratia or other payment	5
Other	8

FINANCIAL STATEMENTS

BOX 12, G.P.O.
SYDNEY, N.S.W. 2001

AUDITOR-GENERAL'S CERTIFICATE

OFFICE OF THE OMBUDSMAN

The accounts of the Office of the Ombudsman for the year ended 30 June 1989 have been audited in accordance with Section 34 of the Public Finance and Audit Act 1983.

In my opinion, the accompanying summarised receipts and payments statements 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 Office.

J.R. MITCHELL, FASA CPA
ASSISTANT AUDITOR-GENERAL

SYDNEY,
6 September 1989

Office of the Ombudsman
Year Ended 30 June 1989

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.

D. E. Landa
OMBUDSMAN

A. Guest
ACCOUNTS OFFICER

11 AUG 1989

OFFICE OF THE OMBUDSMAN

Table A

SUMMARISED RECEIPTS AND PAYMENTS STATEMENT
OF THE CONSOLIDATED FUND AND THE SPECIAL
DEPOSITS ACCOUNT BY ITEM FOR THE YEAR ENDED
30TH JUNE, 1989

Details	Note	1987/88 Actual $000	1988/89 Estimate $000	1988/89 Actual $000
Receipts (a)				
Other Receipts				
Repayments to Previous Years Vote		*	...	19
Unclassified Receipts		*	...	...
Miscellaneous Services Rendered				
Commission on Deductions		1	...	1
Balance of Salaries Adjustment		6	...	14
Suspense - Salary Deductions		*	...	...
Provision for the Purchase of Computers		68	...	...
Provision for Outstanding Commitments		...	...	150
Receipts		75	...	184
Payments (a)				
Salaries and Other Employee Payments	10	2,057	2,434	2,219
Maintenance and Working Expenses		837	1,239	1,081
Plant and Equipment				
Purchase of Motor Vehicles		...	13	19
Purchase of Computers and Related Payment		19	21	79
Total Payments		2,913	3,707	3,398
Excess of Payments over Receipts		2,838	3,707	3,214

(a) Inter-fund transfers have been offset in the preparation of this table.

OFFICE OF THE OMBUDSMAN
SUMMARISED RECEIPTS AND PAYMENTS STATEMENT
OF THE CONSOLIDATED FUND AND THE SPECIAL
DEPOSIT ACCOUNT BY PROGRAM FOR THE YEAR ENDED
30TH JUNE, 1989

Table B

Details	RECEIPTS			PAYMENTS		
	1987/88	1988/89		1987/88	1988/89	
	Actual $000	Estimate $000	Actual $000	Actual $000	Estimate $000	Actual $000
PROGRAM 5.1 Investigation of Citizens Complaints & Monitoring & Reporting on Telecommunic-ations Interception Activities						
Consolidated Fund #	...	...	...	2,894	3,707	3,336
Special Deposits	68	...	...	19	.....	62
Gross Total-Program 5.1	68	...	...	2,913	3,707	3,398
Less Inter-Fund transfers	...	...	...	...	...	...
Net Total-Program 5.1	68	...	...	2,913	3,707	3,398
NON-PROGRAM						
Consolidated Fund	1	...	20	...	...	...
Special Deposits	34	NA	199	658	NA	682
Gross Total Non-Program	35	...	219	658	...	682
Less Inter Fund transfers	...	...	...	616	...	672
Net Total Non-Program	35	...	219	42	...	10
TOTAL						
Consolidated Fund	1	...	20	2,894	3,707	3,336
Special Deposits	102	NA	199	677	NA	744
GRAND TOTAL - GROSS	103	...	219	3,571	3,707	4,080
Less Inter-Fund transfers(a)	...	...	...	616	...	672
GRAND TOTAL-Note 11	103	...	219	2,955	3,707	3,408

Includes Employers Liability to State Public Service Superannuation Fund Special Appropriation Act No. 45, 1945.

(a) Amounts transferred from Consolidated Fund to Special Deposits are included in the Consolidated Fund payments section in this table. This has been done to make the Consolidated fund figures comparable to figures published in the Budget Papers. The Special Deposits transfer receipt amount is not displayed to ensure that total net program receipts are disclosed.

Table C

OFFICE OF THE OMBUDSMAN
STATEMENT OF SPECIAL DEPOSITS ACCOUNT BALANCES AS AT
30TH JUNE, 1989

Previous Year Cash $000	Previous Year Securities $000	Previous Year Total $000		Account	Note	Current Year Cash $000	Current Year Securities $000	Current Year Total $000
34	...	34	1140	Balance of Salary Adjustment	10	49	...	49
42	...	42	1196	Salary Deductions		66	...	66
62	...	62	1784	Provision for the Purchase of Computers and Related Payments		0	...	0
...	...	...	1820	Provision for Outstanding Commitments		150	...	150
138	...	138		Total - All Special Deposits Accounts		265	...	265

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.

(e) All totals have been rounded to the nearest one thousand dollars ($1,000). Asterisks in tables denote that the amount is five hundred dollars ($500) or less.

Note 2 Schedule of uncollected amounts

There are no uncollected amounts as at 30th June, 1989, 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 1989, and comparative amounts as at 30th June 1988, for the following items are as follows:

1987/88		1988/89
$		$
20	Advertising	...
850	Books	294
3,283	Electricity	...
22,754	Fees	10,502
624	Motor Vehicles	175
169	Postal & Telephone	207
205	Printing	...
24,922	Stores	350
557	Travel	1042
53,384		12,570

Note 4 Contingent liabilities

The Office of the Ombudsman does not have any contingent liabilities.

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 Assets written off

During the financial year ending 30th June 1989 The Office of the Ombudsman wrote off plant and equipment unlocated from previous stocktakes valued at $1,421.78. Details of this equipment are as follows:

Item	Value	Date last sighted
Camera,Polaroid	$60.13	June 1983
Dictaphone,Lanier P-124	$269.00	April 1987
Dictaphone,Sanyo TRC 3500	$76.00	April 1987
Dictaphone,Sanyo TRC 3500	$76.00	April 1987
Dictation Set,Phillips	$97.65	Sept 1983
Dictation Set,Phillips	$109.00	Sept 1983
Dictation Set, Phillips	$109.00	Sept 1983
Dictaphone,Sanyo TRC 3500	$76.00	Sept 1987
Dictaphone,Sanyo TRC 3500	$76.00	Sept 1987
Calculator	$11.95	Sept 1987
Memoscriber,Sanyo	$199.56	Sept 1987
Memoscriber,Sanyo	$191.50	Sept 1987
Microphone,Akai	$69.99	Sept 1987
Total	$1,421.78	

The Office of the Ombudsman had no bad debts to be written off during this financial year ending 30th June 1989.

Note 7 Commitments

Commitments on hand as at 30th June 1989, and comparative amounts as at 30th June 1988, for the following items are as follows:

1987/88 $		1988/89 $
10,952	Stores	150,000 *

* This amount has been transferred to a Special Deposits Account at the Treasury for the purpose of purchasing new furniture and equipment in the 1989/90 financial year.

Note 8 Material assistance provided to the Department

No material assistance was provided to the Office during the financial year ending 30th June, 1989.

Note 9 **Sums of money held for two years or more**

The were no monies held by this Office as at 30th June, 1989 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 $2,218,896 which includes an amount of $48,600 for the final eight days of the year to reflect the full year's salary costs.

Note 11 Dissection of Program

A. The table below details the program receipts of Consolidated Fund and Special Deposits Account. The figures shown are net of inter-fund transfers

Previous Year Receipts $000	Program Description	Balance of Salaries $000	Provision for Computers $000	Provision for Outstanding Commitments $000	Other $000	Total Receipts $000
*	Program 5.1 Investigation of Citizens Complaints and Monitoring and Reporting on Telecommunications Interception Activities					
68		...	...	...	...	...
35	Non Program	49	...	150	20	219
103	Total	49	...	150	20	219

B. The table below details the program payments of Consolidated Fund and Special Deposits Account. The figures shown are net of inter-fund transfers

Previous Year's Payments	Program Description	Salaries & Other Employee Payments	Maintenace & Working Expenses	Other	Total Payments
$000		$000	$000	$000	$000
2,913	Program 5.1 Investigation of Citizens Complaints and Monitoring and Telecommunications Interception Activities	2,219	1,081	98	3,398
42	Non Program	10	...	...	10
2,955	Total	2,229	1,081	98	3,408

Note 12 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

STATISTICAL TABLES

STATISTICAL TABLES

Complaints received - comparative figures

This year, complaints against departments and authorities and local councils were fewer than in past years, while complaints against Police and against the Department of Corrective Services increased.

The accompanying table shows comparative figures for complaints received about all organisations during the past three years, and the chart following shows the distribution of complaints received during 1988-89.

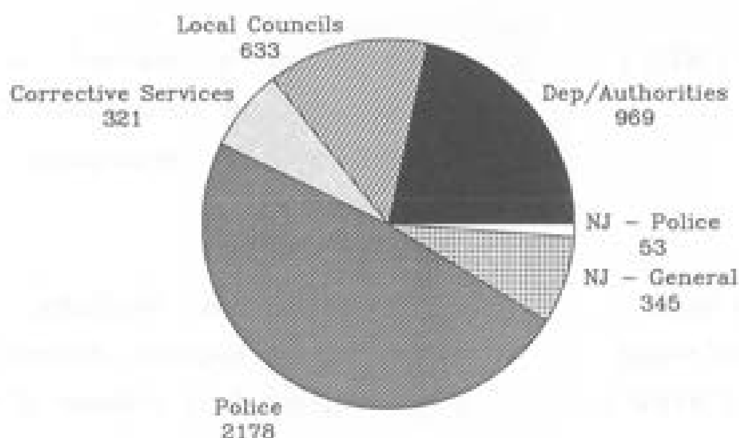
There has been a steady decline in complaints about government departments and agencies and local councils during the past three years. Complaints about the conduct of police show an increase in the same period, and rose by 4% last year. Complaints against the Department of Corrective Services rose by 25% last year.

Complaints Received - Comparative Table

Ombudsman Act	1988/89	1987/88	1986/87
Department and authorities (other than Corrective Services)	969	1067	1182
Local councils	633	672	706
Department of Corrective Services	321	257	262
Outside jurisdiction	345	505	573

Police Regulation (Allegations of Misconduct Act)

Complaints against police	2231	2138	2225
TOTAL	4499	4639	4948



Result categories - complaints under Ombudsman Act

The result categories currently in use are:

No jurisdiction (NJ)	-	Self explanatory.
Declined at the outset (DECO)	-	Complaint is declined without any enquiry being needed (ie on the material submitted by the complainant alone).
Declined after preliminary enquiry (DECE)	-	Complaint is declined after enquiry made with public authority, or complainant. This can be by letter, telephone or interview.
Resolved (RES)	-	Complaint is resolved to the satisfaction of Investigation Officer prior to an investigation being commenced.
No prima facie evidence of wrong conduct (NPFE)	-	Complaint is concluded after preliminary enquiries because there is no prima facie evidence of wrong conduct. Consequently, the matter does not proceed to investigation.
Discontinued (DIS)	-	Complaints that proceed to investigation but stop short of a finding (matter resolved, no utility in proceeding, withdrawn by complainant, etc).

No Wrong Conduct (NWC)	-	After investigation, no wrong conduct found.
Wrong Conduct (WC)	-	After investigation, wrong conduct found.

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPFE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Aboriginal Land Council			1						1	2
Administrative Services			1							1
Agriculture and Fisheries		4	6	1				1	2	14
Albury Wodonga (NSW) Corporation		1	1							2
Anti Discrimination Board			1		1				1	3
Apprenticeship Directorate			1							1
Architects Board of NSW				1						1
Archives Authority of NSW			1							1
Attorney General's Department	3	3	11	4					3	24
Australian Gas Light Company		1	2	6						9
Australian Music Examination Board			1							1
Building Services Corporation	1	3	29	6	1	1		1	5	47
Bursary Endowment Board					1					1
Business and Consumer Affairs	1	7	14	4	1			1	1	29
Chiropractors Registration Board									9	9
Coal and Oil Shale Mine Workers Tribunal			2							2
Consumer Claims Tribunal	1	2	1							4
Corrective Services Department	13	85	140	30	8	6		5	91	378
Council of Auctioneers and Agents			3	2		1			1	7
Dairy Corporation		1	2							3
Darling Harbour Authority		1							1	2
Dental Board of NSW			1							1
Education Department	1	5	11				1	1	12	31

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPFE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Egg Corporation		2	1							3
Electricity Commission		3	3	1					1	8
Equal Opportunity Tribunal	1									1
Ethnic Affairs Commission		1							1	2
Family and Community Service	4	20	40	9	3	4	4	5	18	107
Fire Commissioners Board						1		1	1	3
Fish Marketing Authority		1	2					1	1	5
Forestry Commission		1	1						1	3
Government Insurance Office		16	21	5	1				9	52
Government Real Estate Branch		1								1
Greyhound Racing Control Board			1							1
Hawkesbury Agricultural College			1			1				2
Health Department	2	30	23	3	1	2		3	11	75
Health Department (Prison Medical Service)		4	15	5	2				13	39
Heritage Council		1	1							2
Home Care Service			1	1						2
Housing Department	2	21	42	17	3	1			19	105
Hunter District Water Board			4							4
Independent Commission Against Corruption	1									1
Industrial Relations & Employment		4	7	5		1		1		18
Joint Coal Board			1							1
Kuring-Gai College of Advanced Education		1								1
Land Board Office				1						1

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DECO)	(DECH)	(RES)	(NPFE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Land Titles Office	1	1	1	2					1	6
Lands Department			3	3	1	1			10	18
Legal Aid Commission	2	16	18	4	1			1	3	45
Liquor Administration Board		2		2						4
Local Government Department	1	1	2	1						5
Long Service Payments Corporation			1	1					3	5
Macarthur Institute of Higher Education		1					1			2
Macquarie University		2	2				1			5
Maritime Services Board		1	4	1					5	11
Medical Board of NSW		1	2						1	4
Mental Health Review Tribunal	1	1								2
Mine Subsidence Board			2					1		3
Mineral Resources & Energy			3						1	4
Mitchell C.A.E. (Bathurst)			1						1	2
Motor Vehicle Repair Disputes Committee		1	2							3
National Parks & Wildlife Services	1	2	7			1			1	12
Office of Min. for Environment	1	1		1						3
Office of Min. for Natural Resources					1					1
Office of State Revenue		4	11	3	1				3	22
Optical Dispensers Licen. Board		1				1				2
Parole Board of N.S.W.		1								1
Pastures Protection Board		6	4	1				1	2	14
Planning Department			3						1	4

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPPE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Protective Office			1							1
Public Prosecutions Office	1		1						1	3
Public Trust Office	2	1	5	1					1	10
Public Works	1	4	4	2		1			5	17
Real Estate Valuers Registration Board		1								1
Registry of Births, Deaths & Marriages		1	6	6		1				14
Rental Bond Board			1							1
Residential Tenancies Tribunal	1									1
Riverina Murray Institute of Higher Education		1		1						2
Road and Traffic Authority		32	49	13	4	2		1	18	119
Sport & Recreation								1		1
Sporting Injuries Committee									1	1
State Authorities Super Board		4	7	7					4	22
State Bank		3	3							6
State Compensation Board			1	2					2	5
State Development Department		1								1
State Lotteries Office			1						2	3
State Pollution Control Commission		3	3			1			1	8
State Rail Authority		13	25	11		2		3	9	63
State Transit Authority		4	2	2	1				2	11
Strata Titles Office	1	1	3							5
Sydney Market Authority			1							1
Technical & Further Education Department	1	2	6	1	1				1	12

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPFE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Totalizator Agency Board		1			1					2
Tourism Commission of NSW									1	1
University of Newcastle			2							2
University of New South Wales		1	2						1	4
University of Sydney			3							3
University of Technology		1								1
Valuer Generals Department		1	4		1					6
Water Board		8	29	9	1				3	50
Water Resources			1	1		1		1	4	8
Zoological Parks Board of New South Wales									1	1
	44	344	619	176	35	29	7	29	291	1574

Less Current as at 30/6/88	284
Total Received	1290

COUNCILS

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPPE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Albury City			4						1	5
Armidale City	1		1		1					3
Ashfield Municipal			1		1			1		3
Auburn Municipal		1	2		2				1	6
Ballina Shire		1	2		1				1	5
Bankstown City		1		1						2
Bathurst City								1	1	2
Baulkham Hills Shire		7	14	1					10	32
Bega Valley Shire		2	10						1	13
Belligen Shire			3		1					4
Berrigan Shire		1								1
Blacktown City	1	4	6	2					1	14
Bland Shire									1	1
Blayney (Abbatoirs) County			1							1
Blue Mountains City	1	3	7	2					2	15
Botany Municipal		1	2							3
Broken Hill City			3							3
Burwood Municipal		1								1
Byron Shire		2	4						1	7
Cabonne Shire		1	2	2					2	7
Camden Municipal			1							1
Campbelltown City			4						3	7
Canterbury Municipal		2	3					1		6

COUNCILS

AUTHORITY	(NJ)	(DECO)	(DECH)	(RES)	(NPPE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Carrathool Shire		1							1	2
Casino Municipal			1							1
Central Darling Shire			1	1						2
Cessnock City		2	2						2	6
Cobar Shire		1						1	1	3
Coffs Harbour City		3	2		1				4	10
Concord Municipal					1					1
Cooma Monaro Shire			1							1
Coonabarabran Shire		1			1					2
Coonamble									1	1
Copmanhurst Shire									1	1
Cowra Shire			1							1
Crookwell Shire									1	1
Deniliquin Municipal			1							1
Drummoyne Municipal		1	1							2
Dubbo City									1	1
Dumaresq Shire									1	1
Dungog Shire			1							1
Eurobodalla Shire		3	3				1			7
Evans Shire									1	1
Fairfield City		2	1	1		1				5
Forbes Shire		1	1							2
Glen Innes Municipal			1		1					2

COUNCILS

AUTHORITY	(NJ)	(DECO)	(DECH)	(RES)	(NPFE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Gloucester Shire		1								1
Gosford City		6	9	2	2				3	22
Grafton City			1						2	3
Great Lakes Shire		3	4	1					1	9
Greater Lithgow City		1	1	1						3
Greater Taree City		2	10	1						13
Griffith Shire								1		1
Gunnedah Shire			1						1	2
Hastings Municipal		2	4	2	1				3	12
Hawkesbury Shire			3						2	5
Holroyd Municipal			1	1						2
Hornsby Shire		1	6						3	10
Hume Shire			2						1	3
Hunters Hill Municipal			1							1
Hurstville Municipal			3						1	4
Illawarra County			1					1		2
Inverell Shire		1								1
Kempsey Shire		3	1		1					5
Kiama Municipal						1				1
Kogarah Municipal		1							1	2
Ku-ring-gai Municipal		6	12			1		1	5	25
Lachlan Shire		1								1
Lake Macquarie City		5	14	2	3				2	26

COUNCILS

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPPH)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Lane Cove Municipal		3	1							4
Leichhardt Municipal		2	3			1			1	7
Lismore City		2	1					1	1	5
Liverpool City			4						1	5
Lockhart Shire		1								1
Lower Clarence County		1	4							5
Maclean Shire		1	5							6
Maitland City		1	1							2
Manly Municipal		1	4							5
Marrickville Municipal	1	1	5						3	10
Monaro County				1						1
Moree Plains Shire			2							2
Mosman Municipal		3	2						1	6
Mudgee Shire			3	1					25	29
Mulwaree Shire		1							1	2
Murrumbidgee Shire		1	1							2
Muswellbrook Shire			1	1		1				3
Nambucca Shire			1							1
Narrabri Shire			2							2
Narromine Shire			1							1
Newcastle City		1	1		3				3	8
North Sydney Municipal		1	5	1						7
Northern Riverina County			2	1					1	4

COUNCILS

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPPE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Northern Rivers Electricity			2	1					2	5
Orange City		1							1	2
Oxley County			1							1
Parramatta City		6	2	1	2				1	12
Parry Shire		1	1	1						3
Peel Cunningham County									1	1
Penrith City		2	11	1					2	16
Port Stephens Shire		1	3	1					4	9
Prospect Electricity			1	1	2	1				5
Queanbeyan City		1								1
Randwick Municipal		1	3	1			1	1	10	17
Richmond River Shire		1	1						1	3
Rockdale Municipal		1	3						1	5
Rous County				1						1
Ryde Municipal		3	1					1	1	6
Severn Shire							1			1
Shellharbour Municipal			1						1	2
Shoalhaven City		5	3	3	3			1	2	17
Shortland Electricity			2							2
Singleton Shire			2							2
Southern Mitchell County			1							1
South Sydney City		1	1						2	4
Southern Tablelands County			1						1	2

COUNCILS

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPPE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Strathfield Municipal	1	3	3							7
Sutherland Shire		4	7	2					8	21
Sydney City		3	7	4					3	17
Sydney County		4	4	3					3	14
Tamworth City		1	2							3
Temora Shire			1							1
Tumut Shire								2 *	1	3
Tweed Shire		2	3	1	1			1	5	13
Ulmarra Shire			1							1
Uralla Shire			1							1
Wagga Wagga City		1	1							2
Wakool Shire			1							1
Walcha Shire	1									1
Walgett Shire			1							1
Warren Shire		1								1
Warringah Shire		5	18	2	2	1		1		29
Waverley Municipal		1	5			1				7
Willoughby Municipal			3		1				2	6
Woollhara Municipal		7	4	1	2				2	16
Wollondilly Shire			4	1					2	7
Wingecarribee Shire		2	8		1				5	16
Wollongong City		2	10			3			8	23
Wyong Shire		2	11			1			1	15

COUNCILS

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPPE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Yarrowlumla Shire			1							1
Yass Shire			1						1	2
	6	157	347	50	34	12	3	15	172	796
Less Current as at 30/6/88										163
Total Received										633

* One report covered 2 cases of wrong conduct

SUMMARY

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPPE)	(DIS)	(NWC)	(WC)	(CURR)	TOTAL
Departments/Statutory Authorities	44	344	619	176	35	29	7	29	291	1574
Unscheduled Bodies (Outside Jurisdiction)										
I. Australian Government Departments	92									92
II. Employer/Employee	51									51
III. Private Organisations/Individuals	202									202
Local Government Authorities	6	157	347	50	34	12	3	15	172	796
Total from All Sources	395	501	967	226	69	41	10	44	463	2715
Less Current as at 30.6.88										447
Total for year ended 30.6.89										2268

(NJ)	:	No Jurisdiction
(DECO)	:	Declined at Outset
(DECE)	:	Declined after Preliminary Enquiries
(RES)	:	Resolved after Preliminary Enquiries
(NPFE)	:	No prima facie evidence of wrong conduct
(DIS)	:	Discontinued after Investigation
(NWC)	:	No Wrong Conduct after Investigation
(WC)	:	Wrong Conduct after Investigation
(CURR)	:	Current as of 30th June 1989

POLICE COMPLAINTS

Category	Outcome	Number
NOT OR NOT FULLY INVESTIGATED	Declined	1318
	Conciliated	115
	Discontinued before Ombudsman reinvestigation	67
	Discontinued during Ombudsman reinvestigation	-
NOT SUSTAINED	Not sustained finding without reinvestigation	91
	Deemed not sustained - no request for reinvestigation (Section 25A (2))	244
	Deemed not sustained by Ombudsman - Ombudsman decided reinvestigation not warranted despite request	31
	Not sustained finding following reinvestigation	3
SUSTAINED	Sustained finding without reinvestigation	83
	Sustained finding following reinvestigation by Ombudsman	8
	TOTAL	1960

THE OMBUDSMAN OF NEW SOUTH WALES

FOURTEENTH ANNUAL REPORT

CASE NOTES

CASE NOTES

TABLE OF CONTENTS

COMPLAINTS AGAINST DEPARTMENTS AND AUTHORITIES

BOARD OF FIRE COMMISSIONERS
Retrospectively yours 1

DEPARTMENT OF EDUCATION
Adding insult to injury 2
IQ tests 5

DEPARTMENT OF FAMILY AND COMMUNITY SERVICES
Problems for child carers 6
Child abuse? Or Mongolian Spots? 7

DEPARTMENT OF HOUSING
A reasonable compromise? 9
Don't fence me in 11
Transformer problem 12

HUNTER DISTRICT WATER BOARD
Passing the buck? 12

DEPARTMENT OF LANDS
Premature transfer 14
Please release me 15

LEGAL AID COMMISSION
Legal aid denied 16

LONG SERVICE PAYMENTS CORPORATION
Lost in space? 17

DEPARTMENT OF MOTOR TRANSPORT
Court out by the jurisdiction 18
Post Office box blues 21
Defective car passed 23
Another defective car passed. 24
King-hit by a king pin 25

ROADS AND TRAFFIC AUTHORITY
Licence delays 26

STATE AUTHORITIES SUPERANNUATION BOARD
The involuntary superannuation contributor 27
For services previously rendered 28

STATE RAIL AUTHORITY
Gone in a slash! 29
The wrong boy 30

WATER BOARD
Account problems 31

COMPLAINTS AGAINST COUNCILS

BYRON SHIRE COUNCIL
A nice walk, but 33

CABONNE SHIRE COUNCIL
Quick action 33

CANTERBURY MUNICIPAL COUNCIL
Ombudsman invited to ignore illegality 34

CESSNOCK CITY COUNCIL
Two heads better than one 35

GREAT LAKES SHIRE COUNCIL
Conflict of interest 37

HASTINGS MUNICIPAL COUNCIL
Methane in their madness? 39

NYMBOIDA SHIRE COUNCIL
Problems with open drain 40

WARRINGAH SHIRE COUNCIL
Misleading advice about garbage tendering 42

WOLLONGONG CITY COUNCIL
No pigeon fancier 43

WYONG SHIRE COUNCIL
The best laid plans 44

COMPLAINTS AGAINST DEPARTMENT OF CORRECTIVE SERVICES
Strike remission overlooked 46
Problems with remissions - but, no more 46

COMPLAINTS AGAINST POLICE
Complaint of assault rejected 47
Solicitor's reputation destroyed. 49
Under arrest, or voluntarily assisting with enquiries? 52
Terms of endearment 54
Listening in 57
Shades of the Bermuda Triangle 59
The bargain (or , Oh what a tangled web . . .) 64

Lone constable shows the way and saves the day ! 67
Feudin' , fussin' and a-fightin' 70
Help from an unexpected quarter 72
Vehicle found, but not reported. 76
Rifle recovered , but 77
Love thy neighbour 78
Favoured treatment for Member of Parliament ? 79
Early release 81
Where's my hat ? 83
Neat bookwork 84
Once bitten 85
The police officer who didn't know the road rules 86
Error not fatal. 87
Disclosure of criminal record 88
Father and son. 89
Not for the want of trying ! 90
Tools seized, then lost. 93

COMPLAINTS AGAINST DEPARTMENTS AND AUTHORITIES

BOARD OF FIRE COMMISSIONERS

Retrospectively yours

The Office investigated a complaint by the President of a private association of child care centres about the practice of the Board of Fire Commissioners in charging a fee for an inspection of child care facilities. The Child Welfare Regulations then in force made provision for the Board to inspect child care centres for the purposes of licensing, but they remained silent on whether the Board had the right to charge a fee for its services. A public authority can charge a fee for service only when authorised by legislation to do so.

Investigation disclosed that in 1966 the Child Welfare Department (now Department of Family and Community Services) reached agreement with the Board to revise that part of the Child Welfare Act which dealt with the licensing of day care centres. Regulations were proposed concerning fire precautions to be maintained by such centres. The agreement provided for an annual inspection of child care centres by the Board and for an annual inspection fee to be paid. At the request of the Child Welfare Department, the Board decided to waive the fee for child care centres run on a non-profit basis. As a result, only commercially run child care centres paid the annual inspection fee.

In fact, the Board had no legislative basis for charging inspection fees which, in July 1988, amounted to $46 per child care centre. In the three years July 1985 to July 1988, approximately $44,206 in fees had been collected by the Board. The preliminary finding reached by this Office was that the Board had charged annual inspection fees under a mistake of law, and it was recommended that the $44,206 collected

should be reimbursed to the child care centres concerned.

Before the report became final, the Board advised that the government had passed retrospective legislation, the Fire Brigades (Amendment) Act 1988, to validate the Board's previous actions in charging fees. In the light of this, the provisional recommendation that the money be reimbursed was not proceeded with.

DEPARTMENT OF EDUCATION

Adding insult to injury

The Sydenham-Bankstown Branch of the Challenge Foundation rented a building to the Department of Education in January 1985 when the Department assumed responsibility for a special school formerly operated by the Foundation. When the Department vacated the premises in May 1986, the Foundation discovered that the building had not been cleaned, some fixtures had been removed or damaged and some items of furniture and equipment belonging to the Foundation had been taken. As well, rent had not been paid and, when the Department failed to reply to its correspondence, the Foundation complained to the Ombudsman.

Preliminary inquiries established that there was substantial conflict between the Department and the Foundation about what had occurred. It also appeared that the Department's head office might have been misled by the regional office. A hearing under section 19 of the Ombudsman Act was held.

The Foundation had operated the Sydenham-Bankstown Special School for severely and profoundly intellectually handicapped children until the end of 1984. The Department assumed responsibility for the school

from the beginning of Term 1, 1985 and continued to operate the school in the same premises, which were rented from the Foundation.

Early in 1986, the school principal became concerned about the amount of dust in the school. Tests revealed an unacceptably high level of asbestos in the air. This was coming from an asbestos material sprayed on the underside of the roof of the building as a fire retardant when the building had been constructed many years earlier. On 1 May 1986, students were moved out of the school and accommodated at another school nearby. The Foundation advised the Department that its financial situation at that time precluded it from carrying out the work needed to remove the asbestos. On 2 June 1986 the Department advised the Foundation that the school would not return to the building.

When the school first moved out of the Foundation's building, the principal and her teachers took a "survival kit" of teaching materials, because they thought that the asbestos would be removed during the May school break. When it became known that the school would not return to the Foundation's building, further material was taken as it was needed. The majority of the school's supplies and equipment, however, remained in the building until demountable classrooms on nearby Department property were ready for occupation by the school. The principal said that the last of the school equipment was not removed from the Foundation's building until the end of October 1986. During the period from May to October 1986, she believed that the Department was leasing the building and she had made periodic visits to the building to ensure that there had been no damage by vandals. The principal believed that all of the equipment and furniture belonged to the Department and had taken it with her when the school moved into the demountable accommodation.

By the time the Acting Ombudsman held his inquiry, some of the issues had been resolved. The Department had paid rent to the Foundation,

for August, September and October 1986, in July 1987; but only after one of its legal officers had pointed out that equipment had been left in the building until October 1986, keys had been retained and the Department had not replied to the Foundation's correspondence about the matter.

The issue of cleaning the building had been overtaken by time, because the Foundation had commenced work to remove the asbestos. In October 1987 the Department paid the Foundation $6,368.40 for repairs to the building (removal of fixtures) and for the equipment belonging to the Foundation that it had taken. Nevertheless, the Department refused to explain to the Foundation how the amount of compensation for the equipment had been calculated.

The Acting Ombudsman said that the Department's procedures, when entering into the agreement with the Foundation for the rental of its building and when terminating that agreement, had been inadequate. The form of the agreement had failed to adequately set out the rights

and obligations of each of the parties. Apart from a partial list of equipment prepared by the Foundation, no inventory had been taken of equipment in the premises that did not belong to the Department. The Department had failed to properly terminate the agreement; neither the school principal nor the Foundation had been advised that the agreement had been terminated. The Department, when it removed the students, had failed to remove equipment or renegotiate the terms of the agreement to cover storage of material and equipment in the building. Letters to the Department about the problems had not elicited a response. When the Foundation complained about rent, the removal of its equipment and damage to fixtures, the Department had taken an unreasonably long time to respond. The Foundation should not have had to wait until July 1987 to be paid outstanding rent, nor until October 1987 to receive compensation for building repairs and equipment.

In response to the Ombudsman's report, the Department improved its administrative procedures, and devised new forms of agreement with voluntary associations which clearly set out the rights and obligations of each party. Proper inventories, which identify the equipment which is to be bought by the Department and those items which are to be retained by the governing body of the voluntary association, are now taken. Negotiations between the Department and the Foundation ultimately resolved the outstanding dispute about equipment and compensation.

IQ tests

Details of an investigation into allegations that the Department of Education did not have in place appropriate procedures for notifying parents before their children underwent IQ testing, and did not explain to them the uses of nor provide them with test results, were set out in

the 1986-87 Annual Report (Case Notes; pp3-5).

Although the Deputy Ombudsman's final report was issued in March 1987, no response was received from the Department of Education until mid-1988.

By this time, a new Minister for Education was in charge of the portfolio, and various policy announcements, which rendered much of the information in the Deputy Ombudsman's report obsolete, had been made. The Department, however, conceded that there had been a lack of comprehensive guidelines on the use and application of IQ tests; new guidelines had been issued in September 1987.

The new guidelines outlined the principle that IQ tests would be used only as one component of a broader profile, and spelled out procedures for advising parents, gaining their consent to a test and advising them of test results, as had been recommended by the Deputy Ombudsman.

DEPARTMENT OF FAMILY AND COMMUNITY SERVICES

Problems for child carers

Two similar cases dealt with by the Office have highlighted the consequences that the actions of officers of the Department of Family and Community Services can have for child carers.

Mrs B and her partner Mr H were care givers with the Family Day Care Scheme, as was Mrs F. As a result of a notification of sexual abuse against children in their care, both households were removed from the Family Day Care register. In both cases the children of the care givers had been accused of sexually abusing another child. In the case of Mrs B and Mr H, their children had been interviewed without their knowledge or consent.

While all carers registered by Family Day Care are approved by the Department, they are not actually "licensed" in the same way as child care establishments are. In fact, a person must be deregistered by the Family Day Care Co-ordinator, rather than by a departmental officer, even though this is sometimes done as a result of a departmental recommendation.

In neither case were the child carers given the opportunity to respond to the charges against them; in neither case were the department's reasons for recommending deregistration clearly conveyed to the people concerned; in neither case was the role and responsibility of the Department in relationship to the Family Day Care Scheme made clear to either the carers, the co-ordinators or its own officers. No one was fully aware that the final decision on registration of a day-carer rests with the Family Day Care Co-ordinator.

At no stage was the concern or good faith of the departmental officers in question. They had acted at all times with the interests of the children at heart. Unfortunately, they had acted somewhat in ignorance of the need to afford natural justice to all concerned.

In both cases, the officers involved were spoken to by the Department, existing guidelines were re-examined and apologies were sent to the care givers. More importantly, reviews of the care givers' suitability for re-registration were instigated. In the case of Mrs F, a claim for monetary compensation for loss of earnings resulted in Treasury approval being given to make an ex gratia payment of $20,000 to her.

Child abuse? Or Mongolian Spots?

In their text " Principles and Practice of Dermatology " (2nd edition,

1984; p125), de Launey and Land describe Mongolian Spots as poorly defined, slate grey, blue to brownish macules - (i.e. a circumscribed area of altered skin colour which is not palpable) - present at birth, which generally occur in the lumbosacral region (i.e. lower back) or buttocks. They go on to say:

> Up to 10 per cent of Australian infants have one or more of these macules, and the incidence exceeds 80 per cent in infants born to black or oriental parents. The haevus (i.e. pigmented area) darkens in colour for a time after birth, but later fades and usually disappears before the child is 10 years old.

In mid November 1988, a mother placed her 8 month old son in a local child care centre. Early in December, she was telephoned at work and asked to come immediately to the centre. There, officers of the Department of Family and Community Services asked her questions about certain marks on her child. The mother said that the marks on her child were simply mongolian spots, a condition characteristic of some children from certain Asian backgrounds. The officers nevertheless decided to issue a notice requiring the mother to submit her child for a medical examination to determine whether her son had been physically abused.

Before an officer of the Department can require a parent to submit their child to a medical examination, the Children (Care and Protection) Act requires that the officer " believe on reasonable grounds " that the child has been abused. Despite the mothers explanation of the marks on her son, the medical examination proceeded against her wishes. It confirmed the mother's claim that the marks on her son were mongolian spots.

After the mother complained to this Office, Ombudsman officers

interviewed the Departmental officers involved. The Department's Centre Manager was also present during the interviews. The Ombudsman's officers formed the view that the Department's staff were unclear about the terms of the legislation governing the issue of medical examination notices. The Centre Manager, however, referred to recent Departmental policy in that regard which, among other things, said:

> A medical examination notice should be served in all instances where the care of the child is an issue and it is considered necessary to have a child medically examined for the purposes of determining whether abuse has occurred, obtaining evidence in support of a child's disclosure, relieving a child's anxiety about the medical effect of the abuse that he-she has suffered, or for any other reason that has as its aims the protection of the child.

The policy, regrettably, did not explain the lawful requirement that before Departmental officers can issue a medical examination notice, they must " believe on reasonable grounds " that a child has been abused.

The Ombudsman's Office has asked the Director-General of Family and Community Services whether he believes that the policy provides his officers with sufficiently clear guidance in this important area and is awaiting his response.

DEPARTMENT OF HOUSING

A reasonable compromise?

Waiting to reach the top of the Department of Housing's waiting list may often seem to take an eternity. And in many cases there are good

reasons, difficult though they may be for the person waiting to accept, for amending waiting times to the disadvantage of the applicant.

One such case arose during the year. A family from Sydney's inner western suburbs applied for housing in 1975 and, when their turn was reached, were offered a townhouse in the western suburbs. They did not consider the house to be suitable and refused the offer. No further offers were forthcoming from the Department and there the matter rested - for twelve years.

In 1987, after the couple had another child, they contacted the Department and were told on several occasions and by various staff members that there was no record of their application. Eventually their name was traced but no documents or records could be found. The family subsequently re-applied for housing on the advice of Departmental staff, and had their waiting time re-assessed. At the same time, they were asked to supply income details for as far back as possible. As a result, their waiting time was back-dated to November, 1986. The couple felt that this was unreasonable and complained to the Ombudsman.

Enquiries of the Department of Housing revealed that, since the Department had received no contact from the family following their refusal of the offer of housing in 1975, it had been assumed that they no longer required housing, and their file had been destroyed. In addition, on assessing the family's income over the period from 1974 to 1989, it was found that they were ineligible for housing, on the basis of their income, from 1981 until November 1986, and this prevented eligibility being back-dated beyond the latter date.

In this case the Ombudsman found that the Department had acted in accordance with its procedures and that there was no basis for an investigation of the complaint.

Don't fence me in

A couple lived in a Department of Housing home with their disabled son and daughter. Their daughter was intellectually disabled and an epileptic, but she was extremely physically agile - agile enough to repeatedly climb the fence into the neighbours' swimming pool. Despite additions to the fence, appeals to the local council and applications for assistance to the Housing Department, little had been done to overcome the problem, and the couple complained to the Ombudsman.

Preliminary enquiries disclosed that the Department was unwilling to further upgrade the fence, because it already complied with council regulations, but it carried out some minor repairs. More importantly, the Department said that it would act very quickly on the couple's application for transfer to a new house.

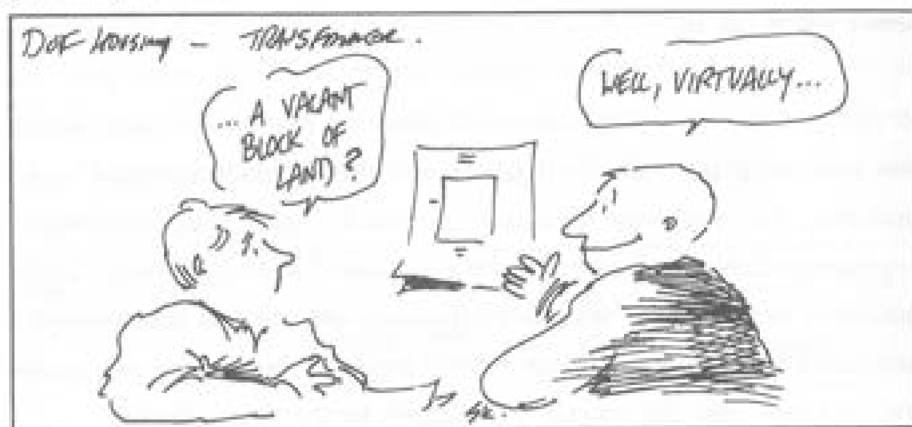
Less than three months after making their initial complaint, the couple had been given a transfer to a safer property, much closer to their

children's special schools.

Transformer problem

A couple complained that, after they had purchased land from Landcom and had their building application approved, but before they could build, an electricity substation was erected on their property, in the area proposed to be used for driveway access. Enquiries with the Department of Housing indicated that the location of the transformer had not been included on the sales plan, and that the sales plan was not the same as the plan registered with the Land Titles Office.

The Department of Housing approved an ex-gratia compensation payment of $6000 to cover devaluation of the property, and is still negotiating a suitable amount to cover valuation fees and legal costs.



HUNTER DISTRICT WATER BOARD

Passing the buck?

" Under protest " a golf club paid over $3,000 to the Hunter District Water Board to cover the cost of relocating one of the Board's access-

holes. The club's complaint was based on its contention that the Board had no power to charge a fee for relocating an access-hole.

The club was extending its premises and proposed to build the extension over the Board's access-hole to the sewermain. Because the Board required access to the main for maintenance, it planned to move the access-hole further along the sewermain to the club's car-park. The Board notified the club that, not only was the club liable for the cost of relocation, but for the cost of restoring the bitumen surface of the car-park as well.

The Ombudsman declined to investigate the complaint because section 19 of the Water Supply Authorities Act provides:

> If a person places a structure or other thing in or near a work of an Authority in such a manner as to interfere with the work, an Authority may -
>
> (a) demolish and remove the structure or thing;
>
> (b) repair the work; and
>
> (c) recover the cost of doing so as a debt owing to the Authority by the person who placed the structure or thing there.

Although it might have appeared to the club that the Board was "passing the buck", its actions were clearly quite legal and, arguably, reasonable.

DEPARTMENT OF LANDS

Premature transfer

Since 1982, Mr H had held a Permissive Occupancy (PO) over a piece of rural land. In 1987 both he and his wife became ill and spent lengthy periods in hospital. On regaining his health, Mr H began to bring his affairs up to date. When he telephoned the local Lands Office to check whether the rental for the PO was due and whether an account had been sent out, he was told that the PO had been transfered to another person. When the Lands Office failed to respond to his several enquiries as to how and why this had occurred, Mr H complained to the Ombudsman.

The Lands Office said that notices for the rental of the PO sent to Mr H had been returned marked "Box Closed" or "Left Address" and the local council had advised that Mr H had sold his property to another person. The Lands Office contacted the purchaser and he said that Mr H had agreed to the transfer of the PO.

In fact, Mr H had sold only some of his holdings and had not agreed to transfer the PO. The PO did not adjoin the property which had been sold and was separated from it by some distance and several roadways; there was no connection between the two parcels of land.

Mr H was able to produce information relating to rental payments which showed that the transfer had been executed at a time when rental had been paid up.

The Lands Office took immediate steps to rectify the situation and to restore the PO to Mr H.

Please release me

Mr and Mrs S had a problem quite the opposite to Mr H's. Since early 1987, they had been seeking to terminate a Permissive Occupancy that they held on some waterfront land.

Despite their supplying prompt proof of compliance with all conditions required by the Department of Lands prior to the termination date, they continued to receive rate notices for the occupancy, which proceeded on to default summonses when the rates were not paid.

A phone call from the Ombudsman's Office to the Department of Lands in February 1989 produced the information that the Department had been " sitting " on the paperwork for the termination " in case the S family changed their minds ". After reference was made to the voluminous, two-year correspondence from Mr and Mrs S, which indicated in strong, even strident, terms their unequivocal wish to terminate the occupancy, a relaxed Lands Department official acted that very day to terminate the occupancy with effect from 1987 and to waive all " outstanding " rates.

LEGAL AID COMMISSION

Legal aid denied

A solicitor complained on behalf of his client about the failure of the Legal Aid Commission to give effect to a determination by the Legal Aid Review Committee that legal aid be granted to his client.

The matter was investigated and the Ombudsman concluded that the Commission had failed to provide the Commission's solicitor handling the application with details of the Commission's retrospective grants policy. This provided that legal aid could not be granted in relation to court proceedings which had been concluded, such as in the complainant's case.

The complainant had given written notification of the hearing date of the matter to the Commission's solicitor; however, because he was unaware of the policy and of the significance of the hearing date, the solicitor had not passed that information on to the Review Committee. Had he done so, the appeal could have been treated as an urgent matter and the Review Committee would have been in a position to make an unimpeachable decision by phone, prior to the commencement of the proceedings.

The Commission argued, on the basis of a general legal opinion obtained from the Crown Solicitor, that it was not obliged to give effect to the Review Committee's decision, since there were no proceedings current at the time and, accordingly, nothing for the Review Committee to determine. Based on his own legal advice on the matter, the Ombudsman took the view that it was not appropriate for the Legal Aid Commission to decide that the Review Committee's decision had no effect; the Commission should have either given effect to the decision

or approached the court for a determination.

The Ombudsman found the conduct of the Commission wrong, because it had acted unreasonably by failing to implement adequate practices and procedures to ensure that all of its legal staff and all Legal Aid Review Committees were advised of the hearing dates of court proceedings pertaining to legal aid applications; and that the Commission was mistaken in law and had acted " ultra vires " by failing to give effect to the Review Committee's decision.

The Ombudsman recommended that the Commission implement procedures to ensure that its legal staff and the Review Committee be kept fully informed of all current legal aid policies relevant to legal aid applications; that hearing dates be provided to the Review Committee as a matter of course; and that the Commission specifically request applicants to supply such dates and point out the consequences of not doing so. The Ombudsman further recommended that the Commission make representations, through the Attorney General, to the Treasurer for an ex-gratia payment to achieve a refund of expenses incurred by the complainant's client as a result of the failure of the Commission to give effect to the Review Committee's grant of legal aid.

In consultation with the Ombudsman, the Attorney-General agreed with the substance of the report and with the recommendations.

LONG SERVICE PAYMENTS CORPORATION

Lost in space?

The complainant's son, in January 1987, lodged an appeal against the Corporation's determination of his registration date (the date he started work as an electrician); he claimed that the determined date was

incorrect. The Corporation responded in June 1987, but then the matter disappeared into a bureaucratic " black hole ".

In August 1987 the complainant wrote to the local Member of Parliament about the matter and those representations were acknowledged by the Minister for Industrial Relations in November 1987. Thereafter, there was silence. By October 1988, the complainant was aggrieved enough to complain to the Ombudsman.

It did not take long for the Corporation to respond this time. In mid-December 1988, almost two years after lodging his initial objection, the complainant's son had his registration date extended by 129 days. As well, the Ombudsman's Office received a detailed explanation (involving lost files, staff resignations and holidays and the participation of many officers) for the delay from the Corporation.

The Corporation offered the assurance that improvements to its procedures for registration and follow-up of correspondence would be instituted.

DEPARTMENT OF MOTOR TRANSPORT

Court out by the jurisdiction

Sometimes, not all of the issues involved in a complaint dealt with by the Office can be satisfactorily resolved. This is usually because the Ombudsman lacks jurisdiction to investigate some conduct of public authorities. A case dealt with during the year illustrates the problem.

After a hearing of two traffic offences at a Sydney Local Court in April 1988, the court administration advised the Department of Motor Transport (DMT) that our complainant, Mr W, was the person convicted. The information passed on by the court, however, was

wrong!

The person convicted, Mr H, was an acquaintance of Mr W. Mr H had borrowed Mr W's car from a mutual friend who had the care of the vehicle. Mr H managed to get himself arrested for failing to stop after an accident and exceeding the blood alcohol limit. To avoid being charged under his own name, Mr H identified himself as Mr W by producing Mr W's spare wallet from the glove box of the car.

Mr W was blissfully unaware of these events until a few days before the hearing, when a pang of conscience struck our evil-doer and Mr H confessed his wickedness to Mr W. A forgiving soul, Mr W asked only that, together, they attend court to clear up the matter. They duly appeared before the magistrate who, upon hearing the case of substituted identity, found Mr H guilty and dismissed the charges against Mr W. Mr W naturally thought that his problem was solved: alas, from this point our tale of administrative woe takes a distinct downturn. Over four months after the hearing, Mr W received a letter from the DMT telling him that his driver's licence had been cancelled for twelve months from the date of <u>his</u> conviction.

The Ombudsman became involved when Mr W complained that, not only had the DMT cancelled his licence for twelve months but, after he

had both visited and written to the Department explaining the situation, the DMT had asked him to submit to a fingerprint check at his local police station. Still worse, as a dutiful citizen, Mr W had not driven his car since receiving the DMT letter in August 1988. Not only did Mr W suffer the inconvenience of having to use public transport in rural New South Wales, but word had started to spread in his town that he had convictions for driving offences.

All this had come to pass because the court had passed on incorrect information to the DMT. The court had told the DMT that the name of the person convicted - " Mr H, " - was just an alias used by Mr W. The DMT had relied on the accuracy of the court's information. In November 1988, two months after the letter from the DMT and over six months after the hearing, Mr W received advice from the court in Sydney telling him what he already knew, namely, that he **had not been convicted** of the two offences in April 1988.

Mr W's licence was subsequently renewed by the DMT and that aspect of Mr W's complaint was thus resolved. The Ombudsman was not able to investigate the remaining aspects because of a problem of jurisdiction.

If the sole responsibility for Mr W's treatment had rested with the DMT, then the Ombudsman would have been able to conduct a formal investigation and make a report. The Ombudsman Act provides that "wrong conduct" includes conduct that is "unreasonable, unjust" or "based wholly or partly on a mistake of fact". But that assessment could only fairly be applied to the conduct of the court administration in providing unverified and incorrect information to the DMT.

The Ombudsman Act, however, makes no distinction between administrative and judicial functions of courts. The entire conduct of courts and of persons associated with them is out-of-bounds for the Ombudsman.

Consequently, complaints like Mr W's cannot be impartially investigated, and the efficiency and responsiveness which often results when bureaucracy is subject to the Ombudsman's review has less opportunity to flourish in the administration of the courts.

Post Office box blues

Mr T operated his business from his residence but, because he feared that mail delivered to his residential address might be stolen, he had made arrangements for all of his mail to be sent to a post office box.

In 1987 Mr T began exchanging correspondence with the Department of Motor Transport in an attempt to convince the Department that it should send his driver's licence to the post box address. Over time, the correspondence became fairly heated but the Department continued to send all of its replies to Mr T's residential address. Finally, in March 1988, the Department provided Mr T with details of the reasons it would accept for the use of post box rather than residential addresses.

In July 1988 Mr T complained to the Ombudsman. He provided copies of all correspondence, together with a legal opinion that he had sought about whether the Department's actions were adequate.

Preliminary enquiries were made and shortly afterwards an officer of the Department telephoned and said that, as a result of numerous complaints about the issue, the Minister for Transport had asked the Department to review its policy on the use of post box addresses.

In its written reply, the Department said:

> ..... initially the Department considered that the only reasons which justified the continued use of a licensee's (or owner of a registered vehicle) PO Box address on its records were where he or she:

(a) resides in an area in which Australia Post (or its mail contractor) has no delivery service;

(b) claims, with police confirmation, to be at risk of physical violence;

(c) is an itinerant worker.

However, it has become apparent following introduction of the Department's new policy that inconvenience is being caused to licensees and owners of registered vehicles who have mail delivery difficulties. The Department has now recognised this problem and expanded the criteria to include the following situations where the licensee or owner of a registered vehicle:

(d) has problems with the security of his/her mail e.g. mail stolen or interfered with;

(e) is away from his/her premises frequently e.g. interstate or overseas;

(f) has a high volume of mail e.g. private and business mail directed to one address;

(g) has dual residence e.g. medical staff and other workers who live in, part time, at their place of employment.

The complainant's reason for seeking to use a post box address fell under (d) of the criteria. The problem was resolved and the Ombudsman's enquiries were concluded.

More recently, however, the Office received several complaints which appeared to indicate that the new procedures were not adequately known to some Departmental staff. In response to a telephone enquiry, the Department issued an Urgent Newsflash to all Motor Registries, drawing the attention of staff to the new criteria.

Defective car passed

Ms H complained about the failure of the Department of Motor Transport to thoroughly inspect a motor vehicle before passing it for registration.

Ms H bought a 1968 Toyota Corona from a private person. The car had been inspected by the Department's Motor Registry at Beverly Hills two weeks previously and had been passed for registration. When driving home after buying the car, Ms H noticed that it had some mechanical problems. She arranged for an NRMA inspection; this disclosed ten defects that required immediate repair.

Ms H later took the car to the Department's Motor Registry at Cammeray where a defect notice was issued. The Department's Chief Inspector considered that the defects found in the car would have been present, and should have been detected, when the car had first been inspected for registration.

Preliminary inquiries showed that the matter was already under investigation because Ms H had also complained to the Department. The departmental report on the investigation was sent to the Department's Chief Solicitor for advice about the payment of compensation to Ms H and about possible disciplinary action against the officer who had passed the car fit for registration. The Chief Solicitor said that the facts pointed to the Department's failure to exercise a proper duty and standard of care in the registration of the vehicle.

The Department successfully negotiated with Ms H about the payment of compensation. Consideration was also given to the need for disciplinary action against the inspection officer involved.

Another defective car passed.

A man bought a car in a private sale on the basis of a " pink slip " that had been issued to the previous owner by an Authorised Inspection Station. The car had been passed as roadworthy.

The " pink slip " had been issued on 11 August 1988 but, to be ready for the forthcoming renewal of the car's registration, on 24 August 1988 Mr S had the car inspected by one of the Department's motor vehicle registries; a substantial number of faults was found.

When preliminary enquiries were made, the Department acknowledged that the first " pink slip " may have been improperly issued, and said that the Authorised Inspection Station was under investigation. Although the complainant accepted this information, he claimed that the Department seemed unwilling to keep him informed of the outcome of its investigation of the Authorised Inspection Station.

This matter was taken up with the Department and, after issues relating to confidentiality were resolved, the Department agreed that complainants were entitled to be kept informed. The Department later provided formal advice of its new policy in this regard.

King-hit by a king pin

Mr G alleged that he had been obstructed in re-registering his truck because departmental inspectors at his local Motor Registry claimed that there was excessive movement in one of the king pins. He added that his attempts to find out how much movement, in fact, was allowed in the king pins of his truck had been frustrated because different sections of the DMT had given him different and conflicting advice.

The examining inspectors rejected the king pin in accordance with Rule 104.12 of the Rules for Authorised Inspections Stations because there was more than 3 mm of movement in it. Mr G took his own measurements with a dial gauge and found the movement to be under the maximum amount allowed.

Mr G claimed that the maximum movement allowed was really 6 mm in any case. He rang a number of registries that, based on the wording of another Rule, 104.09, supported his claim. Nevertheless, a number of inspectors of varying rank who inspected the truck agreed with the original examining inspector. This process went on for a number of days, with Mr G re-presenting his truck, only to have it rejected.

It was clear that there was confusion within the Department about the correct rule to apply (104.12 or 104.09), how the movement should be measured and what exactly the rules meant. As well, the Departmental inspectors had measured the movement with a ruler and this had encouraged inaccuracy when the measurement was being taken. A ruler was the standard measuring equipment supplied to inspectors.

Investigation by this Office found that there had been excessive delay by the DMT in intervening and clarifying the issues of the allowable amount of freeplay in the king pin following Mr G's inquiries. As well,

the delay of 12 months by the DMT in issuing an amended instruction to clarify the amount of movement allowable in a king pin and the correct measurement position was unreasonable.

In accordance with the Ombudsman's recommendations, the DMT amended sections of the rules to remove possible misinterpretations; conducted a review of the remainder of the rules and invited inspectors to inform instructors of the problems that they came across; and issued a measuring device which would enable inspectors to measure freeplay at the wheel rim to the nearest millimetre.

Mr G was later compensated for the loss of earnings he suffered while the Department delayed the registration of his truck for alleged non-compliance with the rules.

ROADS AND TRAFFIC AUTHORITY

Licence delays

Early in 1989, the Government decided to cancel the licences of some thousands of people who had not paid traffic and parking fines. This resulted, inevitably, in a considerable delay in sending out correspondence because the work load had been suddenly and enormously increased.

A number of people who had lost the necessary number of points were required to accept a probationary licence. However, because of the delay, they had not been issued with a probationary licence before their ordinary licence became due for renewal. In one case, a man had to pay the normal renewal fee of $23 to remain licensed until his probationary licence was issued; he had to pay another $100 for the latter.

The Roads and Traffic Authority acknowledged the problem and promptly gave the man a $23 refund.

STATE AUTHORITIES SUPERANNUATION BOARD

The involuntary superannuation contributor

Mr A joined the public service when the old superannuation scheme was still in force, and his superannuation contributions were deducted from his pay. Because he was joining late in his working life, those deductions were quite large. Five months later, he was required to undergo the customary medical examination; three months after that, he learned that he had failed the medical. He immediately lodged an appeal but, through no fault of his own, it was more than 13 months before the appeal was finalised. He lost the appeal and was refused membership of the Superannuation Fund. Several months later, he managed to obtain a refund of his superannuation contributions, some $7,600: but the Superannuation Board declined to pay him any interest on those contributions, saying that it had no legal power to do so.

Mr A complained to the Ombudsman that, as he had never received any benefit from the Superannuation Fund, and since his contributions were compulsory, he should receive some compensation for the substantial amount of interest he had foregone.

In responding to enquiries by this Office, the State Authorities Superannuation Board said that recent legislative changes now allowed the Board to pay interest in certain circumstances. The Board agreed to pay Mr A interest on his contributions from the date of the decision to refuse him membership until the date the contributions were actually refunded. This amounted to $355, but payment was made conditional

upon Mr A foregoing any further claim.

The Ombudsman's investigator spoke to the Board's legal adviser and then conducted some research. He discovered that Mr A had actually been eligible for some considerable benefits during the whole of the time that he was making superannuation contributions. For example, had he retired due to illness during that time, he would have been eligible for a fortnightly pension of up to $300, increasing annually in line with inflation. Had he died, his widow or his estate would have been eligible for certain benefits. The legal principle was set out by the New South Wales Court of Appeal in 1986: under the provisions of the legislation as it then was, a public servant was a member of the Superannuation Fund unless and until he or she was rejected for Fund membership in accordance with the rules.

Because Mr A had been a Fund member, he was obliged to abide by the Fund's rules, just as he had rights to certain benefits from the Fund. On this basis, the Ombudsman's Office took the complaint no further.

For services previously rendered

Mr F was retired from the State Rail Authority on medical grounds on 7 November 1987. His superannuation entitlements were computed from 1 July 1966 when he began work with the Authority. However, Mr F had previously worked for the Department of Transport, from June 1958 to April 1966, and prior to that with State Rail. When Mr F wrote to the State Authorities Superannuation Board in June 1988 about his previous service, he was told that it could not be recognised because his application had been received out of time.

Investigation by this Office found that the advice given by the Board to Mr F was wrong, because there was no "time limit" which prevented

the Board from considering the application made by Mr F. The relevant matter to be taken into consideration by the Board was whether there was any basis for recognising Mr F's non-continuous periods of employment with either public authority.

The Board later advised this Office that, pursuant to Sections 3(6) and 23 of the New South Wales Retirement Benefits Act, Mr F's " continuous " service would be deemed to have begun on 20 June 1956. Mr F, therefore, would be paid for an additional ten years service. Both the State Rail Authority and the Department of Motor Transport agreed to meet the additional costs associated with recognition of this service. The Board added that procedures manuals and departmental training of staff in manually computing such benefit entitlements had been put in place.

STATE RAIL AUTHORITY

Gone in a slash!

Mr W complained that the State Rail Authority had destroyed his fence, had illegally cleared a portion of his land and had delayed in reaching an appropriate settlement of the matter.

Enquiries showed that, although the Authority only held an easement over part of Mr W's land, its staff had cleared the entire block! Mr W, of course, was distressed to find his previously "scrub-like" block completely devoid of trees and shrubs. He sought to have that portion of his land outside the easement restored to its former condition, and he asked the Authority to re-plant trees of similar size to those which its staff had removed. The Authority argued that Mr W's proposal was not feasible, because large eucalypts would be unlikely to survive transplanting. "Installation" of native seedlings was offered instead.

After this Office commenced its enquiries, the Authority offered to re-construct the fence allegedly destroyed by its staff, and to install a tap for watering the newly-planted seedlings. As well, the Authority said that it had issued an instruction to all Regional Engineers "...reinforcing the requirements for Authority Line Staff to contact landowners where possible and check the dimensions of easements before any clearing of land takes place...".

The Ombudsman decided that appropriate action had been taken by the Authority to reach a settlement with the complainant and to ensure that a similar incident did not recur. On that basis, he concluded his enquiries.

The wrong boy

A solicitor complained on behalf of Mr and Mrs S about the removal of their son from a train at Arncliffe Station, and about the young man's subsequent interrogation by the Station Master. The boy had been accused of throwing a seat out of the train as it travelled between Tempe and Arncliffe on its way to points south. However, it was claimed that the boy, who lived at Arncliffe, could not have been

responsible for the incident because he had, as usual, boarded the train at Arncliffe that morning. The boy's school-pass was for travel from "Arncliffe to Kogarah" and showed that he lived at Arncliffe. Although the Station Master had seen the pass and had reached the immediate conclusion that "the driver had got the wrong kid", he had continued to question the boy, had warned him about the consequences of throwing seats out of train doors, and had recorded his name and address in the Station Diary.

The complaint was investigated and, because the information obtained was conflicting, a hearing under section 19 of the Ombudsman Act was held. In his report, the Ombudsman said that, once the Station Master had reached the conclusion that Master S was not the boy who had committed the alleged offence, he should have stopped the interview and allowed the boy to leave. It was not necessary to warn him or to record his name and particulars in the Station Diary. Such conduct was held to be wrong.

The Ombudsman recommended that all particulars identifying Master S be removed from the Station Diary and that the Station Master be counselled about the proper procedures to be adopted in handling similar situations. The State Rail Authority accepted and acted on the recommendations.

WATER BOARD

Account problems

Mrs E complained about the treatment she had received from the Water Board over an account sent to her elderly mother. Her mother had not received an account for the previous year because, it transpired, the Board had changed her mother's address on its computer records

without checking with the customer, and had then sent the account to the wrong address. In spite of this mistake, the Board had sent a bill for interest for the outstanding account, together with the current account. This was bad enough, but the Board had also failed to apply the pensioner rebate, which Mrs E's mother had been entitled to, and had been receiving, for many years.

Mrs E had not received any satisfaction when she approached the Board's counter staff. In fact, she was told that there were other outstanding amounts as well, some dating back several years. When she asked to see the records, she was told that the Board did not keep them on the computer for that long, and that her mother should produce receipts to prove that she had paid. Mrs E thought that for the Board to expect a failing, elderly person to keep records for longer than it did was a bit much.

Preliminary enquiries found that the mistake in the change of address had been due to an error by a solicitor, rather than by the Board. The Board had been notified by the solicitor of a change in ownership of the wrong property. This mistake had been discovered only when the accounts had been returned to the Board by the people to whom they had been sent. At this stage, when ownership of the house was "transfered back" to Mrs E's mother, the Board forgot to include the pensioner rebate.

The problem with the old accounts turned out to be one associated with a new computer system, which did not deal correctly with past, unpaid accounts.

The Water Board was most helpful when, after our enquiries, the errors were discovered. A representative went to see the elderly customer and explained the situation fully. He was able to show Mrs E the past records of the accounts that had been left unpaid. An apology was

given for the treatment that Mrs E had received from the counter staff. Mrs E and her mother were very happy with the outcome of the matter.

COMPLAINTS AGAINST COUNCILS

BYRON SHIRE COUNCIL

A nice walk, but ...

As part of a tourist promotion campaign Byron Shire Council and the local Tourist Authority produced a booklet for distribution to the public. Unfortunately for the complainant, all 46,000 copies of the booklet suggested that access to a local mountain walking trail could be gained through his property, even though he had continually refused to allow access.

As penance for their error, council erected a sign at the point of access to the complainant's property and, amazingly, altered the remaining copies of the booklet to make it clear that "no access" was available. The complainant agreed that Council had done enough to rectify the problem.

CABONNE SHIRE COUNCIL

Quick action

A machinery company acquired land adjoining their existing operation and extended their activities to include spray painting. Residents in the surrounding area were upset that activities that had not been approved in the company's development application were being carried out, and

they complained to the council. Dissatisfied with the council's initial actions, one resident complained to the Ombudsman.

Council responded quickly and took the matter to the Land and Environment Court, where it was successful in preventing the spray painting from continuing. As well, council was able to compel the company to remove unauthorised fencing and to take action to reduce noise and dust.

CANTERBURY MUNICIPAL COUNCIL

Ombudsman invited to ignore illegality

In December 1984 Canterbury Municipal Council allowed a local Rotary Club to establish a community markets on Wiley Park, notwithstanding that such use of the land was not permissible. At the time, council said that the markets could operate on trial for six months, after which the use would be reviewed. Despite this, the markets continued to operate for more than two years, without any review, until a local resident complained about damage to the park, parking difficulties and disruption and danger to traffic on the busy roads around the park.

Preliminary enquiries discovered that council had disregarded its employees' advice that the use was not permissible and should not be allowed. Shortly afterwards, council decided to seek possible alternative sites for the markets; but it seemed disinclined to take action to prevent the non-permissible use of Wiley Park in the meantime. The then Mayor wrote to the Ombudsman saying:

> Council recognises the legitimate concerns of residents in the area, but requests that the worthwhile objectives of the markets be considered in allowing the markets to operate.

The Ombudsman's investigator took the view that the Office was being invited to ignore council's breach of the law and he commenced a formal investigation.

The Ombudsman found that council's conduct had been wrong. He commented:

> Council apparently agrees that, not only is the use not permissible on the [Wiley Park] site, it is also undesirable there and should be removed.
>
> The Ombudsman's Office is sympathetic with Council's concern for the continuing good work of the Rotary Club, but it is necessary to comment that, had Council taken appropriate action in 1985 during the " trial period " , there would be no present problems in this matter.

Council and the Rotary Club agreed on a new site for the markets. Unfortunately, a community markets was a non-permissible use for that site as well, and council made an application to the Department of Environment and Planning for a Local Environmental Plan to allow the markets to operate on the new site. In the meantime, council closed the markets down at Wiley Park. Eventually the planning instrument was altered and the markets were re-established on the new site.

CESSNOCK CITY COUNCIL

Two heads better than one

A land-holder in the Wollombi area complained that Cessnock City Council had built a road causeway across a local creek in such a way that a weir had been formed on her property. She claimed that the causeway had blocked the creek and had caused water to back-up onto her land, resulting in severe flooding.

The complainant said that she had been told by the Department of Water Resources that no permit authorising the construction of the causeway on a natural watercourse had ever been granted to the council. She added that a civil engineer had told her that the causeway had been built either in the wrong place or at the wrong height.

An inspection of the site by this Office confirmed the problem of flooding on the property. It appeared that the previous owners had been concerned at the flood-prone nature of the land and had dug a channel to divert away from the property the natural flow of water in the creek. The council had constructed the causeway to accommodate this diversion.

Preliminary enquiries were made with the council who said that the problem had arisen after the creek had changed course because of natural influences. Because it seemed clear that advice of a technical nature was needed to determine whether council had some obligation to rectify the problem, the matter was referred to the Department of Water Resources. A senior officer of the Department inspected the causeway and later reported:

> I have formed the opinion that, in the process of rerouting the road and building the causeway/culvert, the local run

> off drainage from the old course of the creek has been stopped, and it is this drainage that the complainant is concerned about.
>
> Although council has cut an open channel, it has silted up. It is my opinion that, say, a 200mm pipe laid below the road with a suitable drop inlet would be sufficient to drain the water involved.

The senior officer said that he would be willing to give the council any technical guidance needed. The council advised the Ombudsman that the Department's suggestion would be implemented. The complainant wrote to the Ombudsman expressing her thanks for his help in resolving the matter.

GREAT LAKES SHIRE COUNCIL

Conflict of interest

The potential for conflict of interest in local government administration has always raised difficult issues. This report elsewhere discusses the general topic of a code of conduct for council officers and elected members as a means of dealing with conflicts of interest and other problems.

During the year the Ombudsman received a complaint from a resident group that a member of Great Lakes Shire Council was voting on a matter in which, allegedly, he had a conflict of interest.

The members of the resident group and the Councillor lived in a small coastal village to which the council proposed to provide reticulated water and sewerage. The resident group opposed the supply and wanted to preserve the relatively undeveloped nature of the village. The group alleged that the provision of water and sewerage would benefit a development proposed by the Councillor, and claimed that the Councillor should disqualify himself from any consideration of the matter by council.

Preliminary enquiries disclosed that the Councillor, through company interests, had development approval for a complex comprising a caravan park of 176 sites, a motel of 30 accommodation units, a restaurant, squash courts and a gymnasium and sauna. The development had been commenced but was uncompleted. Conditions attached to council's consent for the development, which had been given in 1982, included requirements for the provision of water and proper disposal of sewerage, at the applicant's expense. It appeared that the latter of those requirements, at least, could involve some expense.

The council argued that the Councillor was exempt from the conflict of interest law by virtue of Section 46C (2)(a)(iii) of the Local Government Act. This section exempts an interest from the general provisions where a councillor's interest is one as a ratepayer or "consumer of gas, electricity or water supplied by the Council in the same manner . . . [as to] persons who are not members of Council". The Councillor himself responded with a brief note expressing his "anger and disgust" at the inference behind the inquiry, and advising that he had put the matter in the hands of his solicitor.

The Councillor's solicitors advised the Ombudsman that they had "formed a clear view that our client has at all times acted with complete propriety" ; they added that they did not intend "to enter upon a written debate as to the legalities of our client's position".

The Ombudsman sought his own legal advice on whether the Coucillor's failure to declare his interest and disqualify himself from participating in debate or voting on the matter was contrary to law.

In the meantime, the matter was due to come before council for determination. On 2 February 1989 the Councillor's solicitor advised that the council intended to decide the water supply issue at its meeting

of 14 February 1989, and that the Councillor "will be in attendance at that meeting and intends to exercise his vote". The Ombudsman replied that he would decide whether further enquiries were warranted when the legal advice that he had sought was received.

In the event, at the council meeting on 14 February the Councillor decided to withdraw from the meeting and to not exercise his vote. The decision to proceed with the water supply scheme was passed by a majority of 10 to 1.

Given the Councillor's withdrawal from the meeting, the Ombudsman decided to conclude his enquiries.

HASTINGS MUNICIPAL COUNCIL

Methane in their madness?

A pensioner couple retired to a beachside home on the North Coast. Their home was adjacent to a beach-front Caravan Park. An (at the time) unobtrusive drainage course wended its way between the two properties, emptying some nearby swampy land which was a sanctuary to birds and other wildlife.

Into this idyllic coastal setting came Hastings Municipal Council, with plans for modernisation and improvement.

Over stages, at great expense, a large section of the drain was turned into a boxed, covered stormwater drain. This technological triumph produced a concentration of methane gas from the swamp, which wafted powerfully across the noses of either holiday makers in the Caravan Park or the pensioner couple, depending on wind direction.

So pungent was the odour that the pensioner couple began to complain

to their doctor of nausea and anxiety attacks. They reported that relatives cut their visits short and social callers sat in their cars, shouting pleasantries to them through tightly closed car windows.

Prolonged representations to council produced an extra twenty metres of covered drain. This transfered the smell from the back to the front of the couple's home, but served no other useful purpose.

Eventually, in June 1988, the couple approached the Ombudsman. An inspection was made of the site and preliminary inquiries were directed to council. In particular, questions were raised concerning the likely effects of additional drainage from newly filled and subdivided land in the area, which, it was postulated, would intensify the couple's problem. After some time, council wrote back indicating that little could or would be done.

At length however, after extended correspondence between all parties and after advice had been obtained from the Sydney Water Board, council agreed in May 1989 to construct vent stacks on the drain; these would disperse the noxious gases. The cost would be considerable, but expert opinion agreed that, once the stacks were built, the fumes would be no more troublesome than they were before the drain was covered, when the watercourse ran peacefully down to the sea.

NYMBOIDA SHIRE COUNCIL

Problems with open drain

A North Coast resident complained about an open drain across his property which carried stormwater from drainage inlets on a public street at the front of his premises to another public street at the rear.

Council had acquired a drainage easement on the property in 1975. The complainant and his wife purchased the property in 1985 and, since then, had made a number of complaints to council about the open drain. The complainant claimed that the drain smelled badly, was a breeding ground for mosquitoes and represented a danger to children; the local school was situated diagonally opposite the complainant's property.

The law makes it clear that public authorities are liable if drainage works they construct constitute a nuisance. Council, through the Shires Association of New South Wales, had received advice from Solicitors that "if. . . interference with the beneficial use of the complainant's land . . . is more than trifling then nuisance could . . . be established". The council had given two reasons for its failure to cover the open drain; firstly, that it was unreasonable for a purchaser of a property to expect council to meet the costs of covering the drain when the property was purchased with the drain open; and secondly, that lack of funds prevented the necessary work being done.

The Ombudsman's investigation found that the conduct of council, in piping road drainage waters onto the complainants' property, thereby creating a nuisance, was both unreasonable and contrary to law. The Ombudsman recommended that council pipe the open drain, make suitable and safe arrangement for the disposal of the drainage water beyond the complainants' property, and place topsoil on the area above and around the pipe so as to make good the area.

In response to the Ombudsman's report, council resolved to fence out the unpiped length of the drainage easement until funds became available for drainage works to be completed. Council did not expect that sufficient funds would become available for four or five years, and considered that fencing the easement was the most appropriate solution to the immediate problems. The council said that it was not simply a

matter of piping the drain on the complainant's property; it would be necessary to complete a network of drains in the area in order to cope with the extra run-off created.

The Ombudsman decided that, because council had addressed the problem and had resolved to implement his recommendations in the future, he should conclude the matter.

WARRINGAH SHIRE COUNCIL

Misleading advice about garbage tendering

Mr M 's company submitted a tender for the collection of domestic garbage in four garbage collection zones in the Warringah Shire. When the tenders were opened, he discovered that some companies had submitted tenders for all seventeen zones in the Shire, in a variety of combinations of up to four zones in each tender. Mr M complained that he had been misled into tendering for only four zones, when he could have tendered for all seventeen zones, by the inclusion of the following statement in a "Note to Tenderers" prepared by council and distributed to prospective tenderers :

> 3. A maximum of 4 zones only may be tendered for.

Although council conceded during the course of the investigation that the statement in the Note to Tenderers had not been clearly expressed, it did not believe that the information, when read in context, was ". . . misleading to the point where the tender procedure should have been aborted and fresh tenders called for."

The Ombudsman said that council's failure to provide accurate and

unambiguous information to contractors interested in tendering for domestic garbage contracts was unreasonable and unjust. He added that council's failure to obtain legal advice about the implications of Mr M's complaint that he had been misled, as soon as it was brought to council's attention, was also unreasonable. When legal advice was sought at a later date, council was advised:

> . . . it would have been preferable, with hindsight, for the explanatory note to additionally provide that more than one tender might be submitted, if that was Council's intention.

The Ombudsman recommended that council develop procedures that included a solicitor's review of all information to tenderers to ensure that it was not ambiguous or misleading, and that standard documentation used for minor or less complex tenders be also checked by council's solicitors prior to first use; the recommendations were not adopted by council.

However, council did agree to obtain legal advice regarding major tendering documentation and to have all such documentation checked by an officer more senior than the author. A review of procedures for calling minor tenders was also commenced.

WOLLONGONG CITY COUNCIL

No pigeon fancier

Distressed by her neighbour's pigeons perched on her clothesline, and pigeon droppings on her car (not to mention her neighbour's practice of standing barechested on her fence and waving his shirt to attract the birds), a woman complained to the council and to the Ombudsman.

Council acted immediately; it insisted that the neighbour cull his flock to an acceptable level of ten birds. He was also instructed to reduce the amount of cooing, whistling and droppings to an acceptable level. It will be interesting to see how he achieves this.

WYONG SHIRE COUNCIL

The best laid plans . . .

A prisoner at Long Bay Gaol complained that Wyong Shire Council had sold his home and another block of land that he owned because rates for both of the properties had not been paid. He also complained that a number of personal effects in the house had been lost after council had authorised the removal of the goods.

It appeared that the prisoner had been corresponding with council on the matter from prison, but he had refused to sign an authority to allow the council to apply both sets of rates arrears to the vacant block; this would have averted the need to sell his home as well. The council authorised the sale of both properties by auction, as provided for under the Local Government Act.

The real problem arose when the council was faced with the dilemma of providing vacant possession for the successful bidders. The prisoner was not able to appoint anyone to clear the home of personal effects and furnishings. In addition, the prisoner had been something of a home handyman, and his garage and outhouse were crammed with engine parts, bicycles, electrical tools and equipment and other items.

Council referred the matter to its solicitors, who drafted a notice authorising council to enter and remove all the goods on the property if they were not removed by a nominated date. The prisoner did not act on the notice, and the council, at considerable expense, authorised a removalist to take the effects from the house. The council later discovered that it had no secure area in which to store the goods, and decided that they should be returned to the property. The successful bidders were asked to withdraw from the sale. After the removal, it was discovered that a considerable number of items were missing; but the council suggested to the Ombudsman that these items had been stolen before the removal occurred. Because of the scale and number of items to be removed, a full inventory had not been taken.

An officer of the council conceded that there had been no power under the Local Government Act to remove the goods, but council contended that it was entitled to act on the legal advice it had been given. The council told the Ombudsman that it would not charge the prisoner for the costs involved in selling his home and removing the goods, providing he signed a release indemnifying council from any claim. The matter is now in the hands of the prisoner's solicitors.

COMPLAINTS AGAINST DEPARTMENT OF CORRECTIVE SERVICES

Strike remission overlooked

A prisoner in Cessnock gaol complained that he had not been granted any "strike remission" for the time that he acted as a cook at Maitland gaol during a State-wide warder's strike in August 1988. He had cooked for three days with no reward! His enquiries had got him nowhere, he said.

Enquiries by this Office revealed that no prisoners who had been at Maitland Gaol during the strike had been granted strike remission, even though prisoners at other gaols had been. The Administration Officer in the Department's Prisoner Index Section found that the application for strike remission from Maitland Gaol had come to his office after all of the other prison applications had been processed, and had been overlooked. The error was immediately corrected and all of those prisoners who were at Maitland at the relevant time and who were entitled to strike remission, including the complainant, received it.

Problems with remissions - but, no more

Prisoners receive a monthly computer print-out which sets out their earliest achievable release date; this date is projected on the basis that they will earn maximum remissions. During the year a number of prisoners became alarmed and wrote to the Ombudsman when they found that their monthly print-outs showed their sentence to be increasing, not decreasing. Enquiries showed that this anomalous situation had arisen because the appropriate statutes and regulations relating to remissions had been strictly applied.

It was found that some prisoners had their sentences reduced by the grant of camp and/or excellence remissions; this, however, resulted in

the period during which prisoners were able to qualify for ordinary remission, fifteen-days for each month served, being shortened. Thus, prisoners who earned camp and excellence remissions qualified for fewer fifteen-day remissions than they otherwise would have received. This showed up on the print-outs as later release dates than those first advised.

The Department's Prisoner Index Unit responded to the complaints by submitting recommendations for the grant of special remission, in an attempt to ensure that those prisoners affected would not be disadvantaged by the operation of the remission system.

The Department of Corrective Services told the Ombudsman that, each week, a number of cases of prisoners who had been disadvantaged in this manner were examined and submitted to the Director-General. At that time, the Director-General was able to approve special remissions of up to twenty-eight days. The Minister was able to approve special remissions for prisoners who had been disadvantaged by more than twenty-eight days.

This anomalous situation could only be corrected by amendments to the Prisons Act and Regulations. During the year, however, the Government reviewed the remission system which resulted in the Sentencing Act 1989 being passed. That Act abolished remissions altogether.

COMPLAINTS AGAINST POLICE

Complaint of assault rejected

A young man complained to the Police Internal Affairs Branch that police had assaulted him when they arrested him and, again, when he

was being held at Sydney Police Centre. He claimed that, as a result, he had suffered facial and other injuries, including a broken nose.

Some twenty police, including the arresting police and those rostered on duty during the relevant time at Sydney Police Centre, were either interviewed or required to submit a written report. All of them either categorically denied the allegations or said that they had no knowledge of the matter.

Each of the seven known non-police eye-witnesses to the complainant's arrest, including the complainant's companions, submitted signed statements which were in direct conflict with the complainant's allegations. In summary, their evidence was that the arresting police had acted with notable patience and restraint, and that the complainant's injuries had been sustained by him before the police arrived.

According to non-police evidence, the complainant had attended licensed premises with his companions, and had consumed a considerable amount of liquor. He had behaved obnoxiously towards female staff, had provoked a brawl with male staff and had assaulted an innocent bystander. He had violently resisted arrest, severely biting an arresting constable in the process. The injuries he claimed to have received from the police had resulted from his own belligerent behaviour before the police arrived. The police were said by one eye-witness to have ". . .had the patience of Solomon actually," and to have ". . . showed extreme patience when they were dealing with him."

There was not a shred of evidence to support the complainant's allegations. However, when he was provided with all of the material disclosed by the police investigation, the complainant neither withdrew nor modified his allegations; he simply failed to reply to the letter which conveyed that material to him for comment.

The Ombudsman informed the complainant that he was confident of his ability to determine the truth of the matter, that he was satisfied on the evidence that the alleged assaults had not occurred and that the complaint was held to be not sustained.

Solicitor's reputation destroyed.

In August 1982 Mr S borrowed a motorcycle from a retailer to "test drive" while his friend, Mr T, waited at the shop. He returned some time later with a damaged motorbike and an injured ankle, claiming that he had been forced off the road by a car. Mr S and Mr T set out for the police station to report the incident and, on the way, Mr S confessed to his friend that he had invented the story of being forced off the road by a car in order to make a third party insurance claim.

Mr S and his mother approached a solicitor about lodging a third party claim. The solicitor, acting in good faith on Mr S's story, sought to obtain a Police Traffic Accident Report on the incident. In May 1984, after such a report could not be found, a police inquiry was started; this involved a further interview with Mr S by a detective and an inspector of police and resulted in Mr S being charged with public mischief.

During his interview with police, Mr S accused his solicitor of encouraging him to fabricate the car story to support the third party claim. When he was made aware of this accusation in June 1984, the solicitor wrote to the Commissioner of Police denying Mr S's accusation and asking for an investigation.

When the detective interviewed Mr S's mother in July 1984, she refuted her son's claim that the solicitor had encouraged him to make the third

party claim. Despite this evidence and Mr T's earlier statements about Mr S's fabrication, the solicitor's good name and reputation remained clouded; he was mentioned at Mr S's court appearance in November 1984, and an insurance company where he had once worked was told of a possible investigation concerning his alleged involvement in a fraud. At around this time, the detective lodged an information against the solicitor at the local court for "aid and abet a public mischief" . This information, however, was later destroyed, in somewhat mysterious circumstances.

In February 1985, after a further internal police inquiry, the solicitor received from the Police Department a letter saying that he had been exonerated from all blame in the matter. The solicitor was not satisfied and he complained to the Ombudsman. The Police Internal Affairs Branch further investigated the matter and, in December 1985, whilst agreeing that complaints regarding the detective's behaviour towards the solicitor were sustained (he had called the solicitor a "pipsqueak"), the Internal Affairs Branch reported that there was no proof of any attempt to implicate the solicitor in a conspiracy to defraud.

The Ombudsman decided to reinvestigate the solicitor's complaint and for this purpose held an inquiry. In his final report released in August 1987, the Ombudsman concluded that the detective had withheld information and that the solicitor had been forced to resign from his practice and to leave the town in which he lived as a result of the damage to his reputation.

The Ombudsman recommended that:

- independent legal advice be obtained on the question of bringing criminal charges or disciplinary proceedings against the detective;

- disciplinary action be taken against the detective for failing to keep proper records;

- the Commissioner of Police examine procedural issues connected with the completion of various forms and the failure of the Department to adequately deal with the solicitor's initial complaint;

- the destruction of the information at the local court house be investigated; and

- an ex gratia payment of $25,000 be made to the solicitor as " recognition of the great harm he had suffered due to the wrong conduct of particular police and the incompetent administration of the Police Department as a whole " .

As a consequence of the Ombudsman's recommendations, in July 1988 the Police Department carried out yet another investigation. The Department concluded, however, that no compensation should be paid to the solicitor and that it was merely necessary to counsel the detective about his role in the matter.

The Ombudsman believed that further action was necessary and, in March 1989, he made a report to Parliament. The report criticised the Police Legal Services Branch for the manner in which it had dealt with the matter and strongly recommended that independent legal advice be sought. Once again the Ombudsman recommended a payment of $25,000 to the solicitor in recognition of the harm done to his reputation.

At the time of writing, the Police Department had taken no further action.

Under arrest, or voluntarily assisting with enquiries?

A young man was stopped by two police officers in relation to the manner in which he was driving. When questioned by a constable about two sets of driving lights that were on the passenger seat of his car, he told the officer that they had been given to him by a friend and that he had made arrangements to pay for them later. He denied stealing the lights. The officer believed that the lights had been stolen because they were similar to lights that had been reported stolen a few days earlier, and a car of the same make as that driven by the young man had been reported at the scene of the theft.

The young man said that the constable placed him under arrest, read him his "rights" and put him in the back of a panel van. He said that the police stopped at his home on the way to the police station to advise his parents of his arrest, and his parents met him at the station. The owner of the stolen driving lights later attended the police station but he could not identify the lights found in the young man's car as his and the young man was allowed to leave.

One police officer said that the young man had not been arrested, but had voluntarily agreed to accompany the police to the police station for further inquiries. The officer said that he had administered a caution to ensure that any evidence he obtained would later be admissible in court. The other police officer, who was a Probationary Constable at the time, said that he had heard his partner caution the young man, but he could not recall hearing his partner arrest him. He said that he was not sure whether the young man had been arrested or not.

Police Instruction 31 [paragraph 7(1)] states:

> 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.

Paragraph 8(2) of the same Police Instruction says:

> A member of the Force, when arresting a person, shall inform him of that fact and of the grounds for the arrest, unless the actions of the person being arrested or the surrounding circumstances render this impracticable. Before a person is accompanied to a Police Station or elsewhere, he should, if he is not under arrest, be so informed. If not under arrest, he is not obliged to accompany Police anywhere but may do so voluntarily.

The Ombudsman said that the young man's detention was contrary to the Police Instructions. He said that a seventeen year old youth, who had been cautioned, refused permission to drive his own car to the police station and placed in the back of a police vehicle, could hardly be described as " free to come and go as he pleases " .

The Constable was counselled regarding his responsibilities in advising members of the public about whether they were under arrest. No recommendations were made concerning the conduct of the Probationary Constable.

Terms of endearment

Mrs J complained to the Police Department about the actions of her former defacto husband, a Detective Chief Inspector. Her complaint contained 19 separate issues, including allegations of assault, harassment, and receiving obscene telephone calls and mail. She also alleged that the Chief Inspector had smashed some of her furniture with a baseball bat and had used his service revolver to shoot holes in her refrigerator door and in a glass coffee table. She further alleged that the Chief Inspector had once pointed his service revolver at her and had threatened to shoot her.

Mrs J supplied the police investigator with numerous offensive and obscene letters, many of them signed, which had been sent to her by the Chief Inspector. She also provided two taped recordings of telephone calls received at her home. The voice on the tape was later identified as that of the Chief Inspector. During these conversations, the Chief Inspector made at least two death threats and frequently referred to Mrs J in obscene terms.

Because the tape recordings had been made without the Chief Inspector's knowledge, the police investigator sought advice from the Director of Public Prosecutions on whether action should be taken against Mrs J under Section 7 of the Telecommunications (Interceptions) Act. The DPP advised that action against Mrs J would not be in the public interest. Prior to making her complaint to police, Mrs J had complained to Telecom about the nuisance telephone calls

that she had been receiving. Telecom monitored all of Mrs J's incoming calls between 26 March and 7 April 1987, and this showed that 170 telephone calls were made in that period from the Chief Inspector's residence to Mrs J's number. On some occasions, these calls were as regular as fourteen calls in fifteen minutes, and they were generally made around midnight. Following their investigation Telecom wrote to the Chief Inspector and told him that action would be taken against him under Telecommunications By-Law 239 if the calls to Mrs J continued.

At the time of the police investigation, the Chief Inspector was off duty on sick report. The Director, Police Medical Services, wrote:

> . . . I examined [the Detective Chief Inspector] . He is now in a psychological withdrawn state and I will submit him to the Police Medical Board, as I consider he is unfit for further Police service. He is not fit to be interviewed.

Bearing in mind the Director's medical assessment, the Chief Inspector was not interviewed in any depth regarding the allegations made against him; however, he submitted a report to the police investigating officer.

In his report, the Chief Inspector denied the numerous allegations of assault made by Mrs J, but he agreed that he had once punched her in self-defence and that this had "resulted in her having dental work done to her teeth which I paid for". He also agreed that "a bullet was accidentally discharged by me into the door of the refrigerator. I later paid [Mrs J] . . . compensation." With regard to the telephone calls, the Chief Inspector denied responsibility for these and placed the blame onto others who had access to his home telephone. However, he admitted authorship of the letters, which he called "descriptive letters of my opinion of Mrs J" . Much of the Chief Inspector's report was

an attack on Mrs J's credibility and reputation, and included an allegation that she was having an affair with one of the police investigating officers and with a Minister of Federal Parliament.

When the police investigation had been completed to the best level possible, given the Chief Inspector's health, it was reviewed by the former Assistant Commissioner Internal Review. He determined that the question of taking disciplinary action against the Chief Inspector would be held in abeyance for a period of six months, and would be reviewed at the end of that time in the light of the Chief Inspector's conduct and work performance. In reaching his decision, the Assistant Commissioner considered:

- the Detective Chief Inspector's 31 years of police service;

- the poor state of the Chief Inspector's mental and physical health; and

- that the Chief Inspector had honoured his bail undertaking not to approach Mrs J.

The Ombudsman concurred with the penalties imposed by the Assistant Commissioner, particularly as the Chief Inspector was to be placed before the Police Medical Board and was unlikely to ever return to police duties.

Listening in

A woman employed as the Personal Assistant to the Divisional Commander of a large regional police station found a listening device attached to the underside of her desk. She made a complaint about this to her superiors. At that time, the Police Department considered

that the woman's complaint fell within the same category as a complaint by a police officer against a police officer, and the Department did not notify the Ombudsman of its receipt. The complainant, however, was not a police officer, but a public servant employed by the Police Department. The Ombudsman was notified of the complaint in February 1988, some four months after it had been made and following the decision of Lee J in the Administrative Law Division of the Supreme Court, where he determined that complaints made by police officers against other police officers fell within the ambit of the Police Regulation (Allegations of Misconduct) Act.[1]

The Ombudsman took issue with the Police Department for their failure to notify him of this complaint and later received a written apology from the Officer in Charge of the Police Internal Affairs Branch.

During the police investigation, a Senior Sergeant at the police station where the complainant worked admitted placing the listening device under her desk as a prank, to listen to "titillating" conversations between female staff members. The Senior Sergeant had purchased the

[1] For further discussion, see 1987-88 Annual Report, pp131-35

listening device by mail order and it had been assembled by another police officer who was a licensed radio operator.

The Senior Sergeant said that he had the device for about six months before secreting it under the woman's desk. He intended to use an FM radio in the station as a receiver. He claimed that, by the next day, it had "slipped his mind" and that he had forgotten about it until he heard that the device had been located. Although the device was under the woman's desk for at least three months, the Senior Sergeant said that it had never been used. Whether this was true will never be known.

Because the police investigation was unable to prove that the device had been used by the Senior Sergeant, he could not be charged under the Listening Devices Act. He was, however, charged departmentally with misconduct for bringing discredit upon the New South Wales Police Force. The Senior Sergeant admitted the charge and submitted a report requesting leniency, claiming that he had learned from his "childish indiscretion" . The Commissioner of Police directed that the Senior Sergeant be penalised by being transfered to another district. The question of the imposition of any other penalty was deferred for twelve months and was to be reviewed in the light of the Senior Sergeant's conduct and work performance in that time.

The Ombudsman decided not to reinvestigate the complaint because there was no conflict in the evidence and the Senior Sergeant had admitted the charge of misconduct. The complainant later wrote to the Ombudsman and said that she was satisfied with the police investigation, which she felt had been prompt and efficient. Her only concern was that, four months after the Commissioner's decision, the Senior Sergeant still had not been transfered. She found this extremely difficult because, by virtue of his rank, the Senior Sergeant often relieved the Divisional Inspector, and this placed her in the position of being his personal

assistant. This situation was remedied and the Senior Sergeant was transfered to another division.

Shades of the Bermuda Triangle

At about 4.00pm on 23 May 1986, Mr L and three friends sailed from Nelson Bay on a fishing trip in Mr L's boat, a six metre, twin-hulled "Shark Cat" . They went to fish above the wreck of the "Oakland", north of Cabbage Tree Island. They anchored in the sand north of the "Oakland" and let out sufficient rope to allow them to drift back over the wreck.

At about 5.50pm, the men noticed that the boat was taking on water. It soon became obvious that the boat would sink. A hand flare was let off and all four occupants jumped overboard and swam towards Cabbage Tree Island; as they did so, they saw the boat overturn.

The Port Stephens Volunteer Coastal Patrol recorded radio messages about flares being sighted. At 6.20pm the police launch, "Sea Eagle", left Nelson Bay to search the area in which flares had been sighted. They found nothing and returned to Nelson Bay. Mr L and his friends, who had reached Cabbage Tree Island safely, saw the police launch searching in the area, but they were unable to attract its attention.

At about 8.30pm the group were picked up by another boat which had come in close to shore off Cabbage Tree Island. Mr L and his friends were taken to the wharf at Little Beach, Port Stephens. There, they spoke with two police officers. The police went out on the police launch again to search for the sinking boat. They located the boat but did not recover it.

Despite many dives and salvage attempts over the ensuing weeks by various people, the boat was never recovered or salvaged. Mr L

complained that certain police officers had failed to act properly following the sinking of his boat.

The police investigation officer found that the evidence he had obtained was insufficient to support departmental or criminal charges against any officer; he determined that Mr L's complaint was not sustained, even though he made clear that his investigation had failed to clearly prove or disprove Mr L's allegations. The Legal Services Branch confirmed the investigator's view that the evidence was insufficient on which to base departmental charges, and the Police Department advised the Ombudsman that the complaint was determined to be not sustained.

The Ombudsman decided to reinvestigate the complaint because, on the basis of the evidence in the police report, he was unable to determine where the truth lay. A hearing under section 19 of the Ombudsman Act was held before the Assistant Ombudsman.

Mr L alleged that the police had failed to salvage his boat on the night it sank and that they had failed to advise him of the result of their search for the boat. All of the participants in the conversation between Mr L, his friends and the two police officers at the wharf at Little Beach agreed that there had been a general discussion about what had happened and where the boat had last been seen; however, there was conflict in the evidence concerning the particulars of that discussion. Mr L maintained that he had asked Sergeant X, more than once, if he and one of his friends could accompany the police to search for the boat but that Sergeant X had refused permission. Sergeant X could not recall this conversation; nor could he recall whether he had refused to allow the men onto the police boat.

Sergeant X recalled having told Mr L that he would try to tow the boat in and that he would contact Mr L to let him know what had happened. Mr L and two of his friends confirmed that this had been

said. Sergeant X also said that, when Mr L and his friends left, they had told him that they were going to the Country Club, not home. Mr L denied having said anything other than that he was going home and that he could be contacted there.

The police officers located Mr L's boat, which had sunk below the water level, with the bow bobbing up out of the water in the swell. They said that there had been a lot of debris in the water and a lot of nylon rope floating around the boat. The police felt that to try to tow the boat would have been too dangerous in the rough seas prevailing at the time. They had been concerned, too, that the police launch might foul its propellers in the rope in the water. They had watched the boat sink (to ensure that it would not be a navigational hazard) but had not been able to mark the spot because they had not had any suitable equipment on board the launch for that purpose.

The Ombudsman was satisfied that the decision to not attempt recovery of Mr L's boat had been reached in the exercise of the professional judgement of the police officers, which had been based on the sea and wind conditions prevailing, the fact that the craft was almost wholly submerged and the risk of damage to the police vessel. He was satisfied that the decision had been reasonable.

Mr L's mother and sister said that they were both at home when Mr L returned. He had told them what had happened, and had said that the police would contact him on their return to Nelson Bay. During the evening Mr L had gone to the police wharf to see if the police had returned. Both women were certain that no telephone call had been received from any police officer. Sergeant X claimed that he had telephoned Mr L's home but there had been no answer; he had also phoned a couple of the local hotels. Constable Y, who had prepared the occurrence pad entry about the matter, supported Sergeant X's evidence.

The occurrence pad entry said that Mr L had been contacted and informed about the result of the police search. Constable Y said that, when he had prepared the entry he had assumed that Sergeant X would have been able to contact Mr L; he admitted that he had failed to correct the entry. The Ombudsman was satisfied that Mr L had told Sergeant X that he was going home. He did not accept that Sergeant X had made any telephone call to Mr L's home on the night in question.

In the days following the loss of Mr L's boat, Sergeant X had contact with Mr L on at least two occasions. On the first occasion, the two met and specifically discussed the location of Mr L's boat. Sergeant X had pointed to a map, or an aerial photograph, and had indicated an area on the south-eastern coast of Cabbage Tree Island where he thought that the boat had sunk. Sergeant X's opinion had been based on his experience of the local tides, currents and weather conditions.

The Ombudsman concluded that this had been the only assistance provided to Mr L. No other police assistance had been offered by Sergeant X, or by any other officer at Nelson Bay Police Station, during the course of Mr L's endeavours to recover his boat. He concluded, however, that Sergeant X had given adequate information to Mr L concerning the probable position of his boat.

About two weeks after the loss of his boat, Mr L was contacted by a police officer, Constable Z. Constable Z was an amateur diver and claimed that he had heard of the boat sinking and that he had been given the "proper bearings from the boys". Constable Z outlined his plans to recover the boat but said that Mr L could not go with him because he would be using a friend's boat for the salvage. Mr L said that Constable Z told him that, if the boat was recovered, it would cost him $1000.

Constable Z was not attached to Nelson Bay Police Station. He said that he had contacted Mr L out of courtesy, to let him know what was planned. He said that Mr L had nominated the figure of $1000. Constable Z said that, once he had decided to try to recover the boat, he had contacted Sergeant X and asked if he could be shown where the boat went down. A couple of days later, Constable Z met Sergeant X at the police wharf. Some repairs to the police launch had just been completed and it needed a test run. Sergeant X, who was off duty, went with Constable Y on the police launch for the test run. They met Constable Z on his friend's boat off Cabbage Tree Island. Sergeant X indicated where he thought Mr L's boat could be found. Constable Z's salvage attempt failed because he could not find the boat.

After considering all of the evidence, the Ombudsman concluded that Sergeant X had been prepared to offer this degree of assistance to Constable Z solely because he was a fellow police officer. He was satisfied that the use of the police vessel to assist Constable Z had not been improper, because there had been no breach of Police Rules or Instructions. He concluded, however, that Sergeant X's decision in this regard had been unreasonable because he had never offered similar assistance to Mr L in his attempts to recover the boat.

Mr L claimed that Constable Z had told him that he knew where the boat was and that Mr L had been searching in the wrong place. This claim, which was denied by Constable Z, was given some support by the other people who had accompanied Constable Z to search for the missing boat. The Ombudsman was satisfied that Constable Z had deliberately left Mr L with the impression that he had more accurate information as to the boat's likely position than Mr L possessed, and that he had done so to induce Mr L to accept his salvage proposal. The Ombudsman did not accept Constable Z's contention that he had been motivated by a selfless desire to assist Mr L. He accepted the

evidence of Mr L, which was corroborated by his sister, that it had been Constable Z, and not Mr L, who had suggested the sum of $1000 as a salvage fee. He said that it was clear that the fee would have resulted in a clear profit for Constable Z had the admittedly amateurish salvage attempt succeeded. The Ombudsman said that Constable Z's dealings with Mr L had been improper and that he had used the suggestion that he had particular knowledge of the location of the sunken boat, together with his position as a police officer, to solicit money from Mr L for his personal benefit. The Ombudsman considered that Constable Z's conduct had been such as to bring the Police Force into disrepute.

The Ombudsman found that Sergeant X had failed to inform Mr L of the results of the search for his boat, and that he had lent assistance to Constable Z. He recommended that Sergeant X be paraded and counselled as to his conduct. The Ombudsman also found sustained the complaints concerning the conduct of Constable Z, in failing to advise Mr L of the bearings of the position where he believed the boat could be located, and in soliciting payment of $1000. He recommend that the Commissioner of Police obtain independent legal advice as to whether there was sufficient evidence to prefer a departmental charge against Constable Z. The Commissioner has sought such advice and, at the time of writing, further advice is awaited.

The bargain (or , Oh what a tangled web . . .)

In 1981 Mr A, after reading a classified advertisement in a major Sydney newspaper, purchased a Holden Commodore from Mr X. Mr A paid $6,200 for the car, which seemed to him to be a pretty reasonable price.

Some three months later, detectives from the Motor Squad visited Mr A at his country address and showed him where the chassis and engine

numbers of the car had been altered. They told Mr A that the car that he had purchased had been previously stolen. They took possession of Mr A's car as evidence against Mr X. Mr X was subsequently charged with several counts of "receiving" in relation to Mr A's car and other vehicles.

Mr A instructed his solicitors to institute legal proceedings against Mr X to recover the money that Mr A had paid him for the stolen car. Mr A was ultimately successful in recovering the $6,200 he had paid Mr X for the car. Mr A later gave evidence for the police at the committal proceedings against Mr X, who was sent for trial. Mr X did not stand trial, however, as the Attorney General declined to file a bill of indictment against him.

Mr A had written off the stolen car episode to experience when, over three years later, Senior Constable B contacted him by telephone at his new Sydney home. Senior Constable B told Mr A that he had been given the task of returning a motor vehicle exhibit to its lawful owner. Mr A told Senior Constable B that he had relinquished his title to the car, and did not want anything to do with it, because he was already out of pocket in legal expenses and the purchase price of a replacement vehicle. A few days later, Senior Constable B called Mr A again and was adamant that he come to the police exhibit yard to remove "his" car.

The next day, Mr A went to the yard with his mother. Senior Constable B spoke to them for some time and showed them the car. It had been stored outdoors for some three years and the elements had taken their toll, substantially reducing the car's value. Senior Constable B told Mr A that the car could never be re-registered because the owner could not be located. He said that, if Mr A did not claim possession of the vehicle, it would be sold as scrap and any proceeds would be paid into Consolidated Revenue. Mr A said that, when he

told Senior Constable B about Mr X, Senior Constable B said that Mr X was in gaol and could not be contacted there because "there are no phones in gaol."

Rather than take possession of the car, Mr A agreed, with Senior Constable B's persuasion, to sell the car to a car wrecker nominated by Senior Constable B for the sum of $1,500. Mr A said that he thought that he was doing the right thing and, besides that, he thought that he could use the money he would obtain to defray the financial losses he had suffered as a result of buying the car in the first place. Mr A's mother returned to the police yard the next day and signed a statutory declaration giving the wrecking yard title to the car. Senior Constable B, a Justice of the Peace, witnessed the declaration.

A few weeks after the transaction, Mr A received a telephone call from Mr X who demanded the return of the car to which he had obtained title on the refund of Mr A's purchase money. Mr A offered Mr X the money he had received from the wreckers, but Mr X did not think that this represented fair value for the car. An, as yet, unresolved legal battle commenced between Mr A and Mr X about the extent of Mr A's liability.

After Mr X had made his demands of Mr A, Mr A contacted Senior Constable B, who provided him with valuations of the car based on the condition in which it was at the time of its sale to the wreckers.

However, the bombshell dropped about a month after Mr X had first made demands of Mr A. Senior Constable B contacted Mr A to tell him that he had received a letter of demand from Mr X, because he had bought the car himself! Mr A was astounded at this revelation, especially as Senior Constable B had told him that the car could not be re-registered. Even though Mr A had contacted Senior Constable B a number of times, the officer had never told him that he had purchased

the car from the wreckers.

Mr A then complained to the Commissioner of Police about Senior Constable B's dishonesty in his dealings with him. An investigation was commenced by the Police Internal Affairs Branch. This found that Senior Constable B had bought the car from the wreckers the day after the wreckers had ' purchased ' it from Mr A. Senior Constable B had subsequently spent $3,000 improving the car and had registered it jointly with his wife.

Senior Constable B was charged with misconduct. The charge was heard by the New South Wales Police Tribunal and Senior Constable B denied it. The Tribunal found that Senior Constable B had the intention of acquiring the vehicle prior to purchasing it from the wreckers. They found him guilty of the charge and recommended that he be reprimanded. The Judge hearing the charge also made adverse comments about Mr A selling property that he did not own.

The Ombudsman accepted the recommendations of the Police Tribunal and made no others. He would not entertain an application made to him by Mr A for compensation from the Police Department for his legal costs in fighting Mr X's claim for damages.

At the time of writing, both Mr A and Senior Constable B were being sued by Mr X who wished to recover his vehicle or the sum of $6,200. As far as we know, Senior Constable B still has possession of the car!

Lone constable shows the way and saves the day !

Mr & Mrs M lived on a property between Coonamble and Walgett. Mr M was away one evening, when Mrs M returned home to find that her house had been broken into and that property had been stolen. She

immediately rang Coonamble Police Station, 70 kilometres distant, and reported the break in. Coonamble police told her that they would attend at the property the next morning.

Mrs M was a little disquieted at this and contacted her neighbour. The neighbour came to the house and checked for missing property; this revealed that several firearms, some ammunition and a quantity of alcohol had been stolen. Mrs M's neighbour knew that three young escapees from a juvenile institution had been reported to be in the area that afternoon and he contacted Coonamble Police Station again. The neighbour told the police about the stolen firearms and alcohol and again asked them to come to the property. The police declined to attend and, when the neighbour said " We will have to look for them ourselves " , he received the reply, " Be careful; they could be dangerous " .

The neighbour then rang Carinda Police Station, a one-man station, and spoke to Constable M, who attended and made enquiries. Constable M, too, knew that the three young people had escaped from an institution at Coonamble that day; he also knew that a car believed to have been stolen by the escapees had been located near Mrs M's property. When

he was told that firearms and alcohol had been stolen, he surmised that the escapees could have been responsible for the theft, and might still be in the area. Constable M contacted Coonamble Police Station and sought police assistance for a search to be made near Mrs M's home, but his request was declined.

Constable M next contacted Walgett Police Station, and sought police assistance from Sergeant F. He told the Sergeant about all of information he had and expressed concern that the escapees might cause trouble that night, bearing in mind that they were believed to be in possession of alcohol and firearms. Constable M's request was denied because, the Sergeant said, it would incur overtime. Sergeant F later said that he had declined to assist Constable M because it was night-time, it would have taken several hours for police assistance to reach the property, and police could have been injured while searching at night, or might even have been ambushed. Sergeant F told Constable M that he would arrange for a search the next day. Before ceasing duty, he left a note in the typewriter at the police station, asking police commencing duty at 7am the next morning to contact the Inspector and arrange police attendance at Mrs M's property.

Constable M in the meantime, with the help of two of Mrs M's neighbours, searched the property and located the escapees only 600 metres from her house. One of the escapees was shot in the foot during a scuffle when the Constable arrested them. Once they were informed of the shooting, Coonamble Police provided assistance.

As a result of this incident the Sergeant in charge at Coonamble was charged with neglect of duty, but this charge was not proven because it was not clear that he had been informed, by the constable receiving Constable M's message of the theft of firearms and alcohol. The constable who took the message, together with another constable who had been on duty at the time, was disciplined. Sergeant F retired

before any action could be taken against him.

Among the recommendations made by the Ombudsman, was a recommendation that Constable M be commended for perseverance and commitment to duty, despite the fact that absolutely no assistance had been provided by other police. The question of Constable M's commendation is currently being considered by the Commissioner of Police.

Feudin' , fussin' and a-fightin'

In 1983 Ms M moved to a semi-rural area in the outer western suburbs of Sydney, and into a de-facto relationship with Mr Z. Ms M's mother, Mrs L, lived twenty minute's drive away in the regional suburban centre.

Soon after Ms M moved into Mr Z's modest home, a dispute developed with their next-door neighbour, Mr P. Mr P's brother was a Senior Constable of police, stationed at a police station in the nearby regional centre. This police station had no policing responsibility for the area in which Mr P and his neighbours lived. Only the parties directly involved know what precipitated the dispute between them; but it appears that neither party believed in the old adage " forgive and forget " , because the dispute continued and, for that matter, escalated over a period of almost five years, until Ms M and Mr Z sold up and moved to Canberra.

The dispute between these neighbours became infamous in the close-knit rural community in which they lived. Not the least aware of the problem were the local police who, by their own records, had attended one or other of the parties' addresses, for various reasons related to the " feuding " , on no less than twenty three occasions over a period of less than six months!

The reasons recorded for police attendance were many and varied; but, on every occasion, it was at the request (often repeated) of Ms M. Many of the complaints seemed to stem from the actions of Mr P's pet dog(s), which allegedly continually attacked and often killed Ms M's pet cats, of which there were, by some accounts, a veritable multitude. At one stage, Ms M actually accused Mr P of "chopping" her cats up. Despite the continued attendance of the police, no evidence of these abominable atrocities was ever produced by Ms M or discovered by the police. Police also attended on numerous occasions after Ms M complained of the volume of noise emitted from Mr P's house, or that Mr P had assaulted her, but on none of these occasions did police discover sufficient evidence to support Ms M's allegations.

On many occasions, Ms M was advised to seek the help of the local Chamber Magistrate. On one occasion, at least, she did, causing a total of nineteen summonses to be issued against Mr P. However, neither Ms M nor Mr Z attended the court on the date of hearing and all of the charges against Mr P were dismissed. Ms M and Mr Z later sent a letter to the court in which they said that they were not " in a fit mental state to attend " .

The local police were also involved in assisting Ms M in situations quite disassociated from her dispute with Mr P. Ms M wandered into nearby bushland on several occasions, one of which saw police conduct a search after fears had been expressed for her safety. She was located standing in a creek, and according to the police report, "was calling out that she was in the Holy Water cleansing her sole" (sic) . Police later assisted Ms M by taking her to her doctor; the doctor issued a schedule for her admission to a psychiatric centre.

While this feud was going on, Mrs L was becoming increasingly alarmed at the injustices she felt were being suffered by her daughter,

and by her perception of indifference on the part of the local police. As well, Mrs L was firmly convinced that Senior Constable P was using his "police influence" to protect his brother, Mr P, from prosecution for his "terrible crimes" . Mrs L wrote a letter outlining her allegations to the Ombudsman.

Preliminary enquiries about Mrs L's complaint were carried out by a senior police officer stationed outside the patrol of the police station involved in the complaint. An exhaustive search was made of records held at the local police station and this established a chronology of events showing police involvement in the dispute. Mrs L also made allegations that Senior Constable P had neglected his duty by standing by while his brother assaulted Ms M. The police found no evidence to support this, either corroborative or medical. However, they did say that Senior Constable P disclaimed responsibility for his brother's actions.

Despite protest by Mrs L, the Ombudsman decided not to investigate on the grounds that the police had carried out preliminary enquiries which answered all of the questions she had raised, and the cost of taking the matter any further, when considered in tandem with the extensive enquiries already undertaken by the police, was not warranted.

When last we heard, Mr P was living happily with new neighbours, as are Ms M and Mr Z in Canberra. Mrs L is still not happy because she is now so far away from her daughter. The local police, however, now have a lot more time on their hands in which to perform their more mundane policing tasks.

Help from an unexpected quarter

The yard sales foreman of a lumber company in a large country town

was spoken to by the company's managing director about irregularities in the company's cashbooks and accounts. In his position, the foreman conducted the majority of the timber yard's cash sales and was responsible for the running of that section of the business.

Police were contacted, and the foreman attended the local police station where he was interviewed by detectives. After he had made certain admissions, he was charged with four counts of larceny involving a total of $164. The detectives, who were aware of a deficiency in the company's accounts of approximately $25,000, further interviewed the foreman and he admitted being responsible for a "general deficiency" of $5,000. A brief of evidence was prepared by the detectives who submitted it to Sergeant A, the town's police prosecutor, for checking. Sergeant A was of the opinion that, although there was a deficiency of approximately $25,000, "there was insufficient evidence disclosed to link the greater amount with the actions of the offender" .

The company engaged a firm of accountants to audit their accounts and establish the extent of the discrepancies. The audit was frustrated by the manner in which the foreman had "covered his tracks" and, although the auditors uncovered some evidence, the company's solicitors said that it would not be acceptable to the court.

The foreman finally appeared at court and pleaded guilty to the charge of larceny as a servant involving an amount of $5,000. Sergeant A was the police prosecutor. The magistrate heard evidence called by the foreman's solicitor and read the police brief of evidence. Personal references were tendered in support of the foreman and these included a medical report which said that he had stolen because he had been " locked into an employment situation " !

While the court was hearing evidence on the question of penalty, Sergeant A sought and received the magistrate's permission to speak.

He told the court that he had known the foreman for a number of years, that he had always found him to be an honest and forthright person and that his actions were completely out of character with the man that he had known for so long.

The magistrate, when summing up, commented that he thought that Sergeant A had acted with the "utmost propriety" in "speaking highly" of the defendant. The magistrate deferred passing sentence on the foreman, on condition that he enter into a recognisance to be of good behaviour for a period of three years and pay compensation in the sum of $5,000 to his former employers.

The case was reported in the local country newspaper under the headline, "PROSECUTOR GIVES EVIDENCE IN SUPPORT OF CHARGED MAN" . Amongst other things, the article said that the foreman "stole money more out of resentment than greed - he wanted to get back at his employer". This report was read by the managing director and other company officers of the lumber company who were, perhaps understandably, flabbergasted! The company wrote to the local district police superintendent, complaining about the actions of Sergeant A while prosecuting the case.

The complaint was made the subject of preliminary enquiries by the police. The Ombudsman then directed that a full investigation be carried out. As part of this investigation, a report was supplied by the superintendent-in-charge of the Police Prosecuting Branch in which he outlined the policy followed by police prosecutors in such cases and said that the Police Prosecuting Branch had a policy of " even-handedness " . He referred to the New South Wales Bar Association rules and said that they had a bearing on the policy of his branch. During the investigation, Sergeant A said that he did not deem himself bound by the guidelines contained in the superintendent's report. He cited the case of Regina V. Marquis to support the probity of his exercising his discretion to inform the court of the foreman's character.

The Ombudsman concluded that Sergeant A had exercised what he regarded as his discretion in giving an impromptu character reference for the foreman. There was no evidence to suggest that other than proper consideration had been given to the matter by Sergeant A when he gave that reference. The Sergeant's actions could be, and obviously were by some observers, construed as impartial. However, the Ombudsman said that, in the interests of preserving impartiality in this area, any police prosecutor wishing to give evidence about the character of an accused person should disqualify himself from prosecuting that matter.

The Ombudsman recommended that no action be taken against Sergeant A, but that the Police Department establish and publish a code of conduct for its prosecutors, and that the code make clear when prosecutors should disqualify themselves from prosecuting a matter.

The commander of the Police Legal Services branch later reported to the Ombudsman that such a code of conduct had been published. One feature of the "Code of Conduct for Legal Service Officers" is that it imposes on such officers the responsibility to "recognise and discharge

their duty to the Court by way of honest and impartial representation."

Vehicle found, but not reported.

On 13 February 1986 the complainant reported the theft of his panel van to Bass Hill police. The value of the vehicle was shown as $1,500, although the complainant believed that its true value was higher, because he had made certain improvements to the vehicle. On 15 February 1986 an Ordinance Inspector employed by Campbelltown City Council reported having found the vehicle to Probationary Constable C of Campbelltown police station.

The Probationary Constable noted the matter in the Stolen Motor Vehicle Recovery Book but failed to note the Ordinance Inspector's advice on the Telephone Message Pad. Because of this, the recovery was not confirmed and the Police Stolen Motor Vehicle Index was not notified that the vehicle had been found.

Sergeant P checked the Stolen Motor Vehicle Recovery Book on 18 February 1986 and endorsed the book to the effect that no matters were outstanding. He failed to notice that the vehicle had not been reported as recovered to the Stolen Motor Vehicle Index. Consequently, the complainant was not told that the car had been found until some thirteen days later, when he received a letter from the Council Ordinance Inspector.

When the van was found by the Ordinance Inspector on 15 February 1986, it had been tipped on its side, had suffered extensive damage to body panels and had some parts stripped from it. The Ordinance Inspector had taken a polaroid photo of the van; from this, the complainant believed that the vehicle was repairable. When he eventually recovered the van on 28 February 1986, however, he found that it had been completely burned out and was not repairable.

Because police failed to advise the complainant that his vehicle had been found, it was left where it had been found for thirteen days, during which time it sustained further damage and was rendered valueless. The Police Department addressed the issue of the payment of compensation to the complainant for the further damage caused to the vehicle after its recovery had been reported to police. Estimates of the value of the vehicle at the time that it was found by the Ordinance Inspector were obtained. The highest valuation was $200.

The Department sought and obtained approval for an ex-gratia payment of $200 to be made to the complainant and Probationary Constable C and Sergeant P were both paraded and disciplined.

Rifle recovered , but . . .

Between 1 January and 29 February 1988, an amnesty was declared for the surrender of prohibited weapons to police. Taking advantage of the amnesty, the complainant handed a prohibited rifle, some ammunition and a gun cleaning kit to a police officer. Not long afterwards, the new Government adopted a different " gun policy " , under which rifles had to be returned to their owners.

The complainant tried to recover his rifle and accessories, but only his rifle was returned to him. He complained about this.

The Police Department investigation found that the police officer concerned, a Constable, had not supplied the required receipt; nor had he entered details of the property in the miscellaneous property book; he claimed that this was because he was unaware of the proper procedures to be followed.

In his report, the Ombudsman said that the Constable had neglected his duty by failing to issue a receipt to the complainant. The Constable had been counselled about his responsibilities in relation to exhibits and property coming into his possession, and the Ombudsman made no further recommendation in this regard.

However, since only the rifle had been returned to the complainant, and not the ammunition and gun cleaning kit, the Ombudsman recommended that an ex-gratia payment be made to him for the loss of those items. The Department later paid the complainant $65.15 in compensation.

Love thy neighbour

Mr A lived next door to Sergeant B in Sydney's southern suburbs. One warm, summer Saturday night, Sergeant B, while off-duty, held a party at his home. According to Mr A, things got a little noisy and by about 12.30am the following morning the party was "raging" to such an extent that he was unable to get to sleep. About 1.00am, Mr A's wife phoned the local police station to complain about the noise. Although police told Mrs A that they were busy, they said that they would send someone down as soon as someone became available.

Mr A said that the noise stopped about 2.00am, but about 2.45am it resumed, this time louder than before! Mrs A again contacted the local police station and was told that the police would return to Sergeant B's home as soon as possible. Mr A decided about 3.00am that he couldn't stand the noise any more. He walked next door to ask Sergeant B to show a little consideration for his neighbours. Mr A had some trouble locating the party host but, when he was found, Mr A said, he appeared to be drunk. Mr A asked him to turn the noise off; Sergeant B said he would turn it down. This offer was not acceptable to Mr A and the verbal argument which ensued saw Mr A physically removed from

Sergeant B's home.

Mr A said that the local police eventually turned up about 3.40am, while the party was still "raging" . Two young Constables spoke to Sergeant B, but Mr A said that he saw Sergeant B waving his finger at them in a threatening manner. After apparently making little progress with Sergeant B, the Constables spoke to Mr A and asked him if he wished to press charges of assault against Sergeant B. Mr A declined their offer.

Mr A later complained to the Police Internal Affairs Branch about the belligerent attitude of Sergeant B , but praised the local police for their attempts , in a difficult situation , at enforcing the Noise Pollution Act. The complaint was successfully settled by conciliation, again by the local police. Sergeant B agreed to comply with his legal responsibilities in the future. Because this was acceptable to the complainant, the Ombudsman did not require a full investigation of his complaint.

Favoured treatment for Member of Parliament ?

A young schoolteacher, newly arrived in a country town, had a motor vehicle collision; the other vehicle was driven by the local Member of Parliament. A police sergeant attended the scene and took statements.

He refused requests from the schoolteacher and her boyfriend that he interview a witness who had pulled in at a nearby farmhouse. He recorded the matter as one involving conflicting statements, and recommended that no further action be taken. The MP was not given a ticket, even though he had been unable to produce his drivers licence. The sergeant also delayed in submitting the standard accident report form for almost eight weeks, later claiming that this was because he had been attempting to contact the witness mentioned earlier. He said that

he had done this in an attempt to assist the parties with any civil proceedings they might wish to take. As it turned out, his efforts to contact the witness had been somewhat half-hearted.

A few days after the accident the schoolteacher and her boyfriend went to the police station and inquired whether any action had been taken. The sergeant became annoyed with their persistence, eventually ordered them out of the station, and refused to provide them with transcriptions of the short statements they had made to him at the accident scene.

The schoolteacher made a complaint that the sergeant had shown favouritism towards the MP and had been rude and abusive to her. A supervising sergeant in charge of traffic matters made preliminary enquiries about the complaint and recommended that no further action be taken. When certain discrepancies were pointed out, he made further enquiries and, this time, concluded that a full police investigation was warranted. A more senior officer from the same regional office investigated the matter and he, and his senior officer, determined that the three issues of complaint were sustained. Officers in Police Headquarters, however, disagreed and in the ultimate report to the Ombudsman reversed those findings.

After reviewing the police reports, the Ombudsman decided that the matter should be reinvestigated. Hearings in the country were arranged and evidence was taken from all parties directly involved.

During the reinvestigation the Ombudsman was forced to make a special report to Parliament in order to rebut suggestions made in the local press that he was investigating the conduct of the Member of Parliament; his report made it clear that the only conduct being investigated was that of the police sergeant.

In the event, the Ombudsman decided that the allegations of favouritism

and failure to properly investigate could not be sustained. He found, however, that the complaints of rudeness and unreasonable failure to provide copies of statements on the part of the sergeant were sustained.

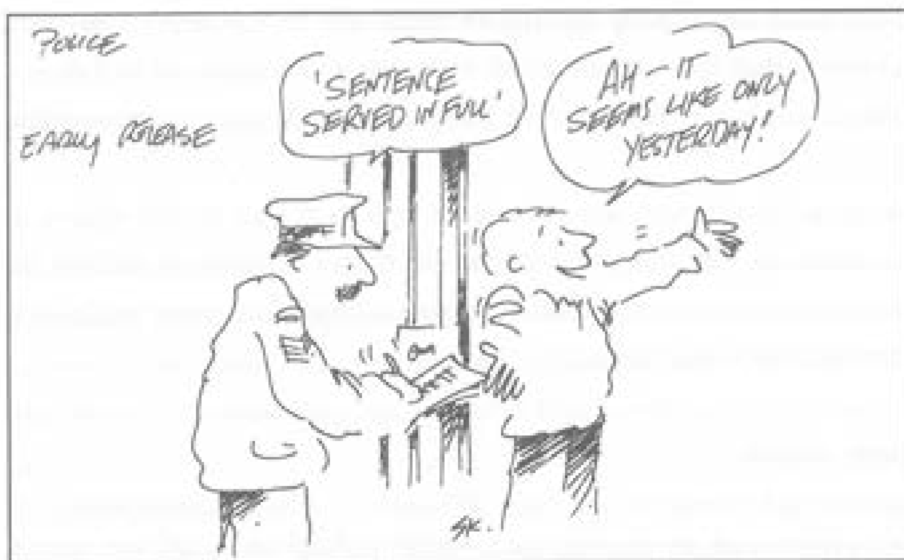
Because the sergeant was mature enough to reflect on his actions and to make the appropriate adjustments to his manner of dealing with similar situations in the future, no recommendations were made in the Ombudsman's final report on the matter.

Early release

Investigation of an anonymous complaint about the early release of a prisoner disclosed that Mr D had been arrested at Kempsey on 30 March 1987. Commitment warrants held for Mr D required that he be kept in police custody until 4 April 1987, but he had been released on 31 March. The Senior Constable who released him told the police investigator that he had released Mr D in error and that he had drawn his mistake to the attention of his superior, Sergeant T.

Sergeant T admitted that he had been told about Mr D's mistaken release and agreed that he had failed to inform his District Commander of the matter. He said that his failure to do so was because of personal and family problems that he was experiencing at the time.

The incident remained unreported to senior police for some twelve months , until the police investigator began to question the police involved. The investigation also revealed that the police charge book and the cell book, which records details of prisoners detained, were endorsed "Released 10am 4 April 1987 - sentence served in full" in respect of Mr D, and that other police documents had been falsified to show that Mr D had been in police custody from 30 March to 4 April.



The Senior Constable admitted that he had made incorrect entries in the charge and cell books. The person responsible for the falsification of other documents, to cover-up the early release of Mr D, was not able to be identified.

The investigation also revealed that the Senior Constable's wife, who provided meals to police prisoners, had been paid for providing Mr D with fourteen meals. The account for the meals allegedly provided had been submitted on her behalf by her husband. The Senior Constable claimed that he had made a mistake when preparing the account. The investigator recommended that the Police Department be refunded the cost of the thirteen meals that had not been provided.

Sergeant T and the Senior Constable were each departmentally charged with misconduct. Both admitted the charges. The question of penalty was deferred for six months, during which time their work performance would be closely examined. If, at the end of that period, their work performance was found to be satisfactory, no further action would be taken.

Where's my hat ?

Mr N was arrested and charged with exceeding the prescribed concentration of alcohol while driving and with driving while disqualified. Bail was refused because of his lack of sobriety.

Mr N was wearing country and western style clothing, including an Akubra hat. Before being placed in the cells, he was searched; most of his property was taken from him and entered into the Prisoners Property Docket book. He was allowed to keep his Akubra hat and a few rings; the rings fitted so tightly that they could not be prised from his fingers and, as well, Mr N suffered from arthritis. Because he had been agitated and aggressive, Mr N was allowed to wear his Akubra hat while in the cells in the hope that this would keep him calm and because he claimed that the hat was of sentimental value.

When Mr N later displayed symptoms of withdrawal from alcohol, he was taken to hospital. On his return to the Police Station, Mr N could not find his hat and he complained that the police had failed to safeguard it. He also complained that his wedding ring was missing.

It emerged from the police investigation that the cleaner at the police station had found the Akubra hat in an unsecured storage room and, after a few days, believing the "pretty grubby" hat to be rubbish, he "threw it in the garbage" . The investigation was not able to identify the person who had put the hat in the storage room. The Department later paid Mr N the replacement value of his hat.

Mr N's wedding ring, however, had never been in the official possession of police, nor had it formed part of his stored property. Mr N said that the ring had been removed from his finger while he was at the hospital.

He claimed that he had three rings on his fingers when admitted; however the Patients Valuables Form used by hospital staff showed only two rings to be part of Mr N's property. This part of the complaint was found to be not sustained.

Neat bookwork

In April 1987 an anonymous typewritten letter was sent to the Police Department. It alleged that a named Senior Sergeant of police at a country police station had stolen a black BMX pushbike which had been handed in after being lost.

The Police Internal Affairs branch investigated the matter. The Sergeant was in charge of miscellaneous property at the police station. Initial interview with the Sergeant revealed some discrepancies; further investigations showed that a number of pages had been torn from the Miscellaneous Property Book and that telephone messages covering a three month period had disappeared.

The Sergeant, in admitting that he had falsely written-off four entries in the book, said, "It was not done for the purpose of gain; it was done for the sole purpose of clearing the property book" . Other inquiries showed that apparently fictitious persons had "collected" property from the Sergeant, because they could not be found at the addresses recorded in the Property Book. When further interviewed about the matter, the Sergeant said, "I have this gut feeling that the complaint quite obviously originated from a member of the Police Force attached to this Station".

In November 1987 this Office was told that the Police Department was seeking legal advice from its Legal Services Branch; in January 1988 the Police Department said that it was seeking legal advice from the Prosecuting Branch. By June 1988 the Director of Public Prosecutions

had been consulted and, because the property which the Sergeant admitted to destroying had been of "negligible" value, no criminal charges against him were recommended.

In July 1988 this Office was informed that four Departmental charges of misconduct had been laid against the Sergeant, and in September 1988 the Police Department said that the Sergeant had admitted the charges. In November 1988 the Police Department said that it had imposed fines of $400 on the Sergeant and, in April 1989, the Office was advised that those fines had been paid.

Once bitten . . .

On 5 September 1985 Ms A was allegedly bitten by a German Shepherd dog on both of her legs and on her right hand. She obtained medical treatment at Royal Prince Alfred Hospital. She then went to the local police station and reported the incident to Constable K, who took a typewritten statement from her. Ms A asked for a copy of her statement because she wanted to take further action against the owner of the dog. Constable K, however, refused to give her a copy of the statement; he allegedly said, " You talk to your solicitor and your solicitor has to give me a ring and we will send it to him. "

The police investigation showed that no entry or record of the incident had been made by Constable K or by any other police officer in the occurrence pad or in any other records maintained at the police station.

Constable K's report about the matter said:

> About 6.30 pm Mrs A of . . . , attended the . . . Police Station in relation to a dog complaint. Mrs A was interviewed and a statement obtained from her about the

incident.

He went on to say that he had made a patrol of the vicinity where the complainant had been allegedly attacked. He recalled having received a phone call from the owner of the dog a few days after the incident, but he was unable to recall that conversation. He admitted that he was "aware that under the circumstances this matter should have been followed up by me and a breach report submitted against the owner of the dog. I am unable to give any reason as to why I did not follow this matter up."

Constable K's failure to take appropriate action and the subsequent lapse of time meant that action against the owner of the dog under the Dog Act became statute barred.

Constable K was charged departmentally with neglect of duty. He admitted the charge and was fined $200.

The police officer who didn't know the road rules

A police officer, a Senior Constable, saw Mr A drive his car past a Give Way sign. The officer stopped Mr A and said that, because he had not slowed down at the Give Way sign, Mr A had committed a traffic offence. He directed Mr A to attend a nearby police station where he gave Mr A a Traffic Infringement Notice for "Drive Contrary to Give Way Sign".

Mr A complained that he had not committed any offence and he and his witness accused the officer of being rude. They claimed that his breath had smelt of alcohol.

Motorists are not required to slow down at Give Way signs when there

are no other vehicles in the vicinity. There had been no other vehicles in the vicinity on this occasion, so the officer was mistaken in his view that Mr A had committed an offence.

The Police Department arranged for the officer to be counselled, as the Ombudsman had recommended.

The initial police investigation of the complaint did not resolve the questions of whether the officer had been rude or had been affected by alcohol, but the Ombudsman decided not to reinvestigate those issues, because there seemed to be no way in which they could be resolved.

Error not fatal.

A motorist was stopped while driving on the Sturt Highway and was issued with a traffic infringement notice. This occurred at 10.50pm on 22 September 1988. The motorist's passenger later read the notice and pointed out that it showed that the offence had been committed at 12.50am on 23 September. The motorist went to the nearest police station where, at 11.15pm, the Constable on duty made a record of the incorrect information in the station occurrence pad.

The NRMA made representations to the Traffic Branch on the motorist's behalf. It was decided to issue the motorist with a caution because he had had a clear driving record for ten years. The motorist, however, was not satisfied; he wrote to the Ombudsman about the advice given to him by the Traffic Branch that errors in detail did not affect the validity of the traffic infringement notice.

Preliminary enquiries were made and the Branch said that errors in time and date did not invalidate the notice, because the offence had still occurred. Although issuing an infringement notice for the wrong

offence would invalidate it, the Department's procedures allowed for the correction of errors on notices. The Branch added that most errors on parking or infringement notices result from poor handwriting.

Enquiries were concluded because there did not appear to be any point in pursuing them. The errors on the notice issued to the motorist were unusual and Departmental procedures for correcting them had been complied with. Moreover, enquiries about the motorist's complaint had raised no suggestion that a widespread problem existed.

Motorists, therefore, should not assume that they will escape penalty if the infringement notice they receive has been incorrectly completed.

Disclosure of criminal record

In early 1987 when he was appearing in divorce proceedings in the Family Law Court in Brisbane, Mr P was shocked to find that a full list of his criminal convictions up to 1971 appeared as part of his wife's recorded affidavit.

Mrs P had asked an investigation agency in Sydney (for whom her previous husband, Mr M, worked) to look into Mr P's past. Police investigation established that a Senior Constable, allegedly on the request of Mr M, had made enquiries with the Criminal Records Unit and had handed the relevant information to Mr M.

A departmental charge of misconduct was laid against the Senior Constable for improper release of Mr P's criminal record, and he was fined. Mr M's behaviour in the matter, of course, was outside the jurisdiction of the Ombudsman.

Father and son.

When Mr A discovered that Police were looking for him following an assault incident at a Central Coast club, he went to the Woy Woy police station with his father, Mr A senior, a former member of the New South Wales Police Force. At the station, after he had been informed of the existence of a warrant permitting police to arrest him for "assault occasioning actual bodily harm", Mr A "surrendered" himself to Senior Constable B.

Senior Constable B executed the warrant on Mr A and charged him with the offence. An alleged conversation that occurred, or didn't occur, (depending on whose version one accepts) while Mr A was being charged gave rise to Mr A senior's complaint.

Senior Constable B alleged, during a later court hearing, that Mr A, in speaking about the alleged assault, had said to him:

> " What would you have done? The old prick was standing in the toilets at the club with his pants around his ankles and asked me to grab hold of him, so I belted him. "

Even though Senior Constable B alleged that this statement, which amounted to an admission of guilt, had been made in the presence of Mr A senior, both Mr A and Mr A senior emphatically denied that Mr A had ever made the statement.

The assault charge against Mr A was dismissed by the Local Court Magistrate hearing the charge; however, it would appear that the question of whether or not the contentious statement had been made was not a factor in the grounds for the dismissal. Rather, it was non-acceptance by the Magistrate of the evidence of the alleged victim upon which he made comment during his summing up.

The Ombudsman asked for a full investigation of Mr A senior's complaint of perjury against Senior Constable B. The investigation was carried out by police who interviewed both Mr A and Senior Constable B who, by that time, had resigned from the Police Force for personal reasons.

As there were no independent witnesses to assist either the police investigators or the Ombudsman, the Ombudsman declined reinvestigation and made a finding of "unable to determine where the truth lies". On this basis, the complaint was deemed to be not sustained.

Not for the want of trying !

In October 1986 Mr G, a passenger in his own vehicle, was arrested by police and charged with " aid and abet driving with prescribed concentration of alcohol " . His companion, Mr B, registered a blood alcohol reading of 0.115. The two men had been drinking together all night and Mr G decided that he could not drive because he had had more to drink than Mr B.

The men were taken to the police station to be charged. They both had quite a bit to say to the arresting police, most of which was abuse and name-calling.

Eventually the time came to fingerprint Mr G. Constable A took Mr G to the cell complex where the fingerprint material was stored. Two prisoners who were being held in the cells became aware of the presence of Mr G and Constable A; even though they could not see them, they could, indeed, hear them. Mr G protested that his fingerprints were not required because they had been taken previously. Constable A was just as adamant that his fingerprints would be taken.

After five unsuccessful attempts to fingerprint Mr G , and a lot of shouting, another noise was heard by the prisoners. A voice was then heard to ask, "What was that for?" and another voice answered "You will get another one if you keep this up!" . Mr G was eventually fingerprinted and charged, but he alleged that Constable A had hit him and he refused to leave the station until Constable A was charged with assault. The Night Officer was called; Internal Affairs was called; and the Scientific Section was called.

All of this interesting information was gathered before sunset the next day. The Internal Affairs investigator decided that he had prima facie evidence of an assault in terms of section 493 of the Crimes Act and he swore an Information for that offence; this was left to lie in the office. All that remained to be done was to locate and interview the Random Breath Test officer and Constable A and his off-sider, and to obtain medical evidence from Mr G or his doctor. This "mammoth" task was eventually reallocated to another police investigator in July 1987. By this time, the police involved had been transfered to all corners of the State.

The new police investigator recommended that the Information left to lie in the office be taken up and that consideration be given to the more serious charge of "assault occasioning actual bodily harm" being laid against Constable A. Fortunately, this investigator had the presence of mind to see Mr G's doctor and was able to obtain evidence from him before the doctor departed from this country to return to South America.

The charges eventually went before the local court in November 1988, although proceedings had been commenced in October 1987.

By this time, one of the prisoners who had been in the cells at the

station was missing and his evidence was lacking. The other prisoner suffered a lapse of memory during cross-examination and his evidence became doubtful. The police investigator's interview with Constable A was finally presented to the court. Constable A's version of events was similar up to the point of the alleged assault. He agreed that there had been some difficulty in fingerprinting, Mr G and, in fact, he had only been successful on the fifth attempt. This was after Mr G had injured himself, he said. Constable A claimed that Mr G had had a cut lip when arrested. The Random Breath Test officer and Constable A's off-sider supported this claim.

Constable A also alleged that Mr G had pulled his hand away from his grip during fingerprinting and that he had repeated this action several times until, finally, Mr G pulled away with such force that he hit himself in the mouth, causing his lip to bleed and his front teeth to be loosened. Nevertheless, a prima facie case was established.

The case for the defence included the evidence of a noted Medical Officer who gave evidence of his examination of photographs. The Medical Officer said that, in his opinion, the injury depicted was more than likely an old injury. He also concluded that this old injury had been aggravated by a heavy blow and that such a blow was more likely to have occurred in the manner claimed by Constable A and was probably a self inflicted wound !

The Magistrate heard character evidence and determined that Constable A was of outstandingly good character. He said that the defence evidence created sufficient doubt to convince him that a jury, properly instructed, would not convict. Constable A was acquitted of the charge of " assault occasioning actual bodily harm ". The s.493 charge, summary assault, was dismissed for the same reason.

The Ombudsman was left with conflicting stories but, because the issue

of assault had been dealt with by the court, he decided not to reinvestigate Mr G's complaint.

Tools seized, then lost.

A man complained that, despite a Magistrate's direction that certain property be returned to him, police had refused to hand it over; when he later tried to recover his property, it could not be found.

In September 1983 Mr P was arrested at his home after police had executed a search warrant; he was charged with offences relating to drugs, the possession of a shortened firearm and goods in custody. The police seized a large quantity of assorted tools. Details of all of the property seized was recorded in the exhibit book held at the police station.

The charges against Mr P were heard at the Local Court in April 1984. The Detective Sergeant in charge of the case gave evidence and said that the tools, the subject of the goods in custody charge, were the property of a TAFE College; however Counsel for Mr P claimed that "some" of the tools belonged to Mr P.

The Magistrate found that Mr P was the owner of some of the tools; he directed that they be sorted into two piles, one comprising the tools belonging to the TAFE College and the other comprising those belonging to Mr P, and that Mr P's tools be returned to him. Constable C, the Court Constable, performed this task; the task was made easier because the tools that belonged to the TAFE College were suitably engraved.

After the court hearing, Mr P went to the police station to collect his tools. A Senior Constable told Mr P that the Detective Sergeant had asked that the tools not be returned pending the completion of an

appeal lodged by Mr P.

The Detective Sergeant could not remember whether Mr P had taken possession of the tools from the court on the day of his April 1984 appearance, or whether he had been told to collect them from the police station. The Monitor at the Local Court could not recall whether Mr P had taken possession of the tools; however, the exhibit list showed that the property had been given to the "defendant". The Court Constable did not know what had happened to the tools, but he assumed that the Detective Sergeant had returned them to Mr P. The Police Prosecutor had no recollection of what had happened to the tools.

In May 1984 the Magistrate sentenced Mr P to a prison term. It was not until September 1985, after his release from prison, that Mr P returned to the police station in an effort to obtain his tools. A search of the exhibit room at the police station failed to locate them. Mr M (now retired), who had been the Officer In Charge of the police station at the time, carried out a search of the exhibit room. To the best of his recollection, the exhibit book had been fully acquitted and filed away but the book could not be found.

Further enquiries were made at various times, but to no avail. It was later established, however, that the most crucial piece of evidence, the exhibit book containing the relevant entry, had been destroyed.

Both complaints were found to be sustained. Although there was no evidence to implicate any particular police officer, the Police Department admitted its liability, and approval was obtained for an ex-gratia payment of $859 to be made to Mr P, being the replacement value of the lost tools.